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THE LAW JOURNAL REPORTS

FOR
THE YEAR 1863:

COMPRISING

REPORTS OF CASES

In the House of Lords,

AND IN THE COURTS OF

Chancery and Appeal in Bankruptcy,
Probate, Divorce and Matrimonial Causes, Admiralty,
Queen's Bench and the Bail Court,
Common Pleas, Exchequer, Exchequer Chamber, and
Crown Cases Reserved.

FROM

MICHAELMAS TERM 1862, TO TRINITY TERM, 1863,
BOTH INCLUSIVE.

The House of Lords Cases are given in the Courts of Chancery and Common Law respectively: Decisions in Error and on Appeal in the Exchequer Chamber will be found in the respective Courts from which the Errors and Appeals come; the Common Pleas includes the Appeals from Revising Barristers; and the County Court Appeals are in the Queen's Bench, Common Pleas, and Exchequer respectively.

THE CASES RELATING TO THE POOR LAWS, THE CRIMINAL LAW AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM PART III. OF THE WORK.

THE DECISIONS IN THE PROBATE COURT, THE DIVORCE AND MATRIMONIAL CAUSES COURT, AND THE HIGH COURT OF ADMIRALTY, WITH THE CASES DECIDED ON APPEAL FROM THOSE COURTS, ARE SEPARATELY ARRANGED, AND FORM PART IV. OF THE WORK.

EDITED BY

MONTAGU CHAMBERS, Esq. ONE OF HER MAJESTY'S COUNSEL,
FRANCIS TOWERS STREETEN, Esq.

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NAMES OF THE REPORTERS.

1863.

In the House of Lords,

WILLIAM WARREN STREETEN, Esq. BARRISTER-AT-LAW.

Lord Chancellor's Court,

CHARLES EDWARD HAWKINS, Esq. BARRISTER-AT-LAW.

Court of Appeal in Chancery,

SAMUEL VALLIS BONE, Esq. BARRISTER-AT-LAW.

Rolls Court,

THOMAS PARKER, Esq. BARRISTER-AT-LAW.

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Court of the Second Vice Chancellor,

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Court of the Third Vice Chancellor,

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Cases in Bankruptcy,

CHARLES EDWARD HAWKINS, Esq.

And SAMUEL VALLIS BONE, Esq. BARRISTERS-AT-LAW.

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Courts of Exchequer Chamber, and Crown Cases Reserved,

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JUDGES AND LAW OFFICERS.

FROM MICHAELMAS TERM 1862, TO TRINITY TERM 1863, BOTH INCLUSIVE.

IN THE COURTS OF CHANCERY.

The Right Hon. LORD WESTBURY, Lord High Chancellor.
The Right Hon. Sir JAMES LEWIS KNIGHT BRUCE, Knt., Lord Justice.
The Right Hon. Sir GEORGE JAMES TURNER, Knt., Lord Justice.
The Right Hon. Sir JOHN ROMILLY, Knt., Master of the Rolls.
The Hon. Sir RICHARD TORIN KINDERSLEY, Knt., Vice Chancellor.
The Hon. Sir JOHN STUART, Knt., Vice Chancellor.
The Hon. Sir WILLIAM PAGE WOOD, Knt., Vice Chancellor.

IN THE COURT OF APPEAL IN BANKRUPTCY.

The Right Hon. LORD WESTBURY, Lord High Chancellor.
The Right Hon. Sir JAMES LEWIS KNIGHT BRUCE, Knt., }
The Right Hon. Sir GEORGE JAMES TURNER, Knt., } Lords Justices.

IN THE COURTS OF PROBATE AND MATRIMONIAL CAUSES.

The Right Hon. Sir CRESSWELL CRESSWELL, Knt., Judge Ordinary.

IN THE HIGH COURT OF ADMIRALTY.

The Right Hon. STEPHEN LUSHINGTON, D.C.L.

IN THE COURT OF QUEEN'S BENCH.

The Right Hon. Sir ALEXANDER COCKBURN, Bart., Chief Justice.
The Hon. Sir WILLIAM WIGHTMAN, Knt.
The Hon. CHARLES CROMPTON, Knt.
The Hon. Sir COLIN BLACKBURN, Knt.
The Hon. Sir JOHN MELLOR, Knt.

IN THE COURT OF COMMON PLEAS.

The Right Hon. Sir WILLIAM ERLE, Knt., Chief Justice.
The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.
The Hon. Sir JAMES SHAW WILLES, Knt.
The Hon. Sir JOHN BARNARD BYLES, Knt.
The Hon. Sir HENRY SINGER KEATING, Knt.

IN THE COURT OF EXCHEQUER.

The Right Hon. Sir FREDERICK POLLOCK, Knt., Chief Baron.
The Hon. Sir SAMUEL MARTIN, Knt.
The Hon. Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.
The Hon. Sir WILLIAM FRY CHANNELL, Knt.
The Hon. Sir JAMES PLAISTED WILDE, Knt.

Sir WILLIAM ATHERTON, Knt., Attorney General.
Sir ROUNDELL PALMER, Knt., Solicitor General.
Sir ROBERT JOSEPH PHILLIMORE, Knt., Queen's Advocate.

PREFERMENTS AND MEMORANDA.

In *Hilary Term*, 1863, JOHN OSBORNE, Esq., of Lincoln's Inn, and JAMES ST. GEORGE BURKE, Esq., of the Middle Temple, were appointed Her Majesty's Counsel learned in the law.

In the vacation after *Hilary Term*, GEORGE STOVIN VENABLES, Esq., of the Inner Temple, was appointed one of Her Majesty's Counsel learned in the law.

In the vacation after *Trinity Term*, SIR CRESSWELL CRESSWELL, Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, died in consequence of injuries received by the falling of his horse. He was succeeded by SIR JAMES PLAISTED WILDE, one of the Barons of the Court of Exchequer.

In the same vacation, GILLERY PIGOTT, Esq., Serjeant-at-Law, was appointed to succeed SIR JAMES PLAISTED WILDE in the Court of Exchequer, and received the honour of knighthood.

SIR WILLIAM ATHERTON retired from the office of Attorney General in consequence of ill health. SIR ROUNDELL PALMER, Her Majesty's Solicitor General, was appointed Her Majesty's Attorney General, and ROBERT PORRETT COLLIER, Esq., one of Her Majesty's Counsel, was appointed Her Majesty's Solicitor General. He received the honour of knighthood.

In the same vacation, WILLIAM HENRY COOKE, Esq., of the Inner Temple, JOHN GRAY, Esq., of the Middle Temple, JOHN JOSEPH POWELL, Esq., of the Middle Temple, and GEORGE LOCH, Esq., of the Middle Temple, were appointed Her Majesty's Counsel learned in the law.

REPORTS
OF
CASES ARGUED AND DETERMINED

In the House of Lords,

BY
WILLIAM WARREN STREETEN, Esq.
BARRISTER-AT-LAW.

AND IN THE
Courts of Chancery,

BY
CHARLES EDWARD HAWKINS, Esq.
SAMUEL VALLIS BONE, Esq., THOMAS PARKER, Esq.
THOMAS WYATT GUNNING, Esq.
GEORGE FRENCH, Esq.
AND
THOMAS NOTTIDGE, Esq.
BARRISTERS-AT-LAW.

DURING FOUR TERMS,
VIZ.
MICHAELMAS 1862, HILARY, EASTER AND TRINITY, 1863.

26 & 27 VICTORIÆ.

CASES ARGUED AND DETERMINED

IN THE

Courts of Chancery,

AND ON APPEAL TO THE HOUSE OF LORDS.

COMMENCING WITH

MICHAELMAS TERM, 26 VICTORIÆ.

WESTBURY, L. C. }
Nov. 12. } PHILLIPS v. GUTTERIDGE.

Legacy—Annuity—Charge on Corpus.

*A testator gave leaseholds to trustees upon trust to receive the rents and profits and to pay the annual sum of 60*l.* to H. for life, and after the death of H. to raise by sale or mortgage the sum of 400*l.* for the children of H., and after the death of H. and the raising and payment of the 400*l.*, to assign the said leaseholds, or such part thereof as should remain undisposed of, unto T. absolutely. The income proving insufficient to satisfy the annuity, it was held that it was chargeable upon the corpus.*

In this, which was a creditors' suit, the question whether an annuity was to be paid out of *corpus* or out of income alone, was decided by Stuart, V.C., on further consideration, in favour of the annuitant. From this decision the plaintiffs appealed. James Gutteridge, the testator in the cause, by his will, dated in 1827, gave to William Probert certain leasehold land and groundrents "upon trust to receive and take the rents, issues and profits thereof, and after payment of the groundrent, &c. and the interest of any money secured or to be secured thereon, to pay the annual sum of 60*l.* to my daughter Harriet for her life, &c.; and in

case of the death of my said daughter, leaving any child, then upon trust to continue the payment of the said annual sum of 60*l.* for the benefit of such child; and upon further trust in case of the death of my said daughter leaving any child or children, when and so soon as the youngest of such child or children shall attain the age of twenty-one years, to raise out of the land, groundrents and premises, by sale or mortgage, the sum of 400*l.*, and divide the said sum, &c.; and upon further trust, during the lifetime of my said daughter, and until the youngest child (if any) shall attain the age of twenty-one years, to pay the residue of the said rents, issues and profits (after payment thereof of the said groundrents, interest, &c. and the said annual sum of 60*l.*) unto my son, Thomas Gutteridge; and upon further trust, after the decease of my said daughter, in case she shall die without leaving any child, &c., or in case she shall leave any child or children, after the attainment by the youngest of such child or children of the age of twenty-one, and the raising and payment of the said sum of 400*l.*, and after the performance of all the before-mentioned trusts, upon trust that the said William Probert shall assign the said land, groundrents and premises, or such part thereof as shall remain undisposed of, unto my said son absolutely." The plaintiffs held a mortgage on the testator's lease-

hold property; which after the testator's will had been transferred to them on their making a further advance. The property had been sold, and after paying off the original mortgage a sum of 700*l.* remained; and the income being insufficient to keep down the annuity, the Vice Chancellor declared that the annuitant was entitled to resort to the *corpus*.

Mr. Malins and Mr. W. Rudall, for the appellants, contended that the annuitant here could not be in a better position than a tenant for life—*Foster v. Smith* (1).

The LORD CHANCELLOR.—There the testator contemplated the property remaining in its entirety. Here the direction for payment of the residue contemplates the full satisfaction of the annuity.

Mr. Malins.—The words “undisposed of” referred to the sum of 400*l.* and the raising of that sum. The testator had as much an intention to benefit the children as his daughter.

The LORD CHANCELLOR.—If the daughter received less than the 60*l.* during her life, would not her representatives be entitled after her death to continue the receipt of the dividends until the deficiency was made up?

Mr. Malins and Mr. Rudall referred to *The Attorney General v. Poulden*, 3 Hare, 555.

Earle v. Bellingham, 24 Beav. 445; a.c. 27 Law J. Rep. (N.S.) Chanc. 545.

Mills v. Drewitt, 20 Ibid. 632.

Mr. Greene and Mr. Beavan, for the annuitant, were not called upon.

The LORD CHANCELLOR said that the decree was right. The general rule was, that an unlimited indefinite charge upon “rents and profits was a charge upon the *corpus*. Here the charge was “out of the rents and profits” to pay the annuity to his daughter for her life; it was not out of the rents and profits during her life. The right of the trustees was general and indefinite. The charge, therefore, on the rents and profits continued until the annuity was satisfied. The decision in *Foster v. Smith* went upon this, that the effect of the

gift over was to reduce the charge on the rents and profits to a charge during the life of the annuitant; but on the death of the annuitant, the trustees were to convey over the estate to the testator's sisters; and the right, therefore, to receive the rents and profits ceased on the death of the annuitant. Of necessity, therefore, in *Foster v. Smith* the trust to receive the rents and profits was construed to be a right to receive them during the life of the annuitant. In *Earle v. Bellingham* the Master of the Rolls followed *Foster v. Smith*, and there the trust was, after the death of the annuitant, to transfer a specified sum; and there was, therefore, an intention to have the *corpus* kept in its entirety for the benefit of those who came afterwards, and who were intended to have the *corpus* in its integrity. But here there were no such words; but the gift over was in terms made subject to what was necessary for the legal operation of the antecedent gift, and the party claiming the residue could only claim what remained after the effect of the antecedent gift was exhausted. Did, then, this charge upon the rents and profits constitute a charge upon *corpus*? and his Lordship was of opinion that it did, and he found nothing to rebut that in the terms of this will. He could not, therefore, alter the decree, as he considered that the Vice Chancellor had put a proper interpretation upon the will; and the annuitant must, therefore, continue to receive the annuity out of the *corpus*.

WESTBURY, L.C. }
Nov. 4. } ELLISON v. THOMAS.

Practice—Petition of Re-hearing.

Semble—that a person brought before the Court by service of notice of the decree under the 15 & 16 Vict. c. 86. s. 42. is entitled to present a petition of re-hearing.

Mr. Graham Hastings, on behalf of a person who had been served with notice of the decree, under the 15 & 16 Vict. c. 86. s. 42. rule 8, applied to have a petition of re-hearing received by his Lordship's secretary. An objection had been made that the petition was not presented by a party to

(1) 1 Ph. 629; a.c. 2 You. & C. C.C. 213.

the suit; and although this objection had been since withdrawn, it was desirable to have the Lord Chancellor's directions on the subject, in order to settle the practice. The rule under which this person had been served with notice of the decree, provided that "after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may, by an order of course, have liberty to attend the proceedings under the decree," &c.

The LORD CHANCELLOR said, that his present impression was, that a party brought into court by the operation of that order, was entitled to present a petition of rehearing. He would direct that the petition should be received; but that would not prevent any question being raised on the hearing of the appeal.

KINDERSLEY, V.C. }
Nov. 5. } MADDEN v. IKIN.

Legacy—Period of Distribution—Vesting of Shares—Priores Natu.

A testator directed that the income of certain property mentioned in his will should be enjoyed by his wife and his unmarried daughters during their lives, and after the death of the last survivor of his wife and unmarried daughters the principal of the stock should be divided equally among the two eldest children born in legitimate wedlock to each of his sons and daughters. But in case there be only one child living to any of his married sons or daughters, that that child receive only the proportion divided equally, according to the number there may be:—Held, that after the death of the widow and unmarried daughters those children only were entitled to take who were living at the period of distribution, and the property was not vested in those who were priores natu.

This was a special case, filed for the purpose of having a construction put upon the will of William Molesworth Madden, dated the 22nd of August 1819, which was to the following effect: "In the first place

having, by my wife, Elizabeth Madden, seven children now alive, my desire is to divide my property among them, so that they may each enjoy their portion without jealousy or strife, feel grateful for the benefits they may receive from me, and learn to imitate my example in the management of their own families, should they have any." The testator then gave various pecuniary legacies to the children, and continued, "And all other property I may die possessed of I bequeath to my wife, Mrs. E. Madden, the interest of which to be enjoyed by her as long as she remains single, but in case she marries again, to be forfeited and devolve to my remaining unmarried daughters. Now, the intent and obligation of this my will is, that in five months after my decease my two sons, Morison Madden and Wyndham Madden, may, if they choose, receive and be paid their separate portions from my funds of stock in the Bank of England, now in the hands of Messrs. Coutts & Co., who receive my dividends on 9,311*l.* 10*s.* in the 3*l.* per cent. consols, and 2,263*l.* 1*s.* in the navy 5*l.* per cents. But not so to my wife, Mrs. Madden, and my five daughters. My will and intent is, that no part of the principal of the portions I have bequeathed to them shall be touched on, except on the marriage of any of my daughters with the consent and approbation of the majority of my executors, when I wish it, if possible, to be settled on themselves and the children they may have. This I deem essential to the welfare and honour of those of my family who remain unmarried, that they live together in love and amity on the interest of the money I bequeath them, which I have been saving all my life for their sakes. While they continue together their income will be good, and sufficient for the line of life we have lived in; but if, on the contrary, disagreement or misfortune should occasion their separation, they would be poor and miserable. I therefore again insist that if any of my aforesaid family (Mrs. Madden and our five daughters) shall separate from each other (except by the marriage of any of my daughters), their portions shall be transferred to and divided equally amongst those of my daughters who may thus continue unmarried residing

together. And I also declare this my will to be, that on the demise of any of my before mentioned wife and daughters who continue unmarried, the interest of their share or stock coming to them in virtue of this testament shall immediately revert to those who continue unmarried and live together. And I also will that after the death of the last survivor of the aforesaid Mrs. Madden and those of my daughters who may be unmarried and living together, the entire of the principal of the stock, the interest of which they have been living on, shall be divided equally among the two eldest children born in legitimate wedlock to each of my sons and daughters. But in case there be only one child living to any of my married sons and daughters, that that child receive only the proportion divided equally according to the number there may be; and I do hereby appoint my wife, Mrs. Madden, my eldest son Morison Madden, and my son Wyndham Madden, to be my executors."

The testator died in March 1820, leaving his wife and seven children surviving. His eldest son was married at his death, but all the rest were single. Three of the daughters, viz., Elizabeth, Marianne and Clarissa, married subsequently with consent, and their legacies were settled according to the direction in the will. The widow and the other daughters continued unmarried, and resided together until their deaths, the last surviving of the three being Sophia Madden, who died in September 1861. Upon her death the portion of the funds the income from which had been paid to the widow and unmarried daughters became divisible.

The first child born to the eldest son of the testator was Elizabeth Madden, who married the defendant, Joshua Ikin, and died in June 1839. The second child was William Madden, and the third Henry Madden. The first child born to the second son was Ann Madden, who married John Grane. The second child was Elizabeth, who married John Oliver, and died in June 1860; and the third child was Emily Madden, an infant. The testator's daughter Elizabeth married the Rev. J. Serres, and she had a first and second son living. Marianne married the Rev. C. Schlenz,

and her first and second child were still living. Clarissa Madden married the Rev. H. Hutton, and her first and second children were still alive. All the above grandchildren of the testator were born before the death of Sophia Madden, the last of the unmarried daughters of the testator.

Doubts having arisen as to the mode in which the funds ought to be distributed, this case was proposed, for the determination of the following questions :

First, whether the gift to the two eldest children born in legitimate wedlock to each of the sons and daughters of the testator, was confined to children of such sons and daughters as were married at the testator's death?

Second, whether under such gift each child who was one of the first two children born to a son or daughter, and living at the testator's death, or born afterwards, before the period of distribution, took a vested interest not liable to be divested by such child's death before the period of distribution; and if not, then whether a child who was not one of the first two children born to a son or daughter, but who was at the period of distribution one of the two eldest of the children then living of such son and daughter, was entitled to participate in the funds; or whether the only objects of the gift were children, each of whom was one of the first two children born to a son or daughter, and living at the period of distribution; and if so, whether the division ought to be *per capita* or *per stirpes*.

Mr. C. Jones appeared for the trustees, and submitted the questions to the Court.

Mr. Speed, for the representative of the first-born child of the testator's eldest son, who died in the lifetime of the tenant for life, and for the representative of the second-born child of the second son, who died before the period of distribution; contended that those children took vested interests.

He cited

Booth v. Booth, 4 Ves. 408.

Packham v. Gregory, 4 Hare, 396; s. c.

14 Law J. Rep. (N.S.) Chanc. 191.

2 *Jarman on Wills*, 722.

Mr. Josiah Smith, for the second child of the eldest son and the two eldest by birth who were alive at the period of distribution, contended that the fund would only go to those children who were the eldest by birth and also living at the period of distribution.

He cited

Adams v. Adams, 25 Beav. 652.

Adams v. Roberts, Ibid. 658.

Mr. Baily and *Mr. Kingdon* appeared for other parties.

KINDERSLEY, V.C., after referring to the will, said: It is possible that, in the abstract, the testator might have intended by the two eldest children *priores natu*, or the eldest living at a particular period. The whole question is, which did he mean? and that does not depend upon the question of the period of vesting, but the particular individuals intended. If he meant *priores natu*, then the gift would be vested, whether the children survived the period of distribution or not; but if he meant the two eldest at the time of distribution, it could not vest, because it cannot be determined till that period who will be the persons to answer the description. If the words, "two eldest children born in legitimate wedlock to each of my sons and daughters," were unexplained, they would mean *priores natu*; but is there anything in the will to assist that construction? It has been contended that there is, and the words, "legitimate wedlock," were referred to; but if they are taken in connexion with the whole sentence, "born to each of my sons and daughters," they can only apply to the children being legitimate; and I cannot on that argument conclude in favour of the *priores natu*. The testator, in connexion with these gifts, provides for the event which might happen, viz., that although one of his sons or daughters might have had two or more children living, they might have died, and therefore he used the word "living." But still it is said, when? at what time? *Prima facie*, the words point to some specific period; but it is contended that the word "living" does not point to a particular time, but

that it simply means born. Still, if the testator had meant that, he might have used the word "born," instead of "living," but that would be incorrect and inappropriate. The word "living" must, therefore, have its natural sense, that is, at some particular time; but when, must be a question. No time has been suggested except the period of distribution, which is the obvious meaning; but it has been ingeniously attempted to interpolate the word "such," not pointing to the case of one only child. In all the authorities cited there was a gift to a class of issue, about which there could be no question; but here it is the entire question, the class not being ascertained, and therefore the word "such" cannot be interpolated; but it must mean, in case there was only one child, whether *prior natu* or third, fourth or fifth who had become an eldest child by reason of the pre-decease of the others who were originally eldest, and in that there is nothing unreasonable. For some cause, the testator determined that the division should not be amongst all the children of each of his sons or daughters, but only among two. What that cause was can only be conjectured; possibly that by limiting the number, the benefit might be the greater. It is not unreasonable that the testator might have contemplated the case of eldest or second grandchildren dying infants, and therefore wanting no provision, and of children still living who would, and that the eldest living would have such provision, but in case only one child should be then living, that child should not have as much as two children, but a share only, as if there had been a division amongst all. In the case, therefore, of the eldest son, there is an exclusion of the grandchild who died in the lifetime of Sophia, and the two eldest living at her death are entitled. As to the expression, "married," the testator must have intended "who shall be married," just as the word "born" meant now born or who shall be born. The costs of all parties come out of the estate, no one objecting.

ROMILLY, M.R. }
 Nov. 8. } BATEMAN v. HOTCHKIN.

Tenant for Life—Timber—Underwood.

A tenant for life impeachable for waste is entitled only to the windfalls of such trees as he had a right to cut. He is also entitled to the thinnings of plantations if properly made, and he is entitled to the crops of all coppices cut in due rotation.

The defendant was tenant for life of several large settled estates in Lincolnshire, with remainders over. He was *impeachable* for waste, and attained twenty-one in March, 1860. The plaintiff, after stating these facts, said it was desirable to cut and sell certain of the timber and underwood on the settled estates or otherwise to provide for the management of the woods, timber and underwood growing thereon, and on the 12th of June 1862 he obtained a summons, upon which, on the 16th of June, an order was made in the cause directing the defendant to bring in an account of any sale of timber, underwood and poles effected by him from the year 1860, and to pay the produce thereof into court to the account entitled "the capital account." It then appointed a manager of the woods, timber and underwoods growing on the settled estates, and directed that he should have full power to fell, grub up, cut or lop any timber or other trees, not planted for ornament or shelter, and cut any underwood upon any part of the settled estates, which he might consider fit and proper, and he was to distinguish the timber from the underwood and the proceeds and value thereof separately. But as regarded the plantation at Woodhall, he was to carry out a report of Mr. Paxton's, dated the 27th of August 1860. He was then directed to sell the timber and underwood, and after payment of the expenses incurred, he was on the 1st of December in every year to bring in an account of the monies received and applied by him and also a report of the timber and underwood proposed to be cut, and of the replanting, ditching, fencing and other works proposed to be done during the ensuing year, and he was to pay the balance certified to be due from him on taking the

account into court, to the credit of the cause, "the capital account."

No act of waste had been done by the tenant for life, but with a view to settle his future rights, the question was brought before the Master of the Rolls in chambers, who gave the following opinion in writing, that "In the case of waste committed by a tenant for life by cutting timber, the produce of the sale of it is part of the inheritance, and as the tenant for life can gain no advantage by his own wrongful act the produce is invested and accumulated for the benefit of the first estate of inheritance. In the case of timber *blown down* by a storm there is no waste, because it is the act of God, but the produce of the sale of it goes, like the act of waste, to the inheritance: that is, the money must be invested in consols, and the interest paid to the tenant for life." The tenant for life brought in under the order an account of fir-poles blown down in the plantations at Woodhall, which he had sold, and from which a sum of 290*l.* had been realized; and he claimed a right to retain it as a part of the profits arising from the estate.

He also claimed to be entitled to the thinnings of the plantations of larch and Scotch fir which required thinning, or the produce thereof. He made no claim to ash-trees, but he claimed the ash-poles growing from stubs, and also all the underwood.

Mr. Speed, for the plaintiff, said, that a tenant for life impeachable for waste was entitled to the profits of the land only; he would not be allowed to take anything which could by any means tend to the injury of the person entitled to the inheritance; he might be allowed timber for the repairs of houses and fences (*Co. Litt.* 41, *b*), but he could be allowed neither to commit voluntary waste nor to suffer permissive waste.

Lewis Bowles's case, 11 Co. Rep. 81.

Whitfield v. Bewit, 2 P. Wms. 240; s. c.

3 *Ibid.* 266.

Lushington v. Boldero, 15 Beav. 1; s. c.

21 Law J. Rep. (N.S.) Chanc. 49.

Mr. C. Hall, for the tenant for life.—It was necessary to define the meaning and

extent of the word "timber": it seemed that a tenant for life, if impeachable for waste, is not entitled to timber blown down; but if he is not impeachable for waste, he is entitled to it. If, however, he had a right to cut poles, he must be entitled to those blown down. Oak and ash trees were in general considered timber, and so were elm trees in some counties, but they were not universally considered to be timber. It might also be questioned whether Spanish chestnut or other woods introduced into this country were timber by law. Were fir-trees also to be considered as timber? especially Scotch fir-trees, which were chiefly planted for the protection of young oak-trees; the wood of the Scotch fir was knotty and gnarled, and of so little use that the trees were now generally discarded from plantations. The tenant for life was also entitled to all thinnings of plantations; it was only necessary to ascertain at what age the thinning was to cease. He was also entitled to all the underwood to be cut in rotation by way of crop.—

Barrett v. Barrett, Hetley, 35.

Phillipps v. Smith, 14 Mee. & W. 589, 594; s.c. 15 Law J. Rep. (N.S.) Exch. 201.

The King v. the Inhabitants of Ferrybridge, 1 B. & C. 375, 387; 2 Dowl. & Ry. 634.

Pidgeley v. Rawling, 2 Coll. 275.

THE MASTER OF THE ROLLS.—It might be doubted whether a tenant for life impeachable for waste has any right to cut poles: he is, however, entitled to all that were blown down, if he otherwise has a right to cut them. The only order, therefore, I shall now make is, that the tenant for life is entitled to all such trees felled by the wind as he would have been entitled himself to fell, and also to all proper thinnings of plantations, &c., as well as to all coppices and osier-beds cut in the nature of crops (1).

ROMILLY, M.R. { SIR EDWARD BAKER v.
Nov. 10, 11. { THE METROPOLITAN
RAILWAY COMPANY.

Specific Performance—8 & 9 Vict. c. 18.
s. 9.—*Compliance with Forms*—*Validity of Contract*—*Time for Completion*.

If the legislature prescribes formalities to be observed by parties contracting inter se, and one of them endeavours to avail himself of the want of such forms to postpone or avoid the completion of a contract entered into, the Court will itself ascertain whether the intentions of the legislature have, in substance, been complied with; and if they have, it will carry the contract into effect.

Public companies having power to purchase land cannot contract for its purchase, and insist upon a custom to defer its completion to the extreme period of time allowed them for the taking of land and the completion of their works. No such custom exists, but they are bound to complete their contract within a reasonable time.

The Metropolitan Railway Company was incorporated by an act passed in 1854; other acts were subsequently passed, and by an act in 1860 they were empowered to take divers lands in the parish of St. Marylebone, of which the plaintiff was tenant for life.

On the 18th of July 1860 the company gave the plaintiff notice that they required certain lands therein specified, and that they were willing to treat for the purchase, and for the compensation to be made for the damage that he might sustain in the execution of the works; and, on the 22nd of November 1860, they gave the plaintiff notice of their intention to summon a jury to ascertain the amount of purchase-money and compensation to be paid, and at the same time they offered 4,262*l.* 5*s.* 7*d.* for the property, which was declined.

No jury was summoned, but by an agreement duly executed by both parties they agreed that the amount to be paid for the fee simple of the lands mentioned in the first notice, together with other lands situate in Lisson Grove South, and for the damage or injury by severance or otherwise to the remainder of the estate, should be settled by a single arbitrator, to be appointed

(1) See *Gordon v. Woodford*, 27 Beav. 603; s.c. 19 Law J. Rep. (N.S.) Chanc. 222; *Brydges v. Stephens*, 6 Madd. 279; and see 2 Swanst. 150.

pursuant to the powers of the Lands Clauses Consolidation Act, 1845, and they thereby jointly appointed Charles Lee to be the sole arbitrator.

When before the arbitrator a question arose which led to another agreement, dated the 29th of January 1861, which was executed by the plaintiff and the defendants, by which the company agreed to construct their railway and works under the land coloured blue on the plan, or some part thereof, and to restore the surface as near as might be to the same level and condition within the space of a year from that date, and that they would grant to the plaintiff, his heirs and assigns, and his and their tenants, a free and uninterrupted right of way or passage upon, over and along the land coloured blue, in as full, complete and beneficial a manner as then existed, with full power for the plaintiff to restore the existing walls and fences upon the same piece of land, and to use the same piece of land as open forecourts and gardens.

The arbitrator allowed the time for making the award to elapse, and none has ever been made, as the defendants when applied to refused to renew the reference.

On the 27th of June 1861, the company paid a sum of 788*l.* 5*s.* 2*d.* into court to the credit of "*Ex parte* the Metropolitan Railway, the account of Sir E. Baker, Bart.," and they sent him a certificate, and a bond executed by the company under the provisions of the Lands Clauses Consolidation Act. They then entered not only into the land in respect of which the 788*l.* 5*s.* 2*d.* was paid, but also into other parts of the lands comprised in the notice of the 18th of July 1860, and commenced the execution of their works.

On the 31st of January 1862 the plaintiff, by notice, claimed 1,355*l.* 11*s.* 11*d.* for the waste and damage, and the injury done to the lands, and he desired the defendants, in the event of their not being satisfied, to have the same settled by a jury.

On the 21st of January 1862 the defendants gave the plaintiff notice that they would summon a jury to ascertain the value of the land and the compensation to be paid for the damage sustained or to be sustained by severance or otherwise by the execution of the works, and it concluded by offering the plaintiff 4,612*l.* 5*s.* 7*d.* for such pur-

chase-money and compensation as aforesaid.

The plaintiff accepted this offer, and on the 12th of February 1862 his solicitors wrote, asking whether they were prepared to pay the money into court.

No notice was taken of this letter; the plaintiff therefore appointed W. Moseley his surveyor to value the property comprised in the defendants' notices, in compliance with the 8 & 9 Vict. c. 18. s. 9, which requires that in cases of purchase of land from persons having a limited interest in the property, and who are unable to sell to the company, except under the powers of such act, the purchase or compensation money must not be less (except where it has been determined by a jury, or by arbitration) than should be determined by the valuation of two able practical surveyors, one nominated by the company and the other by the vendor. On the 25th of February 1862, the plaintiff gave the defendants notice of the appointment, at the same time requiring them to appoint a surveyor on their behalf to join in a valuation of the property.

The defendants did not appoint a surveyor. The plaintiff, therefore, on the 18th of March 1862, filed this bill, praying that the several notices might be declared to be a valid agreement, and that the defendants might specifically perform it and pay the purchase-money into court.

The defendants, by their answer, said that they had taken and paid for a portion of the land, and that they were not under any obligation to pay for the remainder of the lands, or to appoint any surveyor until they required possession thereof. They also said, "that it was the universal practice of railway companies, as is well known to the plaintiff and his solicitors, not to pay for the lands required or agreed to be purchased by them until they require possession of such lands." That they were quite willing to perform the agreement whenever they should require possession of the lands and hereditaments; but as no period was fixed for its completion they insisted that they were not bound to pay the purchase-money or otherwise perform the agreement until they required possession, or, at all events, until a good title was shewn to the lands.

Mr. Selwyn and Mr. Bowring, for the plaintiff.—The contract with the company was made without any reference to their requiring possession of the land; it was an absolute purchase without any condition being attached. The custom claimed for companies generally of not paying for lands they had purchased until they required possession was simply absurd. If they purchased lands they were bound to pay for them in a reasonable time, like any other purchaser. In this case the company had taken possession of a part of the lands, and there was not a pretence for their refusing to complete the purchase as to the whole—*The Eastern Counties Railway Company v. Hawkes* (1).

Mr. Baggallay and Mr. Bovill, for the defendants.—No time was mentioned for the specific performance of this contract. The company had no present occasion for the possession; they were, therefore, entitled to postpone its completion for so long a time as the act allowed them for taking land and the completion of their works. The fairness of the price had not been certified by any surveyor, neither had any abstract of title been delivered. In the absence of these, and of the returns being satisfactory, the Court would not compel a specific performance of the contract.

Tillett v. the Charing Cross Bridge Company, 26 Beav. 419; s.c. 28 Law J. Rep. (N.S.) Chanc. 863.

Darbey v. Whitaker, 4 Drew. 134.

THE MASTER OF THE ROLLS.—It has been argued that this is a contract which the Court will not enforce, because the provision in the Lands Clauses Consolidation Act which requires the fairness of the price to be certified by two surveyors when the land was taken from a limited owner, has not been complied with. The cases cited by the defendants have no reference to the present case. If the contract was uncertain, and the agreement was that the price to be paid should be named by another person, the Court would certainly not perform the contract, as it could not compel a

third person to fix the price; but when such a contract is entered into for a fixed sum without any compliance with the rules prescribed by the legislature, and a suit is instituted asking for the sanction of this Court, in that case the omission of the formalities cannot be permitted to affect the contract; on the contrary, if the Court itself approves of the contract, and the terms on which it has been entered into, it will support it; and one party cannot be allowed to say that the forms imposed by the legislature to secure fair dealing have not been observed, that he may relieve himself from the contract. The Court will ascertain the fairness of the contract and the sufficiency of the price to be paid for the interests sold. The validity of the contract cannot be allowed to depend upon the omission of one party to nominate a surveyor. The Court will itself, without any reference to surveyors, say whether something more ought not to have been given. The next question relates to the time within which the contract is to be performed. The defendants appear to misapprehend the clauses of the acts of parliament obtained by railway companies and the duties arising from the contracts into which they enter. The clause which gives to companies so many years to take land and complete their works, is not an enabling, but a disabling clause. It fixes a period for the company to take the land and complete their works; but after that it deprives them of the powers, so that they may not be kept floating against the owners of property for an unlimited period. It is a mistake to say that the company may contract for land, but that they are not compellable to complete the purchase until the time given for the completion of the works expires. The power which the legislature confers upon the company enables them to take the land, and make the railway within a limited number of years; but whatever contract they enter into within that period, they are bound to complete within a reasonable time. The case does not differ from that of a private owner who sells his estate without fixing a time for the completion of the purchase. In such a case the Court requires it to be completed within a reasonable time. It would be as reasonable to contend that the owner of a fee simple estate and his heirs had an unlimited

(1) 5 H.L. Cas. 331; s.c. 24 Law J. Rep. (N.S.) Chanc. 601; affirming 22 Law J. Rep. (N.S.) Chanc. 77; 1 De Gex, M. & G. 737; 20 Law J. Rep. (N.S.) Chanc. 243.

time within which they might perform the contract, or if he was tenant for life that he had all his life to perform it, as to contend that a company has the whole time given to it for the completion of their works, to complete any contract which they may enter into. A similar argument raised a like absurdity, which was exposed by Lord Eldon, in *Crawshay v. Maule* (2), where he held that the duration of a partnership was not to be measured by the term of a lease, which was a part of the partnership property. If time is specifically mentioned in a contract, the Court will enforce it; but in the absence of its fixing any time, it requires it to be completed in a reasonable time. The plaintiff in the present case is entitled to ask that the agreement shall be immediately performed. Each party, therefore, must do every act which is necessary to forward the completion of the contract within a reasonable time.

Mr. Selwyn said that as the defendants assigned no reason for the non-completion of the contract, except that they did not immediately require the property for their undertaking, they ought to pay the costs.

Nov. 11.—**THE MASTER OF THE ROLLS.**—The defendants have occasioned this suit. They have not repudiated the contract altogether; but they claimed a right to postpone it for the whole time given them by their act of parliament for the exercise of their power, and the completion of their works. The usual decree, therefore, must be made for the specific performance of the contract. There must be a reference as to the title, and also to inquire whether the consideration-money is sufficient within the provisions of the 8 & 9 Vict. c. 18. s. 9, and the defendants must pay the costs of the suit up to the hearing.

LORDS JUSTICES. }

July 15, 16; }

Aug. 5. }

FRITH v. FORBES.

Principal and Agent—Mercantile Law—Consignment—General Lien of Consignee—Positive Directions to Consignee—Bills drawn against Cargo.

In a case where goods were consigned by merchants in India to merchants in England, and the bills of lading were accompanied by bills of exchange in favour of a third firm of merchants, the Master of the Rolls decided that the cargo was subject to the general lien which the merchants in England might have for any balance they had against the merchants in India, and that the realization of the cargo by the consignees did not make them liable to pay the bills of exchange annexed to the bills of lading, unless by some act of their own they had made themselves liable. On appeal, however, the Lords Justices held, that the general lien of a consignee upon goods consigned to him, could not be set up by him against positive directions given to him by the consignor; and if he accepted a consignment accompanied by such directions he was bound to apply it accordingly.

This was an appeal, by the plaintiffs, against an order of the Master of the Rolls (reported 31 *Law J. Rep.* (N.S.) Chanc. 793), dismissing the bill with costs. In the former report the facts are very fully disclosed, and they are so amply referred to in the judgment of the Lords Justices, that the following brief outline will be sufficient. The defendants, Messrs. Forbes & Co., opened an account with Messrs. Begbie & Co., merchants, at Rangoon, upon which Begbie & Co. were to draw on Forbes & Co. in the ordinary manner, remitting such bills as they might draw, but the accounts were to be kept at all times fully covered. Begbie & Co. were also agents for the plaintiffs, Frith & Co., and having disposed in their behalf of goods belonging to them, received in payment articles of merchandise which they consigned to the defendants, Forbes & Co., transmitting to them the bills of lading, and at the same time informing them that they had drawn against the cargo bills of

(2) 1 Swans. 495, 521.

exchange in favour of the plaintiffs, Frith & Co. The defendants, Forbes & Co., did not accept these bills, but upon the arrival of the vessel they took possession of the cargo, sold it and applied the proceeds to the discharge of a general balance due to them from Begbie & Co. Thereupon Frith & Co. filed their bill against Forbes & Co., to have it declared that they were entitled, in priority to any lien in favour of Forbes & Co., to a valid charge on the bills of lading, and the proceeds of the cargo consigned by Begbie & Co., of Rangoon, to Forbes & Co., for the amount of three bills of exchange drawn by Begbie & Co. in favour of the plaintiffs, and against the proceeds of the cargo consigned, but which three bills were refused acceptance by Forbes & Co. The Master of the Rolls decided that, by the general law of merchants, the consignee of goods had a lien upon them as soon as they came to his hands for the payment of any general balance due from the consignor to him, and that such a lien could only be postponed to the claim of a third party against the cargo by some express or implied act of the consignee, shewing his recognition of such a claim; his Honour therefore held that the lien of Forbes & Co. must prevail over the right of Frith, Sands & Co. to any portion of the proceeds of sale of the cargo, and he dismissed the bill with costs.

From this decision the plaintiffs appealed.

Sir Hugh Cairns, Mr. Amplett and Mr. Macnaughten appeared for the appellants.

Mr. Rolt, Mr. Baggallay and Mr. Druce supported the order of the Master of the Rolls.

Mr. Homersham Cox and Mr. W. Knox Wigram appeared for other defendants.

The cases cited at the Rolls were relied on upon the appeal.

Aug. 5.—LORD JUSTICE KNIGHT BRUCE.

—The plaintiffs, a house of trade in London, are the holders for value of three dishonoured bills of exchange drawn in their favour by Begbie & Co., an Indian firm, now insolvent, upon the house of Forbes & Co., a trading firm in London, which house, being also creditors of Begbie

& Co., had received and possessed a cargo of goods consigned to them in England from India by Begbie & Co. Upon part of this cargo the plaintiffs claim to have a charge on three bills of exchange; that claim being disputed by Forbes & Co. led to the present suit, in which we have to say whether in our opinion such a charge existed. Three bills were transmitted to the plaintiffs by Begbie & Co. in the early part of the year 1860. One of the three bills was for 1,200*l.*, and was dated the 27th of March 1860, another for 1,800*l.*, dated the 2nd of April in that year; the third, for 1,758*l.* 2*s.* 8*d.*, dated the 14th of the same April. All were dishonoured in the same year, 1860, Forbes & Co. having in that year, on the presentation to them of the three bills respectively by the plaintiffs, refused to accept any one of them. Each was drawn at six months' sight, and six months from the presentation of the latest presented had expired before the year 1861. Letters to Forbes & Co. on the subject of the three bills of exchange and cargo were, as well also as bills of lading, received by Forbes & Co. from Begbie & Co. in 1860, and in that year, also, letters from Begbie & Co. to the plaintiffs relating to the matter were received by the plaintiffs. The cargo was shipped from India by Begbie & Co. in the year 1860, on board of a barque called the *China*, and was consigned by them to Forbes & Co.; but the barque having received damage at sea the arrival of the cargo was delayed; it was transhipped, and came into the possession of Forbes & Co. in the year 1861, and not before, and they received it, well knowing, of course, that the three bills of exchange had been drawn on them. The tenor and purport of the material documents appear sufficiently in the pleadings in the cause; that is to say, in the bill of complaint, and the joint and several answers of the defendant Sir Charles Forbes and the defendant Mr. John Beaumont, who at present constitute or represent the house of Forbes & Co. The most material letters were dated respectively the 22nd of March and the 2nd and 16th of April 1860. Of the cargo already stated to have been received or possessed by Forbes & Co., the teak wood and bags of cutch, and the hogsheads of oil mentioned respectively in the letters to Forbes & Co. of the 22nd of

March and the 2nd and 16th of April 1860, form part. The cargo is that which, in the bills of exchange of the 22nd of March and the 2nd of April, is mentioned as "consignment per *China*." Did then the bills of exchange and the letters which, in the year 1860, were received by Forbes & Co. and the plaintiffs respectively, from Begbie & Co., and those who, after their insolvency, represented their estate, and the fact of the cargo having been received and possessed, as it was received and possessed, by Forbes & Co., in and not before the year 1861, under the bills of lading, with the knowledge already stated, confer on the plaintiffs, as against Begbie & Co. and their estate, and against Forbes & Co., the charge claimed by the plaintiffs? My impression as to this at the conclusion of the argument was in the plaintiffs' favour, as to the bill of exchange for 1,200*l.* with respect to that portion of the cargo which is mentioned in the letter of the 22nd of March, and as to the bill of exchange for 1,800*l.* with respect to that portion of the cargo which is mentioned in the letter of the 2nd of April. That impression remains, and is confirmed. I felt, however, for some time a difficulty as to the bill of exchange for 1,758*l.* 2*s.* 8*d.*, but my ultimate conclusion is in the plaintiffs' favour as to that bill also. With respect to the cutch and oil which are mentioned in the letter of the 16th of April, they are portions of the same cargo, although the bill of exchange for 1,758*l.* 2*s.* 8*d.* does not mention the cargo or the vessel—the *China*—on board of which it was shipped. I am of opinion that, as between Begbie & Co. and the plaintiffs, the appropriation of the cargo was in each instance effectual, and that the house of Forbes & Co. was, as to each of the three portions of the cargo, bound either to decline the receipt of it, or after receiving and possessing it, to expect to treat it as so charged. That house accepted the cargo with knowledge of the letters of 1860 to the house concerning the cargo, and with knowledge of the bills of exchange mentioned in them. I think, therefore, that the plaintiffs acquired a charge on the goods mentioned in the letter of the 22nd of March for the 1,200*l.* bill, on the goods mentioned in the letter of the 2nd of April for the 1,800*l.* bill, and on the goods mentioned in the letter of the

16th of April for the other bill, and that the debt due to Forbes & Co. from Begbie & Co., and the general lien which Forbes & Co. would, but for what I have mentioned, have had on the cargo, are immaterial, the cargo having in my view of the case come into the hands of the house of Forbes & Co., for the specific purpose in the first instance, as concerns the specific portions of it which have been pointed out, of paying the three bills of exchange respectively as has been stated, subject of course to providing for the attendant expenses. Stress was laid by the counsel for Sir Charles Forbes upon certain letters and bills which preceded the 22nd of March 1860—one letter referred to was in February 1858—letters and bills which were contended to create a lien in favour of the house of Forbes & Co., prior and preferable to the charge, if any, held by the plaintiffs. It appears to me, however, that these letters and bills have not, nor had, any such effect, and they are unimportant. The plaintiffs seem to me entitled to an order as to each of their three bills of exchange, in conformity with what had been said, fulfilling, however, the undertaking contained in the 34th paragraph of their bill, as to the bill of exchange for 400*l.* In dealing with the case, I have not treated the plaintiffs' case as constituted or advanced or assisted by the source from which, or the character and manner in which the house of Begbie & Co. originally acquired the cutch, further than as those circumstances went to make them general debtors to the plaintiffs. I am not, however, sure that the plaintiffs would not be, or are not entitled to be, considered as having had originally a specific claim on part, at least, of the cutch, independent of the bills of exchange and the letters, were it important to them that the matter should be so viewed. I allude more to what is stated in the 5th and 25th paragraphs of the bill of complaint.

LORD JUSTICE TURNER.—My opinion is the same. The Master of the Rolls seems to have decided this case upon the ground of general lien to Forbes & Co. as consignees. But, speaking with all possible respect for his Honour's opinion, I do not think the general lien of a consignee can be set up in opposition to positive directions given him by the consignor. If

the consignee thinks proper to accept a consignment with express directions to apply it, or the proceeds of it, in a particular way, he cannot, as I apprehend, set up his general lien in opposition to those directions. In such a case, only what remains after answering the particular directions can, as I think, become subject to the general lien. It was argued for Forbes & Co., that the consignments in question, though they might not be subject to their general lien, were by the letter of the 1st of February 1860, set forth in the answer, made subject to a special contract contained in the letter of the 25th of February 1858, which the answer also sets forth. But the letter of the 1st of February 1860 refers merely to the intention to consign, and does not indicate the terms of the consignment, and the letter of the 25th of February 1858 cannot be held to have prevented Begbie & Co. from making a consignment upon special terms, or subject to particular directions, if Forbes & Co. should think proper so to accept them. This argument, therefore, may be laid out of the case. The real question here is, what was the effect of the letters which were written, and the bills of exchange which were drawn, with reference to the particular consignment in question? Now, in all the letters written by Begbie & Co. to Forbes & Co., with reference to each of these bills, it is in terms expressed that the bills were drawn against the consignments, terms which, as I understand their import, cannot be construed otherwise than as meaning that the bills were to be paid out of the proceeds of the consignment. There is here, therefore, so far as Begbie & Co. are concerned, an appropriation of this consignment to the payment of the bills, and the appropriation remaining unrevoked, the question, as it seems to me, must be, whether the plaintiffs are entitled to the benefit of the appropriation? As to the bills for 1,200*l.* and 1,800*l.*, I am of opinion that they are so entitled, for the bills for those sums refer to the consignments, and operate, I think, as orders by Begbie & Co. on Forbes & Co. to pay the bills out of those consignments, and the presentment of the bills by the plaintiffs was a communication to Forbes & Co. of

those orders. As to the bill for 1,758*l.* 2*s.* 8*d.*, however, on considering the case since the argument, I have felt more doubt than had at first occurred to me upon it; for, as to this bill, neither the bill itself, nor the letter transmitting it to the plaintiffs, refers at all to the consignments; and I am not prepared to go the length of saying that the holder of a bill of exchange drawn against a consignment has a lien upon the consignment, where no communication has been made to him of the bill being so drawn. But I think the plaintiffs have the lien claimed by them upon this bill also, under the special circumstances of this case, having regard more particularly to this catch having been received by Begbie & Co. in payment for property of the plaintiffs sold by them, and to the description of consignment to Forbes & Co. of the catch thus received by Begbie & Co., which had been going on, and was completed by this particular consignment. It may well be, as the Master of the Rolls has observed, that Forbes & Co. were not bound to accept the bills; that they could not know whether the proceeds of the consignment would be sufficient to meet the bills. The question is, not whether Forbes & Co. were bound to accept the bills, but whether the presentment of the bills by the plaintiffs was not sufficient to produce an appropriation in their favour, which had been already made by Begbie & Co.; and I am of opinion that it was.

WOOD, V.C. }
Nov. 7. } MASSEY v. MASSEY.

Executor—Account—Wilful Default.

In an administration suit an inquiry as to wilful default will not be directed upon a mere general allegation of neglect. Some particular instance must be alleged and proved, so as to raise at all events a case of suspicion in the mind of the Court.

This was a suit for the administration of the estate of George Massey, in which the plaintiffs, who were beneficially interested, sought to charge the defendants, the execu-

tors, with wilful default in not getting in certain book debts owing to the testator.

The amended bill contained the following charge. "The book debts due to the testator were good debts, and ought to have been recovered by the defendants. The defendants have, by their answer to the original bill in this cause, admitted, and it is the fact, that none of the book debts due to the testator at his death were received or got in by them. The plaintiffs charge, and it is the fact, that the defendants wholly neglected to get in any parts of the said book debts, and that the same have been, by reason of the neglect of the defendants, wholly lost to the estate of the testator, and the defendants or some of them ought to be decreed to pay and make good the amount of such book debts and interest thereon."

The defendants by their answer submitted that under the provisions of the will the right to recover and receive book debts was vested in the widow of the testator, and averred that she had got in some of such debts, and that such as were not got in were due from persons who were unable to pay them. They denied that they had been guilty of neglect or omission, and submitted that they were not liable to make good the amount of such debts.

The case was argued by Mr. Rolt, Mr. Willcock, Mr. Daniel, Mr. Little, Mr. Everitt and Mr. Burt.

The cases cited were—

Sleight v. Lawson, 3 Kay & J. 292; s.c.

26 Law J. Rep. (N.S.) Chanc. 553.

Coope v. Carter, 2 De Gex, M. & G. 297;

s.c. 21 Law J. Rep. (N.S.) Chanc. 570.

Wood, V.C. said he adhered to the view expressed by him in *Sleight v. Lawson*. The observations of Lord Justice Knight Bruce, in *Coope v. Carter*, did not go further than to say that where circumstances raised a suspicion in the mind of the Court, if it was likely that further evidence might be obtained, the Court ought to direct an inquiry short of directing as to wilful default, in order to ground upon that a new order directing an inquiry as to wilful default at a future stage. If, in this present case, he were to direct any inquiry as

to wilful default, he should be departing from the wholesome rule that an executor was entitled to know what case he had to meet, and not be compelled to answer a mere general allegation. The plaintiffs should have pressed the executors much further. Some more searching inquiry should have been made of the widow, in order to fix upon some one particular debt on which the issue could have been raised, instead of resting on the sweeping allegation contained in the bill. So far as it sought to charge the executors with wilful default, the bill must be dismissed.

Wood, V.C. }
Nov. 22. } HOOK v. HOOK.

Gavelkind—Descent amongst Collaterals—Nephews and Great-nephews.

The custom of gavelkind being that the lands of an intestate dying without issue are partible amongst his brothers equally, the Court will apply all the incidents of descent to that custom, and the descendants of a deceased brother will stand in the same position jure representationis as their respective parents would have occupied; nor does the right of representation stop at the children of a brother, by analogy to the Statute of Distributions. Therefore, where a man died intestate and without issue, seised of gavelkind lands, leaving a nephew and two sons of a deceased nephew, it was held, that the latter were entitled jure representationis to the share which their father, if living, would have taken.

William Hook, of Tunbridge, in the county of Kent, by his will, dated the 16th of October 1857, directed his trustees, as soon as conveniently might be after his decease, to sell and dispose of his real estate and such parts of his personal estate (except his leasehold property) as should be of a saleable nature, and to stand possessed of his residuary personal estate and of the monies to arise by such sale, upon trust to distribute and divide the same into eleven parts, and to pay one of such parts to his nephew, William Hook, one to his sister-in-law, Ann Stevens, and

one to William Stevens, a son of Ann Stevens, and therein described as the testator's nephew; and he made other dispositions not necessary to be stated of the remaining shares. The testator also directed that in the event of the death of any infant legatee, the share of such legatee so dying should go to and be equally divided amongst the brothers or sisters of such infant legatee, and if there should be no brother or sister surviving such infant legatee, then to the next-of-kin of such legatee; but the will contained no further or other residuary gift of real or personal estate.

The testator died on the 8th of July 1861; at the time of his death he was seised of real estate of gavelkind tenure of considerable value, and also of considerable personal estate. William Hook, Ann Stevens and William Stevens died in the testator's lifetime, and their shares consequently lapsed, and it being admitted that the lapsed shares, so far as they comprised real estate, were not converted by the trust for sale, the plaintiff, who was the only surviving nephew in the male line of the testator, claimed those shares as the testator's sole heir in gavelkind; but the defendants, George and Robert Hook, the two sons of a deceased elder brother of the plaintiff, claimed to be entitled to a moiety by the right of representation.

Mr. J. Napier Higgins (with whom was *Mr. Rolt*), for the plaintiff, argued that where a nephew was in existence the custom did not extend to make great-nephews co-heirs with him by representation to their deceased father. There was nothing to shew that by the custom of gavelkind, representation was extended in the collateral line further than brothers and sisters of the intestate and their children. The Court would not extend a custom of descent which was opposed to the rules of common law further than it was proved to exist.

Ratcliffe v. Chaplin, 4 Leon. 244.

Denn v. Spray, 1 Term Rep. 466.

1 *Rol. Abr.* 624, pl. 2.

By the Statute of Distributions, 22 & 23 Car. 2. c. 10. representation was not admitted beyond the children of brothers and sisters, and this statute only enunciated the old common law rule before primogeniture was established, when land was partible

equally amongst all the children—*Bowers v. Littlewood* (1). Afterwards, when females were excluded, lands were partible equally amongst all the males.

Blackborough v. Davis, 1 P. Wms. 41.

Chitty on Descents, 73, 81, 83.

Clements v. Scudamore, 1 P. Wms. 63.

He also referred to

Beviston v. Hussey, Skin. 385.

Denn v. Purvis, 1 Burr. 326.

Crump v. Norwood, 7 Taunt. 362.

Robinson on Gavelkind, 57 et seq.

Chitty on Descents, 169–171, 183.

Co. Litt. 140, b.

Mr. Osborne, for the two sons of the deceased nephew, contended that grand-nephews were entitled by representation to the share which their father, if living, would have taken, and the descendants of collateral heirs in the remotest degree were entitled to stand in the place of their ancestors. He commented on *Clements v. Scudamore*, and referred to

Locke v. Coleman, 1 Myl. & Cr. 423.

Cole v. Wade, 16 Ves. 27.

Robinson on Gavelkind, 113 (ed. 1822).

Mr. A. E. Miller (*amicus Curie*) drew his Honour's attention to *Muggleton v. Barnett* (2).

Mr. Higgins replied.

Wood, V.C.—This case has been very ably argued on both sides. I was at first apprehensive that I should have to balance the opinions of *Mr. Peckham* and *Mr. Butler* on the one hand, against that of *Mr. Preston* on the other (given in the case of *Gooding v. Gooding*, and stated in *Chitty on Descents*, 183, &c.), which, I need hardly say, would have been a work of no small difficulty; but it does not appear to me that those opinions bear on the case before me; on the contrary, so far as they have any bearing upon it, they all three concur in the opinion that the sons of a deceased brother would be admitted.

The case stands thus: the canon of construction is very well expressed in the case of *Clements v. Scudamore*: it is, that where the custom has made the youngest son the

(1) 1 P. Wms. 594.

(2) 27 Law J. Rep. (N.S.) Exch. 125.

heir, the law implies all the necessary consequences of descent. That seems to be the canon which ought to govern in this case. You first ascertain the custom, and when you have ascertained the custom, you apply all the common incidents and rules of descent to the custom so ascertained. The statement of Peckham that the custom of gavelkind does not extend beyond sons and daughters, seems to have been made *per incuriam*. There was at first a notion, apparently derived from Lambarde, that the custom in gavelkind extended only to the sons of the intestate, and Peckham said the custom in gavelkind does not extend beyond sons and daughters. He says, in his third opinion, "In none of the books treating of or referring to gavelkind can I find any authority to support the idea that the custom of gavelkind extends through all the branches of inheritance,"—the case before him being that of cousins of the intestate, who, therefore, were obliged to claim not through the brother of the intestate but through the uncle, a branch higher up. He says, in *Lambarde's Perambulation of Kent*, the custom only speaks of sons, and Lord Coke says this is the general custom, and adds, "but yet by custom when one brother dieth without issue, all the other brethren may inherit." There you get the custom of gavelkind pretty clearly established as dividing the land amongst all the brothers of the intestate. Now, when you have found that custom, the rule of descent applies just as in the case of Borough English. If you have to trace the heirship from the brothers of the intestate—if those are the stirpes from which the heirship is to be traced, if any one of those brothers dies in the lifetime of the intestate his issue will inherit *ad infinitum*, together with the issue of the other brothers in the same line, the issue all being traceable up to brothers, and brothers only. Then the point which raised the difficulty and doubt in the minds of Mr. Butler and Mr. Peckham was, whether the rule could be carried any further, and taken to extend to all the descendants of an uncle of the intestate. That was the point upon which they differed from Mr. Preston. After saying that it goes to all the brethren he says, "and in *Somner, Taylor, Robinson, Comyn's Digest, Watkins's Descents*, and other books adverting

to gavelkind, none of the cases stated in exemplifying the custom in the transversal or collateral lines, go beyond brothers, and the representatives of deceased brothers taking *jure representationis*." That is the case before me. I have here the representatives of a deceased brother taking *jure representationis*, that is, one son of the deceased brother and the grandsons by another son of the same deceased brother. I do not find that I contradict any opinion of Mr. Peckham by holding that those grandsons come in representing the brother through one son, as the plaintiff, the other son, comes in representing the same brother of the intestate.

Now Mr. Butler's opinion is this: "If this case should be made a subject of judicial inquiry, it would be left to a jury to determine by precedents, whether the customary descent of gavelkind stops with brothers, and where a brother is dead without issue, or extends to remoter branches in a collateral line." Mr. Butler does not doubt that it goes to a brother, and when he is dead to his issue. Mr. Butler's accuracy would not allow him to speak of issue when he meant children only. He considers that it may run on to the issue of the brother who is dead when once you apply the rule to brothers; and the doubt which he had was, whether any case could be found that went higher than that, and took it to the descendants of uncles or great-uncles, and the like.

The cases at Nisi Prius do not seem to be necessary to Mr. Osborne's case. He adheres strictly to what has been decided. Mr. Peckham and Mr. Butler express no opinion upon the subject, but that the custom extends to the brothers, and to the issue of the brothers by the right of representation. If it were not so, a very strange state of things would occur which would be contrary to the case of *Clements v. Scudamore*, and to the course of the Court in applying the necessary incidents and consequences of descent. The case before me is a strong exemplification of that. The gentleman who claims the whole, traces his pedigree through a brother of the intestate; but his brother was an elder son of the same brother of the intestate—it was not Borough English, but the custom of gavelkind in which it is partible among

the children of the brother. The moment he does that the defendants say, How do you dispose of our father's position? Your ancestor was our ancestor. The moment you claim through him, why are we, the descendants of his eldest son, to be excluded? And it would be contrary to all the ordinary notions of descent that, both the plaintiff and the defendants being obliged to trace their descent from the one brother of the intestate, all the children of the elder son of that brother, who always come in as representing the share which their deceased father would have had, should be utterly excluded by the younger son. It seems to me that that would be contrary to all the usual incidents of heirship, when once you ascertain the custom. It does not seem that Mr. Peckham and Mr. Butler doubt it; Mr. Preston thought it went further to the cousins; but they all three seem to concur in saying that the issue of the deceased brother stand in the position that the brother held.

With reference to the heirship, I think I cannot entertain any doubt; and therefore, though it has been ingeniously argued that, from the way gavelkind originated, viz from a common-law course of descent, which would make the inheritance partible to all, males as well as females, I might be persuaded, by a somewhat refined course of reasoning, to hold that the statute for administration of intestates' estates was enacted with a view to this supposed common-law right; and as that statute stops at the relationship in question, gavelkind must be presumed to be a course of inheritance which stopped at that particular point. I apprehend that it is an answer to that to say, that if I were so to hold, I should be obliged to hold that when the brothers were deceased, and there were seven or eight nephews descended from two or three stirpes, all the nephews would take *per capita*, which is not at all consistent with *Clements v. Scudamore*, which decides that when once you have ascertained the lines, they take according to the ordinary incidents of heirship. They would not take, according to any of the authorities, *per capita*. I think there can be no doubt that the plaintiff takes one moiety, and the two sons of the other nephew deceased take the other moiety between them.

KINDERSLEY, V.C. } CANCELLOR v. CAN-
Nov. 6. } CELLOR.

Will—Construction—Children and Issue.

A testator gave his real estate to trustees to permit his wife to receive the rents for life, with remainder for the separate use of his daughter, and after her decease for the sole use and benefit of all and every the children and issue of his daughter which she might happen to leave her surviving, to take as tenants in common, and their respective heirs and assigns for ever; and if but one such child, then upon trust for such only child, his or her heirs or assigns for ever. But if his daughter should happen to die without leaving such issue, or leaving such, all of them should die during their minority and without leaving lawful issue, then upon trust for such persons as his daughter should by deed or will appoint. And the testator bequeathed his personal estate in terms nearly identical with the devise of the real estate, except that in the gift over the language was "in case there shall be no child or issue of my said daughter." The daughter survived the widow and died, having had six children, two of whom only survived her; one child was unmarried, and the other had a son born before the death of the daughter:—Held, that all the children or issue of the daughter living at her death took per capita as tenants in common in fee simple as to the real estate and absolutely as to the personally, the property being divisible equally in thirds between the two children and the grandchild.

This suit was instituted to administer the estate of the Rev. William Agulter, dated the 23rd of November 1829, whereby he gave and devised all his real estate to the Rev. William Parker and Charles Harper, their heirs and assigns, upon trust for the sole use and benefit of his wife Ann, and to permit her to receive the rents for life, with remainder upon trust for the sole use and benefit of his daughter, Eliza Ann Cancellor, the wife of H. Cancellor, and to permit and empower her, his said daughter, to receive the rents for her sole use and benefit, as if she was sole and unmarried, for her life, her receipt to be a sufficient discharge; and from and after the decease of his said daughter for the sole use and

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benefit of all and every the children and issue of his said daughter which she might happen to leave her surviving, to take the same as tenants in common, and not as joint-tenants, and their respective heirs and assigns; and if but one such child, then upon trust for such only child, his or her heirs and assigns, for ever. But if his said daughter should happen to die without leaving such issue, or leaving such and all of them should die during their minority and without leaving lawful issue, then upon trust for such person or persons, and in such manner as his said daughter should, by any deed or will to be by her legally executed and attested, limit, dispose of, give or devise the same unto. And as to all the rest, residue and remainder of his personal estate and property whatsoever, after payment of a legacy of 500*l.* to his wife, and of all his just debts, funeral and testamentary expenses, he gave and bequeathed the same to his trustees, their executors and administrators, upon trust for the sole use and benefit of his wife Ann, and permit her to receive the dividends during her life, with remainder for the sole use and benefit of his daughter, Eliza Ann Cancellor, and to permit and empower her to receive the dividends during her life, (her receipt to be a sufficient discharge,) as if she were sole and unmarried. And from and after the decease of his said daughter upon trust for the use and benefit of all and every the children and issue of his said daughter which she might happen to leave her surviving, and if there should be but one such child, then for the sole use and benefit of such only child, his or her executors or administrators; and in case there should be no such children or issue of his said daughter, or being such and all of them should die during their minority and without leaving lawful issue, then upon trust for such person or persons as his said daughter should, by any deed or will to be by her respectively legally executed and attested, give or bequeath, direct or appoint, or dispose of the said residue of his personal estate or any part thereof; and the testator appointed his widow and daughter executrices.

By a codicil, dated the 18th of December 1832, the testator gave a cottage, which he had purchased subsequently to the date of

the will, to the trustees, upon the same trusts.

The testator died on the 26th of March 1836, and the estate having been handed over to the trustees, the testator's widow received the income thereof for her life. She died on the 6th of August 1849, and the testator's daughter then received the income and died on the 1st of February 1862, having had six children, four of whom died infants and unmarried during her lifetime. The other two, Charlotte Cancellor and the Rev. J. H. Cancellor, survived her, and both had attained twenty-one. Charlotte Cancellor, who was the plaintiff, was unmarried; but J. H. Cancellor was married and had one child, who was an infant, and was born in January 1862.

The following questions were raised by the trustees: whether upon the death of Eliza Cancellor, the plaintiff Charlotte Cancellor, and her brother J. H. Cancellor, were entitled to the property of the testator in equal shares, or whether the child now born and the children that might be born of J. H. Cancellor were entitled to participate.

Mr. Baily and *Mr. Osborne* appeared for the plaintiff.

Mr. Bazalgette and *Mr. Aikin*, for the infant grandchild, and

Mr. Vaughan Hawkins, for the trustees.

The following cases were cited—

North v. Martin, 6 Sim. 266.

Butter v. Ommaney, 4 Russ. 70; s. c. 6 Law J. Rep. Chanc. 54.

Cormack v. Copous, 17 Beav. 397.

Gordon v. Whieldon, 11 Ibid. 170; s. c. 18 Law J. Rep. (N.S.) Chanc. 5.

Roddy v. Fitzgerald, 6 H.L. Cas. 823.

KINDERSLEY, V.C.—This will presents so many difficulties that every suggestion made as to one portion is met by some difficulty in another. The testator intended that his wife and daughter should successively enjoy the income of his property, real and personal, and then that it should go to the children or child, or some class of issue of the daughter, and the question now is, to whom did the testator mean it to go? The testator might have anticipated that

his daughter would have many children who might marry and die and leave issue, and some might survive, and so on, taking all the ordinary chances into consideration; but he certainly uses language the most difficult to be interpreted. The two clauses in the will giving the rent and personalty are nearly identical in words; but there is a difference, which consists principally in the gift over, the language being, "in case there shall be no child or issue of my said daughter," in the case of the personalty, whereas in that relating to the realty it is, "in case my said daughter shall happen to die without leaving such issue," not using the word "children." Many things have been suggested. It has been said that the first limitation, taken alone, supposing there was nothing else to control it, clearly gives to every child, grandchild and individual, being more remote issue of the daughter who survived her, equal shares in fee simple *per capita*; and no doubt, standing alone and uncontrolled, that would be the result of the language, and it is contended for the infant, that it was so uncontrolled. It is a clear rule that in "considering a will" the testator must be taken to use the words in their primary and natural sense, unless the context shews that he meant them in a secondary sense; and therefore the whole question is, whether there are other clauses in the will sufficient to control the effect of these words, and it is contended that there are such words. First, the effect of the infant's contention would be that children, grandchildren and parents would take together, *pari passu*, *per capita* as tenants in common: a very improbable intention, which this Court would not adopt unless such intention was clear, and there was nothing to control it and shew that he did not so intend; in any case the Court would most unwillingly arrive at the conclusion that children, grandchildren, or great-grandchildren or issue however remote, of a child, should take *pari passu*, although, no doubt, in this case this clause standing alone would have that effect. Immediately following are the words, "if but one such child, then the whole to such only child, his heirs and assigns for ever." One view is, that if one child survived the daughter, although there might be a score of issue of other predeceased children, that

one child would exclude all of them, although if there was no child living at her death the issue would all take *pari passu*; nothing could be more improbable or monstrous, although it is justly said that you cannot control the caprice of a testator. Another suggestion is, that the testator, in using the words "one such child," did not refer to an actual child in the proper and primary sense, but to a child of the daughter's child descended from the testator. That is plausible, but it must be remembered that as at first the words are "child and issue," the Court is bound to take those words in the primary sense, unless there is reason to control it, and it must be taken to mean an actual child, a descendant of the testator in the first generation. Afterwards the testator uses the words "such issue" simply, which embraces grandchildren in its natural sense, but there is nothing there to throw light on this intention. Looking at the corresponding clause as to the personalty, the language is different, and that may assist the construction, the word "child" being also used, and therefore he has so used the terms as to shew that he did not confound them, but had in his mind the distinction between the two. It is said that you may reconcile the clauses and get over the difficulty by holding, that children living at the death of the daughter took, that is, actual children and issue of predeceased children of the daughter, taking by substitution for their deceased parents, and it would certainly to some degree get over the difficulty if it could be adopted. But there is nothing in the language pointing to substitution; the word used is "and" issue, not "or," which might give some semblance of such an intention, although no doubt it is said that the words point to children in the aggregate. Having thus adverted to the various suggestions, and the difficulties which stand in the way of adopting them, still some meaning must be given; and taking the words of the first gift and the words of the gift over in the clause relating to the personalty, I think the words "child and issue" must be taken in the primary sense, namely, the word "child" to mean children properly so called, the word "issue" children generally, that is, those more remote than children proper. However reluctantly, therefore, I must

conclude that the testator intended all the children or issue of the daughter living at her death to take *per capita* as tenants in common in fee simple as to the real estate, and absolutely as to the personalty. The property consequently will be divisible into equal thirds between the daughter and son and the grandchild.

KINDERSLEY, V.C.
Nov. 7.

BRANDON v. BRANDON, in re THE SOUTH - EASTERN RAILWAY COMPANY AND THE LANDS CLAUSES CONSOLIDATION ACT.

Lands Clauses Act—Costs of separate Investments.

A railway company having taken land which was the subject of a suit, and paid the money into court, the parties obtained an order for re-investing a large portion of the money in land. They then applied by petition for a small portion of the remaining fund to be invested, and they served all the parties to the suit:—Held, that, the Court considering this purchase to be for the benefit of the parties, and neither capricious nor unnecessary, the railway company must pay the costs.

In this case certain lands, forming part of the property of the late Samuel Brandon had been taken by the South-Eastern Railway Company, and the purchase-money, amounting to 7,000*l.*, had been paid into court under the Lands Clauses Consolidation Act. A portion of this sum, amounting to 6,200*l.*, had been re-invested in the purchase of land with the sanction of the Court, leaving 800*l.* still in court. It was now required to lay out a further sum of 80*l.* in the purchase of a small piece of land, under these circumstances: a lease of this property had some time since been granted to a person named Neale for twenty-one years, with a proviso, that if the lessee did not renew at the expiration of his term, then that the lessee should be bound to sell to the lessor an adjoining piece of land, upon part of which an inn, called *The White Lion*, stood.

The lease not having been renewed, it was now proposed to purchase the small piece of land mentioned in the last paragraph, and to pay for it out of the balance of the money paid into court.

A petition was presented by the parties interested in the estate to obtain the sanction of the Court to the purchase, and asking that the costs might be paid by the railway company.

Mr. Baily and *Mr. Hardy* appeared in support of the petition.

Mr. Walford, *Mr. Cracknall*, and *Mr. Elderton* appeared for parties in the suit who had been served with this petition.

Mr. J. T. Humphry, for the railway company, submitted that the costs ought not to be paid by the company. After 6,200*l.* had been laid out in a particular purchase, the parties had no right to invest the remainder in dribblets and call upon the company to pay the costs. They might otherwise put the company to the expense of a separate set of costs for every 80*l.* of the 800*l.* left; at any rate, there was no necessity for serving all the parties to the suit as the petitioners had done. They cited *Haynes v. Barton* (1).

KINDERSLEY, V.C.—The principle this Court has adopted for carrying out the intention of the legislature with respect to cases of this kind, is that, inasmuch as railway and other companies of the same character are authorized to take the private property of individuals, whether they desire to part with it or not, they must, as a compensation for this uncommon power, submit to bear all expenses of re-investing the purchase-money in other lands. The person whose property they are taking has a right to say that, but at the same time this Court will not allow the obligation on the part of the company to be made use of, so as capriciously to entail upon them unnecessary expense. In the present case the question is, whether there is any mode of dealing with the matter except the course which has been taken. I think there is not. The property taken by the company, and represented by this money, was part of the subject-matter of the suit of *Brandon*

(1) 30 Law J. Rep. (N.S.) Chanc. 804; a.c. 1 Dr. & Sm. 483.

v. *Brandon* and brought into this court in that suit, and in the matter of the Railway Act. If there were no suit the parties could by petition have the purchase-money re-invested; but still it would be impossible to deal with the money except by coming to the court. It has been ingeniously suggested, why should the trustees have bought this little piece of land with this 80*l.*? Could they not have bought it with other money? But that is founded on the supposition that there is other money, which there is not. It has been said there is no authority to buy this land; but no authority is required: if it had been, I should have given it. There is evidence that it is a desirable purchase; and the only question then is, could they have come here without serving all parties to the suit? Clearly not. The petition has been properly entitled in the act and in the suit; the case, therefore, comes within the principle which I have referred to at the outset, which governs these cases, that expense, not capriciously, but rightly incurred, in order to get the authority of the Court for the application of the money, must be borne by the company. No doubt the expense of more than one investment is somewhat heavy, but the legislature has provided that the company shall bear the expense of more than one purchase when the Court thinks it is for the benefit of the *cestuis que trust* to have it in more than one. Here it is, in my opinion, for the benefit of the estate, and the company, therefore, must pay the costs.

STUART, V.C. }
Nov. 18, 19. } PRATT v. BULL

Judgment—Charge on Land—Order of Court of Probate directing Payment of a Sum of Money—1 & 2 Vict. c. 110.

An order of the Court of Probate directing the payment of a sum of money does not, by being registered with the Senior Master of the Court of Common Pleas at Westminster, constitute a valid charge on land.

This was a demurrer.

The bill alleged to the following effect:

Thomas Bull the elder, the father of the defendant, Thomas Bull, by a will dated

the 7th of August 1860, gave all his real and personal estate to the defendant absolutely, and he appointed the defendant executor of his will.

John Bull, the eldest son of the testator, entered a *caveat* against the probate of the testator's will on the ground that the testator was, at the time of the date and execution thereof, of unsound mind and incapable of making a valid will. In consequence of such *caveat* the defendant, Thomas Bull, instituted a suit in the Court of Probate to try the validity of the will against John Bull and Mary Anne Bull the daughter of the testator. On the 5th of February 1861, that suit came on for trial, before Sir Cresswell Cresswell, Judge of the Court of Probate; and pending such trial the suit was compromised, and an order was thereupon made by the learned Judge whereby it was ordered, with the consent of the parties, that a verdict should be entered for the plaintiff in that suit (meaning Thomas Bull, the defendant in the present suit) on all the issues; and with the like consent it was ordered that the same plaintiff, Thomas Bull, should pay to Mary Anne Bull an annuity of 25*l.* for her natural life, and that the order should be made a rule of the Court of Probate at the instance of either of the parties if the Court should see fit.

Shortly after the said compromise the defendant, Thomas Bull, proved the will of the testator in the Court of Probate.

On the 18th of May 1861, a memorandum or minute of the order of the Court of Probate of the 5th of February 1861, was left with the Senior Master of the Court of Common Pleas, at Westminster, who forthwith entered the same in the proper book kept for that purpose, in pursuance of 1 & 2 Vict. c. 110, and the amount of the damages by such order ordered to be paid was in the memorandum or minute stated to be 25*l.* per annum.

On the 24th of July 1861, the order of the Court of Probate of the 5th of February 1861, was made a rule of that Court; and on the 19th of October 1861, a memorandum or minute of that rule was left with the Senior Master of the Court of Common Pleas, at Westminster, in pursuance of 1 & 2 Vict. c. 110.

By an indenture dated the 16th of

November 1861, Mary Anne Bull assigned the annuity of 25*l.*, ordered to be paid as before mentioned, to the plaintiff Thomas Pratt.

The testator was at the time of his death possessed of and entitled to certain leasehold property, in the county of Middlesex, of which the defendant upon his taking out probate of his father's will became possessed.

The bill prayed (among other things) that it might be declared that the annuity of 25*l.* during the life of Mary Ann Bull, was a charge upon all the leasehold property of or to which the defendant Thomas Bull became entitled as before mentioned.

The bill was filed on the 12th of September 1862.

The defendant demurred for want of equity.

By the 25th section of the act constituting the Court of Probate (20 & 21 Vict. c. 77.) it is enacted that "the Court of Probate shall have the like powers, jurisdiction and authority for enforcing . . . all orders, decrees and judgments made or given by the Court under this act, and otherwise in relation to the matters to be inquired into and done by or under the orders of the Court under this act, as are by law vested in the High Court of Chancery for such purposes, in relation to any suit or matter depending in such Court."

Mr. Bacon and *Mr. Hardy*, in support of the demurrer.—The Courts whose judgments when registered were to operate by virtue of 1 & 2 Vict. c. 110. as charges on land were enumerated in that act, and among them the Ecclesiastical Court, which formerly exercised the jurisdiction now exercised by the Court of Probate, was not mentioned. If, then, the registered judgments of the Court of Probate operated as a charge on land, such operation must arise by force of the act constituting that Court. That act, however, afforded no pretence for such an argument; for the 25th section of the act creating the Court of Probate said no more than that that Court should have the same power of enforcing its orders as the Court of Chancery. The act did not give to the orders of the Court of Probate the same effect as the orders of the Court of Chancery. The effect of a registered order of

the Court of Chancery was to create a charge on land. But the enforcing of an order of the Court of Chancery meant an entirely different thing. Thus the order in question did not constitute a valid charge on land.

They referred to—

The Thames Ironworks and Shipbuilding Company (Limited) v. the Patent Derrick Company (Limited), 1 Jo. & H. 93; a.c. 29 Law J. Rep. (n.s.) Chanc. 714.

Mr. Malins and *Mr. Bilton*, in support of the bill, relied on the section above stated.

STUART, V.C.—The object of this bill is to give to an order of the Court of Probate the same effect and to obtain the same benefit under it as can be obtained under a judgment of a Court of superior jurisdiction duly registered according to the provisions of the 1 & 2 Vict. c. 110. If an order of the Court of Probate is to have the force and effect of a registered judgment of a Court of law, or of a registered decree or order of the Court of Chancery, it must have that force and effect either by express words in the act of parliament which constituted the Court of Probate, or by necessary implication from the language of the two acts of parliament construed with reference to each other. It is quite clear that inasmuch as the Court of Probate was not in existence at the time when the 1 & 2 Vict. c. 110. was passed, there cannot be found in that act words to support the case made by the bill. The words of that act are confined to judgments of the superior Courts of common law at Westminster, and orders and decrees of the High Court of Chancery. The act of 20 & 21 Vict. c. 77, which constituted the Court of Probate, might have declared, and probably would have expressly done so if the legislature had intended, that all orders, judgments and decrees of that Court should have the same force and effect as judgments of the superior Courts of common law at Westminster and orders and decrees of the High Court of Chancery. There are, however, no such express words to be found in the 20 & 21 Vict. c. 77, but in the 25th section there are very remarkable words, which say that the Court of Probate

"shall have the like powers, jurisdiction and authority for enforcing all orders, decrees and judgments made or given by the Court under that act, and otherwise in relation to the matters to be inquired into, and done by or under the orders of the Court under that act as are, by law, vested in the High Court of Chancery for such purposes, in relation to any suit or matter depending in such court." That statute, in plain language, gives to the Court of Probate only authority to enforce its own orders in the same manner as the orders of this Court can be enforced by writs of execution, or in such other lawful manner as will not be inconsistent with the practice of this Court. But the power of enforcing an order is one thing, and the force and effect of an order are another; and if I am asked to construe the clause, which relates to the power of enforcing the orders of the Probate Court, as meaning that its orders shall have the same force and effect as judgments of a superior Court of law and decrees and orders of this Court, I must say that I find no language or authority to enable me to do so. On the contrary, there are two circumstances which seem to restrain this Court from putting any large construction upon the words "the power of enforcing all orders, decrees and judgments," made and given by the Court of Probate. The legislature, in constituting the Court of Probate, constituted it as a Court for a peculiar and extraordinary jurisdiction, which was theretofore exercised not by a Court of the Queen, but by the Ecclesiastical Courts. These Courts were constituted for the purpose of deciding all questions relating to the validity of wills, and for granting probates and letters of administration, which are now made the prominent objects of the Court of Probate. There is no jurisdiction in reference to matters of debt given by this act of parliament, though it is very true that there is nothing to restrain the Court from making orders for the payment of costs or sums of money agreed to be paid in cases of compromise; and no doubt such orders would be within the jurisdiction of the Court. But, considering the nature of the Court of Probate, and its scope, object and jurisdiction, a judgment in the sense of a peremptory order of the Court, against a debtor, at the instance of a creditor, would be

foreign to its jurisdiction. This is explained by the act of parliament, for on looking at the 83rd section I find that the Court of Probate has a jurisdiction to exact a bond as security from those who are intrusted as executors and administrators with power to collect and administer the assets of deceased persons, the amount of which is fixed by the Court, instead of creating an obligation between debtor and creditor. Such is the jurisdiction of the Court of Probate. But all the act does is to direct that bonds so executed shall not be the subject of litigation in that Court, but shall be enforced in a Court of common law or in a Court of equity. All that seems to shew that a judgment, which in a general sense is an order of a Court, and can be enforced at the suit of a creditor against a debtor, is not the sort of order which is within the proper scope and province of the Court of Probate. For these reasons, I think, there is no ground for construing the language of the act, or of interpreting it in so favourable a manner as to say that the words of the 25th section give to the orders of the Probate Court the same force and effect as belong to decrees of the Court of Chancery. I am, therefore, of opinion that this demurrer must be allowed, and with costs.

LOKDS JUSTICES. }
 Nov. 26. } *In re SHEPPARD'S TRUSTS.*

Trustees, Appointment of—Contingency
—Trustee Act, 1850.

Where estates were given to trustees upon trust (after a trust for one for life with remainder for his children) to convey to a person in the event of the death of the tenant for life without issue, this Court, differing from the Master of the Rolls, (on an application under the Trustee Act, 1850, 13 & 14 Vict. c. 60.) appointed trustees in the place of original trustees who refused to act.

This was an appeal from a decision of the Master of the Rolls (reported 31 *Law J. Rep.* (N.S.) Chanc. 788) dismissing a petition, with costs. The petition was presented under the Trustee Act, 1850, and asked the appointment of new trustees of

the will of William Sheppard, who, by his will, dated the 25th of May 1838, devised three houses, of which he was seised in fee, to trustees, upon trust, as to each house, for the benefit of a certain child of him (the testator) for life, with remainder in each case to the children of each tenant for life who should be living at his death, and the issue of such of them as should have died in his lifetime; and in the event of each tenant for life dying without issue living at his death, then upon trust to convey and assure each house unto all his (the testator's) children, whether then born or thereafter to be born, who should be living at the death of each tenant for life, and the issue then living of such of them, if any, as should have died in his lifetime leaving issue.

The testator died in December 1840, and all the three tenants for life survived him. Two of them were known to be still living, and one of these was the testator's heir-at-law. There was issue of one only of them. The third, Edward Sheppard, went to Australia in 1857 and nothing had been heard of him for the last four years. He was a married man, and his wife remained in this country, and there never had been any issue of his marriage. The trustees appointed by the will had never accepted the trusts, and had always refused to act, although no formal disclaimer had ever been executed by them, and they declined to appoint new trustees. The two tenants for life, now in England, were in possession of the houses devised for their benefit, and one of them was in possession of the house devised for Edward Sheppard. It was admitted that by reason of the non-acceptance of the trust, the legal estate in the whole property was vested in the heir-at-law of the testator.

The petitioners were the children of the testator other than the three devisees for life, and which children would become entitled to it in the event of the tenant for life dying without issue. The Master of the Rolls, as before stated, dismissed the petition, with costs, and the petitioners appealed.

Mr. George Lovell, for the appellants, divided his argument into two parts: the first was to shew that in such a case as the present the Court had jurisdiction,

which it would exercise, to interpose its authority; and the second to prove that under the Trustee Acts there existed the same jurisdiction, and that the Court would equally and willingly exert it. To support the first proposition, the following cases were cited and commented on at great length:

The Duke of Beaufort v. Barty, 1 P. Wms. 703.

Robinson v. Robinson, 2 Ves. sen. 225; s.c. 3 Atk. 736; 1 Burr. 38.

Stansfield v. Habbergham, 10 Ves. 273.

Garth v. Cotton, 1 Dick. 183; s.c. 3 Atk. 751; 1 Ves. 524, 546.

Ross v. Ross, 12 Beav. 89.

Lord Dursley v. Fitzhardinge Berkeley, 6 Ves. 251.

Allan v. Allan, 15 Ibid. 130.

The Earl of Belfast v. Chichester, 2 J. & W. 439.

Davis v. Angel, 31 Law J. Rep. (N.S.) Chanc. 613.

Mitford on Pleading, 156.

In support of the second head of argument, the statutes

13 & 14 Vict. c. 60.

The Trustee Act, 1856, ss. 32. and 37.

The Trustee Extension Act, 1852 (15 & 16 Vict. c. 55.), were referred to.

Mr. H. Fox Bristowe, for the respondents, the tenants for life (excepting Edward Sheppard), and also for the trustees named in the will, said that the latter had never acted, nor had there ever been any need that they should. They had declined the appointment, and the several tenants for life were in possession, whilst the legal estate was in the heir-at-law, who was one of them. No one of them desired this new appointment, and to make it would be a wholly unnecessary expense. The cases cited had all of them reference to the general jurisdiction of the Court, but this application was under statutory jurisdiction. The interest of the petitioners was so remote as not to be, properly speaking, a beneficial interest under the 37th section of the act of 1856, and they had therefore no right to present the petition, and so the Master of the Rolls had decided.

LORD JUSTICE KNIGHT BRUCE said that he thought it was expedient that there

should be new trustees; and, on the whole, he thought it best to say nothing of the costs on either side.

LORD JUSTICE TURNER quite agreed. It was impossible to say that these applicants, the appellants, had not a beneficial interest within the meaning of the 37th section of the Trustee Act. By that section it was provided that an order for the appointment of new trustees might be made "upon the application of any person beneficially interested" in the trust estate. It did not follow because any person having the right to apply chose to apply, that the Court would appoint a new trustee. That would depend on the 32nd section, which provided that such appointment should be made by the Court whenever it should be expedient to do so. The question whether these petitioners had a sufficient interest was of less importance, for the Court would not make the appointment unless it considered it expedient. In this case the legal estate was vested in the equitable tenant for life. This was objectionable, and his Lordship thought it, therefore, a clear case for the appointment of new trustees of this will. There must be a reference to chambers to appoint, having regard to the interest of all parties in the matter. Each party must pay his own costs up to the present order, and the future costs would be at the discretion of the Judge in whose chambers the proceedings were taken.

STUART, V.C. }
Nov. 5, 12, 17, 19. } LACON v. LIFFEN.

Bankruptcy—Deposit of Instruments of Mortgage of Ships—Order and Disposition—Bill of Sale to secure past Debt and future Advances.

A registered mortgagee of a ship deposited with a creditor the instrument of mortgage thereof, and subsequently became bankrupt:—Held, that such deposit took the ship out of the order and disposition of the bankrupt, and constituted the creditor equitable mortgagee of the ship.

A bill of sale by a trader of all his effects to secure a past debt and future advances, is an act of bankruptcy.

The plaintiffs, Sir Edmund Henry Knowles Lacon, Bart. and Edward Pitt Youell, were

NEW SERIES, 32.—CHANC.

bankers at Great Yarmouth, in Norfolk, and they had also a branch bank at Lowestoft, in Suffolk.

John Peters and Frederick Peacock, who, in and prior to December 1858, carried on the business of fish-merchants in co-partnership at Lowestoft, had in that month and previously thereto a current account with the plaintiffs at their branch bank at Lowestoft; and being, on the 20th of December 1858, indebted to the plaintiffs in the sum of 564*l.* 1*s.* 2*d.*, they, on that day, deposited with the plaintiffs by way of security for that sum the instruments of mortgage of three vessels called, respectively, *The Five G's*, *The Six B's* and *The Rapid*, of which Peters & Peacock were the mortgagees duly registered at the Custom House, Lowestoft, under the provisions of the Merchant Shipping Act, 1854.

On the 22nd of December 1858, two cheques, amounting together to the sum of 112*l.* 1*s.* 3*d.* drawn by Peters & Peacock on the plaintiffs, were presented for payment at their branch bank at Lowestoft, and the plaintiffs before paying such cheques required a further security for the balance then due to them from Peters & Peacock.

Peters & Peacock thereupon executed a bill of sale, dated the 22nd of December 1858, whereby, after reciting that they were indebted to the plaintiffs in the sum of 578*l.*, and that they had agreed to secure the repayment thereof, and also of any further monies in which they might thereafter become indebted to the plaintiffs, and interest for the same respectively, it was witnessed, that they assigned to the plaintiffs all and every the household goods and furniture, stock-in-trade, plate and plated articles, household linen, books, china, and other household effects whatsoever, horses, saddles, harness, and other accoutrements, and also all the implements and live and dead stock, nets, warps, and other goods, chattels and effects then being, or which thereafter might be in, upon, or about the messuages or dwelling-houses, fish-offices, warehouses and premises occupied by Peters & Peacock, or either of them, and situate at Lowestoft, and the offices and other out-buildings and lands belonging thereto, or held therewith, and all and every the book and other debts, sum and sums of money due and owing to Peters & Peacock from

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any person or persons whomsoever, and all other the personal estate whatsoever of or to which Peters & Peacock were then, and from time to time and at all times thereafter should be possessed or entitled, so long as any monies should remain due and payable to the plaintiffs by virtue of the said bill of sale.

On the 23rd of December 1858 the plaintiffs paid the two cheques, amounting to 112*l.* 11*s.* 3*d.*, and after such payment the balance due to them from Peters & Peacock amounted to 581*l.* 18*s.* 10*d.*

On the 28th and 29th of December 1858 the plaintiffs sold a part of the effects comprised in the bill of sale, and such sale produced the sum of 280*l.* 5*s.* 6*d.* only.

On the 29th of December 1858 the plaintiffs gave notice to the mortgagor of the *Rapid* of the deposit with them of the instrument of mortgage of that vessel; and on the following day they gave notice to the defendant Liffen, the mortgagor of the *Five G.'s* and the *Six B.'s*, of the deposit with them of the instruments of mortgage of those vessels.

On the 30th of December 1858 Peters & Peacock were adjudged bankrupt, and the defendant William Bell was appointed official assignee, and the defendant John Rous was appointed creditors' assignee under such bankruptcy.

There was at the date of the bankruptcy and of the filing of the bill in this suit, due to the plaintiffs from Peters & Peacock the sum of 349*l.* 3*s.* 8*d.*, after deducting the before-named sum of 280*l.* 5*s.* 6*d.*; and the plaintiffs were ultimately, on the 20th of May 1859, allowed to prove for the sum of 173*l.* 13*s.* 7*d.* only, and a marginal note as follows was written with the concurrence of the solicitor of the assignees, and signed by the Commissioner in Bankruptcy, in the margin of the plaintiffs' affidavit of debt:—"Proof allowed for 173*l.* 13*s.* 7*d.*, the difference of 155*l.* and 20*l.* 10*s.* being given credit for in respect of three mortgages on three boats named the *Five G.'s*, *Six B.'s*, and the *Rapid*, held by Messrs. Lacon & Co., and for expenses of sale. J. Evans, Commissioner, 20th of May 1859."

The *Five G.'s* and the *Six B.'s* had been advertised for sale by the mortgagor, the first defendant, Thomas Brown Liffen.

The assignees of Peters & Peacock also

had brought an action against the plaintiffs for the conversion of the goods and chattels sold and realized by the plaintiffs under the bill of sale of the 22nd of December 1858, and for the detention of the instruments of mortgage of the three before-named ships or boats deposited with the plaintiffs.

The bill prayed, first, for an injunction to restrain the sale of the *Six B.'s* and the *Five G.'s*. Secondly, for an injunction to restrain the action at law; and, thirdly, for a declaration that the giving and executing the bill of sale of the 22nd of December 1858 by Peters & Peacock was not an act of bankruptcy then committed by them, and for a declaration that the plaintiffs had a lien upon the before-mentioned ships and boats, and the proceeds of the same respectively, in respect of the equitable deposit of the several mortgages before stated; and that the defendants, the assignees, might be directed to join in proper transfers of the mortgage securities to the plaintiffs.

Mr. Malins and *Mr. W. H. Bennet*, for the plaintiffs.—First, with respect to the lien on the proceeds of the ships. By virtue of the 3rd section of the 25 & 26 Vict. c. 63. (the Merchant Shipping Act Amendment Act, 1862), which must be considered as being imported into the Merchant Shipping Act of 1854, the equitable interest of the mortgagees in the ships became vested in the plaintiffs on the 20th of December 1858, when the deposit of the instruments of mortgage with them was made. *The Liverpool Borough Bank v. Turner* (1) would probably be relied upon on the other side; but the enactment contained in the 3rd section of the act of 1862 altered the law laid down in that case. The bankrupts could not, prior to their bankruptcy, have transferred their mortgages otherwise than in the form prescribed in the schedule to the Merchant Shipping Act, 1854, Form K. According to that form, the transfer of a mortgage of a ship must be made by indorsement on the mortgages, and these in the present case were in the possession of the plaintiffs. That being so, and the mortgagors having had notice of the deposit prior to the bankruptcy of Peters & Pea-

(1) 1 Johns. & H. 159; a.c. 29 Law J. Rep. (N.S.) Chanc. 826: on appeal, 2 De Gex, F. & J. 502; a.c. 30 Law J. Rep. (N.S.) Chanc. 379.

cock, *Morris v. Cannan* (2) was an authority for saying that the ships were not in the order and disposition of the bankrupts at the date of their bankruptcy. Upon the question of equitable lien they also referred to

Pye v. Danbus, 2 Dick. 759; s. c. 3 Bro. C.C. 595.

Jones v. Gibbons, 9 Ves. 407.

Ex parte Langston, 17 Ibid. 227; s. c. 1 Rose, 26.

Secondly, with respect to the bill of sale, when it was given a present advance was made to the bankrupts, and a bill of sale to secure a bygone debt, a present advance and future advances was not an act of bankruptcy.

Hutton v. Cruttwell, 1 EL. & B. 15; s. c. 22 Law J. Rep. (N.S.) Q.B. 78.

Bittlesstone v. Cooke, 6 Ibid. 296; s. c. 25 Law J. Rep. (N.S.) Q.B. 281.

Whitmore v. Claridge, 31 Law J. Rep. (N.S.) Q.B. 141.

Thirdly, the marginal note made by the Commissioner in the plaintiffs' affidavit of debt, and the evidence shewed that there was an agreement by the assignees to admit the validity of the plaintiffs' lien on the mortgages and of the bill of sale.

Mr. Bacon and *Mr. G. L. Russell*, for the assignees in bankruptcy of Peters & Peacock.—The 3rd section of the Merchant Shipping Act Amendment Act of 1862 did no more than say that the plaintiffs might have enforced against the bankrupts, prior to their bankruptcy, the equities of the former in respect of the deposit with them of the mortgages of the ships; and the question of such a right in the plaintiffs prior to Peters & Peacock's bankruptcy was not inconsistent with the proposition, that the ships were in the order and disposition of the bankrupts at the period of their bankruptcy. The register of ships at Lowestoft shewed that the bankrupts were at the date of their bankruptcy the duly registered mortgagees of the ships in question, and as such that they had power absolutely to dispose of them. This case was distinguishable from *Morris v. Cannan*, inasmuch as in that case by inquiry at the office of the company it could have

been ascertained that the bankrupt was not the owner of the shares at the period of his bankruptcy; whereas, in the present case, the register of ships at Lowestoft shewed that Peters & Peacock had the power of disposing of the ships at the date of their bankruptcy. The bill of sale in this case was given to secure a by-gone debt and future advances; and this the cases shewed was clearly an act of bankruptcy.

Graham v. Chapman, 12 Com. B. Rep. 85; s. c. 21 Law J. Rep. (N.S.) C.P. 173.

Smith v. Cannan, 2 EL. & B. 35; s. c. 22 Law J. Rep. (N.S.) Q.B. 290.

The Oriental Bank v. Colman, 3 Giff. 11; s. c. 30 Law J. Rep. (N.S.) Chanc. 635.

There was no evidence of any agreement, on the part of the assignees, to admit the validity of the alleged lien on the ships or of the bill of sale.

Mr. Malins, in reply.

Nov. 19. — STUART, V.C. — The first question in this case is as to the validity of the lien claimed by the plaintiffs, in respect of the deposit of the two instruments of mortgage on certain ships.

It appears that the bankrupts were the registered mortgagees of the ships in question, and that the deposit of the instruments of mortgage was made to secure the plaintiffs' debt before the act of bankruptcy. For the assignees it was argued, that according to the Merchant Shipping Act of 1854, as construed by this Court in the case of *The Liverpool Borough Bank v. Turner*, no equitable lien by deposit of the instrument of mortgage can be recognized as valid, and that registration is necessary to give any valid title.

In the present case no assignment of the mortgages was executed by the bankrupts to the plaintiffs, or appeared on the register. It was, therefore, insisted that the bankrupts, as the registered mortgagees, had the mortgages in their order and disposition at the time of the act of bankruptcy. The plaintiffs, however, referred to the Merchant Shipping Act Amendment Act, 1862, as expressly declaring that interests under contracts and other equitable interests must be recognized as included in the words "beneficial interests" in the act of 1854.

(2) 31 Law J. Rep. (N.S.) Chanc. 425.

To this the assignees replied, that the qualifying words in the 3rd section of the act of 1862 reserved the power of disposition to registered mortgagees given by the 43rd and 66th sections of the act of 1854; and therefore that the bankrupts as registered mortgagees, although they had deposited the instruments of mortgage, still had a power of disposition, and might have executed a valid assignment of the mortgages notwithstanding the deposit. But, on referring to the provisions of the act of 1854 as to the disposition or transfer of mortgages, it appears that the statutory form of assignment can only be executed by indorsement on the instrument of mortgage. The words of the form of transfer in Schedule K, referred to in the 73rd section of the act of 1854, seem to be conclusive on this subject, as they include the words "the within written security." So that, without the production of the original instrument of mortgage, no valid assignment or disposition could be made.

The deposit of the original mortgages with the plaintiffs seems, therefore, to have taken from the bankrupts the power of making any effectual disposition or transfer of the mortgages, and thus that deposit constitutes the plaintiffs equitable mortgagees, who have a valid security on the ships. So far, therefore, as the bill prays for a declaration that the plaintiffs have a lien on the proceeds of the ships, they are entitled to a decree to that effect, together with the costs of the suit as to that part of the case.

But as to the second question, which involves the consideration of the validity of the bill of sale, the plaintiffs have failed. In the case of *Bittlestone v. Cooke* it was held, that where a bill of sale of all a trader's goods is in part for a by-gone debt, it is an act of bankruptcy; and the Court referred to the cases of *Graham v. Chapman* and *Smith v. Cannan* as authorities on this point. It must, I think, be considered that the law is so settled.

The case of *Hutton v. Cruttwell* was decided on the ground that the bill of sale was executed to secure a present advance of money made on the faith of that security, and not as to any part of it for an old debt, because the gross amount secured by the deed was advanced at the time by the creditor to whom the bill of sale was executed.

In the present case the bill of sale is expressly given as a security for the old debt and also for future advances. It seems, therefore, to be within the decided cases. It is an act of bankruptcy in itself, and the bill must be dismissed with costs so far as relates to the bill of sale.

An attempt was made, on the part of the plaintiffs, to support the bill of sale, on the ground that the assignees were bound to admit it by a memorandum signed by the Commissioner in the margin of the affidavit of proof of the plaintiffs' debt. But no such point is raised by the allegations in the bill or by the prayer; and if it had been raised, neither the terms of the memorandum nor the evidence seem to establish with sufficient clearness that there was any agreement which bound the assignees to admit the validity of the bill of sale.

Therefore, upon the whole, as to the equitable lien claimed by the plaintiffs on the proceeds of the ships, there must be a decree in favour of the plaintiffs, with costs; and the bill, so far as it seeks relief in respect of the bill of sale, must be dismissed, with costs.

WESTBURY, L.C. } *HILLS v. THE LIVERPOOL*
 April 16, 17; } *UNITED GASLIGHT COM-*
 Nov. 6. } *PANY.*

Patent—Infringement.

A patent was granted to an invention for the purification of gas by means of precipitated or hydrated oxides of iron, and the specification stated the mode of obtaining such oxides. The use of a natural substance containing precipitated oxide of iron was held not to be an infringement of the patent; but upon this substance being revived in the manner described in the specification an injunction to restrain the use of the substance so revived was granted.

This was a motion to dissolve an injunction granted by Wood, V.C., on the 14th of February, restraining the defendants from an infringement of the plaintiff's patent. The patent was taken out in November 1849 for "an improved mode of manufacturing gas," and the specification thus described the invention: "My improvements in the purification of gas and in obtaining

certain products consist of a method of purifying it from sulphuretted hydrogen and ammonia, by passing it through the following porous material, and of renovating the material employed after it has become inert, &c. I effect this in the following manner: I take the sulphates, the oxy-chlorides, or the hydrated or precipitated oxides of iron (which I prefer to use in rather a damp state), either by themselves, or mixed with sulphate of lime or muriate of manganese, &c., and absorb them into or mix them with sawdust or peat-charcoal in coarse powder or breeze, or other porous or absorbent material, so as to make a very porous substance easily permeable by the gas. The material is to be put into a fierce fire (such a one as is used for dry lime answers the purpose), and the gas is to be passed through it, whereby the gas will be deprived of its sulphuretted hydrogen and part of its ammonia, which will be absorbed into the porous material, water being at the same time formed by the union of the oxygen of the oxide and the hydrogen of the sulphuretted hydrogen absorbed. As soon as the material ceases to purify the gas from sulphuretted hydrogen, the gas is to be shut off from the purifier, and a communication opened to the external air: by the agency the purifying material will be renovated, &c. The air will re-oxidize the iron of the sulphuret of iron which has been formed, &c. As soon as the iron is re-oxidized, the gas is to be passed through it again," &c.—"Hydrated or precipitated oxides of iron may be conveniently prepared for these purposes by decomposing sulphate or muriate of iron with lime, &c. They may then be absorbed into or mixed with sawdust, peat, charcoal or breeze, or other such material, and afterwards exposed to the air, the purifying of coal-gas from sulphuretted hydrogen, &c., by passing it through the precipitated or hydrated oxides of iron, and from whatever source obtained, either by themselves, or, what is much better, made into a more porous material, by being absorbed into or mixed with sawdust or peat, charcoal or other porous material, &c. But I do not claim per-oxides of iron or manganese made at a red heat, or the oxide of iron mixed with chloride of calcium, or the muriates and sulphates of manganese, iron and zinc, and absorbed into sawdust."

The defendants applied to the purifying of gas a natural substance called bog ochre, which the plaintiff affirmed contained precipitated oxide of iron, and that, therefore, this employment by them was an infringement of his patent. The properties of this bog ochre were also from time to time restored by exposure to the air, as shewn in the plaintiff's specification; and of this also the plaintiff complained as an infringement. On a motion by the plaintiff, Wood, V.C., on the 14th of February 1862, ordered that the following question of fact be tried before this Court by a special jury of the county of Middlesex, that is to say, "Is the material used by the defendants, the Liverpool United Gaslight Company, in the first instance for purifying gas a precipitated oxide of iron?" and that an injunction be awarded to restrain the defendants, &c. from making use of the plaintiff's invention, comprised in the letters patent dated the 28th of November 1849, in the bill mentioned, in renovating or re-oxidizing the purifying materials used by them for the purifying of gas, whether the same be a precipitated or hydrated oxide of iron by the action of the air whenever such materials from time to time cease to absorb sulphuretted hydrogen, so that they may be used over and over again to purify the gas, until the further order of this Court. But such injunction is not to come into operation for six weeks from this time.

Sir Hugh Cairns and *Mr. Druce* now moved, by way of appeal, to reverse or vary this order.

Mr. Rolt, *Mr. Grove* and *Mr. Marten* appeared for the plaintiff, in support of the Vice Chancellor's order.

The following cases were cited:

Hills v. Evans, 31 Law J. Rep. (N.S.) Chanc. 457.

Hills v. the London Gaslight Company, 5 Hurl. & N. 312; s.c. 29 Law J. Rep. (N.S.) Exch. 409.

Beard v. Egerton, 8 Com. B. Rep. 165; s.c. 19 Law J. Rep. (N.S.) C.P. 36; and

Betts v. Mensies, 30 Law J. Rep. (N.S.) Q.B. 81.

Nov. 6.—The LORD CHANCELLOR.—The first question I have to decide is, whether

the application by the defendants to the purification of gas of a certain natural substance called bog ochre be or not an infringement of the plaintiff's patent? The plaintiff insists that it is: he affirms that the bog ochre contains a large quantity of precipitated oxide of iron; and that the application of precipitated oxide of iron from any source obtained, be it natural or artificial, pure or combined with other substances, is a violation of his patent. The defendants deny that the material in question does contain precipitated oxide of iron; but if it does, they insist that it is a native or natural, and not an artificial, oxide; and they contend that, according to the true construction of the plaintiff's specification, and the judicial interpretation it has received, the patent is limited to the application of such oxides only as are prepared or obtained by some artificial means.

The construction of the plaintiff's specification in this cause must be the same as that which was given to it in the former case of *Hills v. Evans*, in which the validity of the patent was established. It is material to state how and why it was held to be valid. The patent was impugned on the ground of want of novelty. Specifications of older patents were produced, in which various statements were found as to the applicability of the oxides of iron to the purification of gas; and it was insisted that the plaintiff's discovery was thereby anticipated. But the plaintiff's patent was supported on the ground that these earlier descriptions were too general, comprehending (as they did) materials that would purify and materials that would not purify, whence the reader of such former specifications was still left under the necessity of ascertaining by experiment and further discovery what was the exact description of the purifying agent. This appeared to be done by the plaintiff's specification, and the validity of his patent was therefore established.

But the plaintiff's objection to the former specifications was in the former case retorted against himself. In his specification he describes the purifying agents he employs as "the hydrated or precipitated oxides of iron"; and in one place he uses the words "precipitated or hydrated oxides." Now, it appeared from the evidence in *Hills v.*

Evans (which is always admissible to shew what external objects are denoted by terms of art) that of hydrated oxides of iron some are native, that is, formed in the laboratory of nature, and some are artificial, that is, made or resulting from some intervention of human agency. Of the native or naturally-formed oxides of iron some are efficient for the purification of gas, and some will not serve that purpose. Again; of hydrated oxides of iron some are formed by precipitation, and some (so far as we know) are not so formed; but (according to the then state of the evidence) it appeared that all the known precipitated oxides of iron are artificial and are hydrated. It was objected therefore, that inasmuch as the plaintiff used the term "hydrated oxides" without limitation, thereby embracing both native hydrated oxides that would not answer the purpose, and the artificial hydrated oxides that would, the specification was too general, and the patent void. In answer to that objection I held that, having regard to the whole of the specification, the plaintiff had described and meant to include such oxides only (whether hydrated merely, or hydrated and precipitated) as were prepared or obtained by artificial means. Upon a more accurate examination of the judgment of the Court of Exchequer, I find that, in reality, the same conclusion was drawn by the learned Judges of that Court. This is apparent from the following passage (5 *Hurl. & N.* 368). The reasoning of the Court seems to be thus: Precipitated oxides and artificial hydrated oxides are the same thing. We find that the plaintiff meant to describe such hydrated oxides only as are artificial; therefore he meant such hydrated oxides only as are precipitated. With much of the observations of the Court of Exchequer I cannot concur; but I concur in the conclusion that by the terms hydrated or precipitated oxides, the plaintiff intended to denote such oxides only as were artificially prepared or obtained. But this is not the character of the bog ochre as it is primarily and in the first instance employed by the defendants. The ochre is used by the defendants in the first instance in its primitive natural state as dug from the bog; and even if it be, as the plaintiff affirms, a hydrated oxide of iron formed by precipitation, it is clear that it is a native,

that is, a naturally-formed oxide, and, whilst used in that state, must, by the very conditions on which the plaintiff's patent was supported, be held not to be included in the plaintiff's specification. I cannot, therefore, grant any injunction to restrain the defendants from using the bog ochre in its primitive or natural state.

The more material question still remains. The principal impurity from which it is desirable to cleanse the gas is sulphuretted hydrogen. The hydrated oxide of iron effects this by attracting the sulphur, which combines with the iron whilst the oxygen of the oxide uniting with the hydrogen, water is formed, and thus the sulphuretted hydrogen disappears by being resolved into its constituent elements, which enter into new combinations. The chemical combination of the sulphur with the oxide of iron forms a new chemical substance, called sulphuret of iron, which is inert and useless for purification.

But the plaintiff discovered that when this sulphuret of iron is exposed to the atmosphere in such a manner as to cause the atmospheric air thoroughly to permeate and pervade the mass, the sulphur is driven off and precipitated, the iron is re-oxidized by taking up new oxygen from the air, and thus a new hydrated oxide is by this application of a natural agent artificially obtained.

It is material to observe that by this process, directed by human agency, a new purifying material is prepared. It is not as if the air merely freed the iron of an integument of sulphur, which, coating the oxide, obstructed the exercise of its still inherent power; but the facts are, that the sulphur being chemically and not mechanically combined with the oxide, the latter is converted into a sulphuret, and it is by the subsequent acquisition of new oxygen that it is re-converted into a new oxide.

This new oxide I hold to be an oxide artificially prepared or obtained, although it is the result of the natural properties of the air, because those properties are guided and directed to this end by human agency and design. Upon all this the evidence in the cause is without contradiction or dispute.

The defendants admit that when the bog ochre in its natural state has been so long

used as to become inert, it is revived and restored by the use of the process described in the plaintiff's specification, and in that secondary state again applied to the purification of gas. I hold, therefore, that whilst the defendants employ the bog ochre in its natural state, they use a native oxide of iron, which, whether it be hydrated only, or hydrated and precipitated, is not within the plaintiff's patent, and no injunction can be granted against the use of it; but that when they use the ochre after it has been re-oxidized, they use a material which is within the plaintiff's patent, being an artificial hydrated oxide; and this I restrain them from employing.

The Vice Chancellor granted an injunction to restrain the defendants from using the plaintiff's process or invention of re-oxidization. I cannot grant any such injunction, because the plaintiff specifies and claims that process or discovery as applicable only to the renovating the purifying materials he describes, that is, the hydrated or precipitated oxides which are within his patent; and if this ochre be not one of such oxides, the revivification of it is not within the plaintiff's specification. In fact, it is only by the defendants using that process, or some other process of renovation, that the bog ochre is brought into the condition of being one of the plaintiff's patented purifying materials, that is, a hydrated or precipitated oxide artificially prepared or obtained. Therefore, declare that the user by the defendants of the bog ochre employed by them in the purification of gas, so long as the same is used in its native state or condition, is not an infringement of the plaintiff's patent, but that the user of the same material in the purification of gas after it has been re-oxidized or renovated by the means described in the plaintiff's patent, or any other means, is an infringement of the plaintiff's patent, and ought to be restrained by injunction, and restrain the same accordingly.

Direct an account of all the bog ochre that has been employed or used by the defendants in the purification of gas in any other than its native or primitive state, and of the gains and profits that have resulted from such user or employment, with all usual directions. No costs on either side.

WESTBURY, L.C. }
 Nov. 13, 14, 18. } ELLISON v. THOMAS.

Settlement—Portions—Exclusion of Eldest Son.

By a settlement, a sum of money was to be raised after the death of the settlor and another person for all the children of the settlor's son, other than an eldest or only son, for the time being entitled to certain other property. The eldest grandson died before the period when the amount could be raised or he became entitled to the other property:—Held (reversing the decision of one of the Vice Chancellors), that his representative was entitled to share in the fund to be raised for the younger children.

This was an appeal from the decision of Kindersley, V.C., on the 12th of July 1862, reported 31 *Law J. Rep.* (N.S.) Chanc. 867.

By an indenture of settlement, dated the 7th of September 1814, after reciting that Estcourt Cresswell was entitled to certain hereditaments in Devonshire after the decease of Thomas Fry, and that the said E. Cresswell had agreed to secure as a provision for the younger children of Richard Estcourt Cresswell, his eldest son, the sum of 13,000*l.* upon the said hereditaments, it was witnessed that he, the said E. Cresswell, did demise unto his trustees, their executors, administrators and assigns, all the said hereditaments in the county of Devon (subject to the life estate of T. Fry) for the term of 1,000 years from the death of the said T. Fry, upon trust immediately after the death of E. Cresswell and T. Fry to raise by sale or mortgage the sum of 13,000*l.*, which said sum was to be held "in trust for all and every the child and children of R. E. Cresswell now born or hereafter to be born during his life, or in due time after his decease, other than and besides an eldest or only son for the time being entitled, under or by virtue of a certain indenture of settlement, bearing even date herewith, to the estates thereby settled in possession or in remainder immediately expectant on the decease of the survivor of them, the said E. Cresswell and R. E. Cresswell, as the said R. E. Cresswell should appoint; and in default of such appointment, then if there shall be but one such child of the said

R. E. Cresswell (other than and besides an eldest or only son so for the time being entitled as aforesaid), the said sum shall be for the portion of such one or only child, and be an interest vested in such child, being a son, at the age of twenty-one years, or being a daughter on her attaining that age or marriage; and if there should be two or more children of the said R. E. Cresswell (other than and besides an eldest or only son so for the time being entitled as aforesaid), then in trust for such children, and the share or shares of such of them as should be a son or sons to be an interest vested in him or them respectively at his or their age or respective ages of twenty-one; and the share or shares of such of them as should be a daughter or daughters, at her or their age of twenty-one or marriage." And it was provided that if there should be more than one child for whom portions were intended to be provided, and any of these, being a son or sons, should depart this life or become an eldest or only son so for the time being entitled as aforesaid under the age of twenty-one years, or being a daughter should depart this life under that age and unmarried, then his or her share should go over to the others.

By the second deed above referred to and executed on the same day, a certain other estate called the Bibury estate was conveyed to the use of E. Cresswell for life, with remainder to the use of R. E. Cresswell for life, with remainder to the use of R. E. Cresswell the younger (the eldest grandson of E. Cresswell) for life, with remainder to the first and other sons of R. E. Cresswell the younger in tail male, with remainder over.

E. Cresswell died in July 1823; R. E. Cresswell the younger attained the age of twenty-one and died in 1837, leaving a widow, but without issue male; and the second, third and fourth sons of R. E. Cresswell the elder having previously died without issue, the fifth son, W. H. Cresswell, became the eldest son.

R. E. Cresswell the elder then died; and T. Fry died in 1860, when this suit was instituted for the purpose of having a construction put upon the terms of the two deeds of settlement. The Vice Chancellor having decided that the personal representative of R. E. Cresswell the younger was not

entitled to share in the 13,000*l.*, he presented the present petition of rehearing.

Mr. Shapter and Mr. Graham Hastings, for the appellant, contended that "the eldest son for the time being" must mean the eldest son when the 13,000*l.* became distributable.

Duke v. Doidge, 2 Ves. sen. 203, n.
Cowie v. Stirling, 25 Law J. Rep. (N.S.)
 Q.B. 335; s.c. 6 El. & B. 333; 2 Jur.
 N.S. 663.

The words "for the time being" pointed to one time, which must be when the money was to be paid, and then the persons to receive the money were to be ascertained.

Lord Teynham v. Webb, 2 Ves. sen. 198.

Remnant v. Hood, 2 De Gex, F. & J. 396;
 s.c. 27 Beav. 74, 613; 30 Law J.
 Rep. (N.S.) Chanc. 71.

Matthews v. Paul, 3 Swanst. 328.

Livery v. Livery, 13 Sim. 33; s.c. 2
 H.L. Cas. 419; 15 Law J. Rep. (N.S.)
 Chanc. 357.

The proviso for exclusion did not operate until the time for distribution, and then only for the exclusion of one person. There was only one payment, not a succession of payments, or a succession of persons: where the phrase "trustees for the time being" is used, the notion of succession is given by the words "from time to time"—*In re Thompson* (1).

They referred also to

Sandeman v. Mackenzie, 1 Jo. & H. 613;
 s.c. 30 Law J. Rep. (N.S.) Chanc. 838.

Macoubrey v. Jones, 2 Kay & J. 684.

Re Teed's Settlement, 3 Ibid. 375.

Adams v. Adams, 25 Beav. 652.

Moss v. Dunlop, 1 Johns. 490; s.c. 29
 Law J. Rep. (N.S.) Chanc. 39.

Mr. Prendergast (with whom was *Mr. Glasse*), for the plaintiff and younger children, contended, that as the father of R. E. Cresswell the younger could never have made an appointment in his favour, he being the eldest son, he must be excluded from the general trust in default of appointment—*Gray v. Lord Limerick* (2).

(1) 16 Jur. 342.

(2) 2 De Gex & Sm. 370; s.c. 17 Law J. Rep. (N.S.)
 Chanc. 444.

Mr. Surridge (with whom was *Mr. Baily*), for other parties, called attention to the anomalous position of the appellant's claim. If R. E. Cresswell the younger were now alive, he could not have a share in this fund; but his representative now claimed in his place. The son of R. E. Cresswell the younger might now be in possession of the Bibury estate; and if the appellant's claim were allowed, the representative of R. E. Cresswell the younger would share in the portions for the younger children.

Mr. Shapter, in reply.

Nov. 18.—THE LORD CHANCELLOR.—This case depends on the inquiry, at what time the words of exclusion of "the eldest son for the time being" came into operation, that is to say, at what time the eldest son for the time being is to be sought for and ascertained. The trustees are directed immediately on the decease of them, Fry and Estcourt Cresswell, to raise the sum of 13,000*l.* in trust for all and every the children of R. E. Cresswell the elder then born, or thereafter to be born during his life or in due time after his decease, other than and besides an eldest or only son for the time being entitled, under a settlement of even date, to the estates thereby settled, in possession or in remainder immediately expectant on the death of the survivor of Estcourt Cresswell and R. E. Cresswell the elder. This trust took effect on the death of Thomas Fry in the year 1860. At that time, therefore, the words of exclusion had to be applied. The persons entitled must be ascertained at the time when the money is directed to be raised and divided, and the words of exception appear to me to attach at that time upon the son who then answers the description, and to exclude him, and him only, from the class of persons interested. The case hardly stands in need of the well-established principle of this Court, by which a younger son taking the estate has been deemed an eldest son for the purpose of excluding him from a portion, and by which an eldest son not taking the estate has been held to be a younger child; for the words here are "eldest son for the time being," which appear to have been selected for the purpose of denoting, not the person who was actually the eldest son at the date of the deed, but that individual who at a

particular future period might be the eldest living son, provided he was also the person entitled to the settled estate. If the report which I have seen of the Vice Chancellor's judgment be correct, his Honour appears to have treated this question as turning on the meaning of these words, "for the time being," and he seems to have considered that they were intended to operate during the whole period that would elapse between the execution of the deed and the time when the money was to be raised, so that every son who answered the description of eldest son from time to time during that period would be excluded. The effect of such a construction might be to exclude every son, and possibly every child, of R. E. Cresswell the elder (for he might have none but sons) from any share in the 13,000*l.*, which, therefore, would not become raiseable at all. I cannot concur in this interpretation. When a future period is referred to, and it is desired to designate the person who fills a particular character at that period, the words "for the time being" are appropriately used. If several future periods are referred to, the words are again appropriate, and may then denote several different persons who may in succession fill the character at such several periods. If I say that when a particular office shall become vacant, the appointment shall belong to the Prime Minister for the time being, the words denote one person only, for one period only is referred to; but if, as in the instance put by the Vice Chancellor, I direct a certain sum to be paid annually to the rector of A. for the time being, the words denote the rectors from time to time, because they refer, not to the time of one payment, but to the times of successive annual payments. In the present case one period of time only is referred to, namely, the time when the money is directed to be raised. According, therefore, to the literal meaning of the words, one person only is, in my opinion, denoted, and excluded from a share in the 13,000*l.* And this construction is strictly in accordance with the spirit and intention of clauses of this nature; for the intention is, that portions shall be provided for all the children except the one who, at the time when the portions are payable, is entitled to the settled estates. The intention which the Court ascribes to clauses of this description

is well expressed by Lord Hardwicke in *Duke v. Doidge*: "Every child except the heir is considered in equity as a younger, and eldership not carrying the estate along with it is considered not such an eldership as will exclude by virtue of such clauses." That the character of eldest son is to be ascertained at the time appointed for payment of the portions, appears also to be the clear result of the leading cases of *Chadwick v. Dolman* (3), and of *Teynham v. Webb* (4). The Vice Chancellor has treated *Teynham v. Webb* as an authority for excluding by the force of these words, "other than the eldest son," the son who was eldest at the date of the instrument, and also the subsequently born son who was eldest at the time of payment. But I do not so read the case; for the son who was eldest at the date of the instrument appears to have been put out of consideration, because he died under age and before the time appointed for raising the portion, there being no direction for vesting anterior to the time of payment. At the conclusion of the report I find the following words attributed to the Vice Chancellor:—"There is no case" (says his Honour) "which I can find in which there is one who, having been an elder son and said to be so, has been excluded, and yet is represented as having been included; and it would be very anomalous if one who whilst alive should be excluded, should at his death be entitled to participate." But it must be remembered that the trust of the 13,000*l.* is, in terms, for all of the children of R. E. Cresswell the elder, "except the eldest son for the time being"; and, therefore, R. E. Cresswell the younger is one of the *cestuis que trust*, unless he be excluded by the exception. And, consequently, if I am right in my judgment that the exception did not operate or take effect until the time appointed for raising the money, and then attached upon and excluded W. H. Cresswell, who is found by this certificate to have been, at the death of Thomas Fry, the eldest living son of Richard the father, and entitled to the Bibury estate, and who is, in fact, excluded by the judgment of the Vice Chancellor,—it follows that R. E. Cress-

(3) 2 Vern. 528.

(4) *Ubi supra*.

well the younger was never taken out of the class of *cestuis que trust*, and that having attained twenty-one when the right to the portions became vested, he is to be considered as a younger son and entitled to of the city of London, under the provisions of the share in the 13,000*l*.

Therefore, reverse the order of the Vice Chancellor; declare that R. E. Cresswell the younger became entitled to a share in the 13,000*l*., and direct the fund which has been raised to be divided into eight equal parts instead of seven equal parts, and direct payment of one of those eight parts to the representative of R. E. Cresswell the son. The petitioner will take back his deposit. By consent, the costs of all parties are to be paid out of the fund.

KINDERSLEY, V.C. } BANKS v.
June 6. } BRAITHWAITE.

Legacy—Annuity—Legacy Duty.

*A testator gave the residue of his personal estate to trustees, upon trust to set apart 10,000*l*. consols, and pay the dividends to his sister for life, and after her decease to retain so much of the said sum of 10,000*l*. as should be sufficient to realize the clear yearly income of 150*l*.; and he directed the trustees to pay the dividends and other income of the stock so directed to be retained by them to his nephew:—Held, that the nephew took the annuity, subject to legacy duty.*

Edward Coates, by his will, dated the 5th of September 1846, gave the residue of his personal estate to trustees, to invest and set apart 10,000*l*. 3*l*. per cent. consols, and pay the dividends thereof to his sister, Margaret Holman, for life, and after her decease to retain so much of the said sum of 10,000*l*. consols as should be sufficient to realize the clear yearly income of 150*l*.; and he directed his trustees to pay the dividends and other income of the trust stock lastly directed to be retained by them to his nephew, J. C. Holman, the petitioner, for life, or until he should be declared a bankrupt, in which case the interest of the petitioner in such sum was to cease. And, subject to the trusts therein declared for

the benefit of the said Margaret Holman and the petitioner, he directed that the sum of 10,000*l*. consols should sink into and form part of his residuary personal estate.

A suit was instituted for the administration of the testator's estate, and the sum of 10,000*l*. consols was paid into court.

Margaret Holman, the sister of the testator, died in 1861, and this petition was presented for payment of the annuity to the petitioner.

Mr. Hallett, in support of the petition, said, the question was, whether the annuity was to be paid free of legacy duty; and it was contended that this must have been the intention of the testator, since he had used the words "clear yearly income of 150*l*."

The following cases were cited in support of this argument:

- Smith v. Anderson*, 4 Russ. 352; s. c. 6 Law J. Rep. Chanc. 105.
- Gude v. Mumford*, 2 You. & C. 448.
- Marris v. Burton*, 11 Sim. 161; s. c. 9 Law J. Rep. (N.S.) Chanc. 373.
- Dawkins v. Tatham*, 2 Ibid. 492.
- Louch v. Peters*, 1 Myl. & K. 489; s. c. 3 Law J. Rep. (N.S.) Chanc. 167.
- Bailey v. Boulton*, 14 Beav. 595; s. c. 21 Law J. Rep. (N.S.) Chanc. 277.
- Haynes v. Haynes*, 3 De Gex, M. & G. 590.
- Burrows v. Cottrell*, 3 Sim. 375.
- Sanders v. Kiddell*, 7 Ibid. 536; s. c. 5 Law J. Rep. (N.S.) Chanc. 29.
- Pridie v. Field*, 19 Beav. 497.

Mr. Ware, who appeared for the residuary legatees, was not called upon to address the Court.

KINDERSLEY, V.C.—I do not see any reason in this case for saying that the benefit given to the annuitant is to be free of legacy duty. I assume it to be settled, upon the authorities, that if a testator gives a clear annuity of a definite amount, the interpretation put upon such a gift is, that the annuity is to be clear of legacy duty; but I find that even in such a case there are authorities in which it has been held

not to be free of legacy duty if given to several persons in succession. Whether that view is satisfactory or not is immaterial; I am bound to say that, in my opinion, it is very questionable. However, assuming that it is so, that principle does not touch the present question; for in those cases the word "clear" was annexed to the gift of the annuity. In this case there is no gift of an annuity, but what is given is the dividend of a sum of stock. It is not said that the legatee is to have the dividends clear; but the amount of stock is to be thus ascertained. It is such a sum of stock as would produce a clear income of 150*l.* per annum. The particular sum is 5,000*l.* consols; and that amount having been arrived at, the dividends are then directed to be paid to the petitioner. The word "clear" does not apply to that direction. It is quite distinct from all the cases cited. *Marris v. Burton* appears at first sight to be in point, but it is easily distinguishable. There it was not merely a gift of dividends of stock, but an annuity which was to be made good out of other parts of the property.

My opinion therefore is, that the petitioner takes the annuity, subject to legacy duty.

ROMILLY, M.R. }
 July 26. } HOWE v. HUNT.

Specific Performance—Lease by Mortgagor—Refusal of Mortgagee to concur—Damages.

A mortgagor agreed to grant a lease of a shop; the lessee entered into possession and commenced alterations; the mortgagees refused to confirm the lease or to allow him to proceed with the alterations. Upon a bill against the lessor for specific performance,—Held, under the circumstances, as damages had clearly been sustained, that the Court would make an order to assess them, though the 21 & 22 Vict. c. 27. never intended in simple cases to transfer the jurisdiction from a Court of law to a Court of equity.

Relief in equity is not incident to damages.

This suit was instituted by Joseph Howe, asking that Joseph Hunt might specifically

perform an agreement, dated the 24th of September 1861, by which he had undertaken to grant a lease of the ground-floor and basement of No. 50, King William Street, in the City, for seven years from Michaelmas Day then next, at a rent of 300*l.* a year, to be paid, the first year's rent on signing the agreement, and subsequently quarterly in advance. The bill also prayed that the defendant might redeem and exonerate the premises from a mortgage debt charged thereon, and from all claims in respect thereof; and also for an inquiry, and that the damages ascertained, in consequence of the breach of the agreement, might be paid by the defendant.

The agreement was made by the defendant through an agent, and among other things it provided, that the shop part of the premises should be altered by the plaintiff, to adapt them to his business, and for that purpose that a separate entrance should be made by the plaintiff, at his own expense, and in such manner as he might approve, but so as in no way to entitle him to go through the passage or to have any right of entrance beyond that he was to construct on the north side of the shop.

The plaintiff signed the agreement, and paid the first year's rent, and was let into possession; he immediately commenced the alterations upon the premises, intending to carry on the business of a wholesale and retail boot and shoe maker. Before these were completed the mortgagees caused notice to be served on the plaintiff, requesting him not to interfere with the premises; and at the same time they denied the power of the defendant to grant any lease of the premises without their concurrence. The plaintiff then required the defendant to redeem the mortgage and perform the agreement; which the defendant being unable to do, this bill was then filed.

The defendant, by his answer, admitted the agreement, but said that he was not able at present to redeem the mortgage or exonerate the premises from the incumbrance, even if an order for that purpose should be made; and that it had never been anticipated by himself or his agent that the mortgagees would object to the agreement, or to the alterations therein mentioned as intended to be made by the plaintiff; and

that, as the agreement was entered into by the agent under a misconception on his and the defendant's part, it was submitted that the agreement ought not to be performed, but if it had not been abandoned by the plaintiff, that it ought to be rescinded, unless the mortgagees would consent to its being performed upon such terms as the defendant could comply with.

The cause came on upon a motion for a decree.

Mr. Southgate, for the plaintiff, asked not only for a decree, but also for damages for stopping the plaintiff's works, &c. He was entitled to know whether the mortgagees refused to join in granting the lease to the plaintiff. If they refused, and no lease could be obtained, still the plaintiff was entitled to damages under the 21 & 22 Vict. c. 27. s. 3.—*Soames v. Edge* (1).

Mr. H. Shebbeare, for the defendant.—The plaintiff's remedy is at law. He knew, from the notice of the mortgagees, that he could have no relief in equity. The bill ought to be dismissed. He referred to *Rogers v. Challis* (2).

The MASTER OF THE ROLLS.—I had some doubt whether any relief could be given, and I therefore reserved my judgment. The 21 & 22 Vict. c. 27. was never intended to transfer the jurisdiction in a simple case of damages from a Court of law to a Court of equity, and it was not intended that where two persons enter into a contract, one of them knowing or having good reason to believe that specific performance cannot be given by the other, should be at liberty to file a bill to obtain such specific performance, in order that this Court might assess the damages which he had sustained by the breach of contract. On the contrary, the act was intended to apply in *bond fide* cases where the Court, while it considered that the agreement either could not or ought not to be performed, yet thinks that it ought to direct the damages sustained by the plaintiff to

be assessed. I am disposed to think in this case—after the correspondence which has taken place with the mortgagees, who have refused to confirm the demise—though the plaintiff had good reason to believe, still that he did not know he had good reason to believe that the defendant could not give him specific performance; at the same time, considering that the plaintiff has incurred considerable expense and damage in consequence of the conduct of the defendant, who so recklessly entered into the agreement to grant the lease, the Court will not send him to law to recover it.

I propose, therefore, to make an order to assess the damages sustained by the plaintiff by reason of the breach of the contract on the part of the defendant, but I shall give no costs on either side up to the hearing. The plaintiff will have the subsequent costs. I adopt this course instead of dismissing the bill, because it is a new case under the 21 & 22 Vict. c. 27, and under the peculiar circumstances, considering the damages which the plaintiff has clearly sustained, I do not think I ought to leave him to an action at law. The further consideration must be reserved.

ROMILLY, M.R. }
Nov. 8. } DICKINSON v. TEASDALE.

Statute of Limitations—Charge of Debts—Trust.

A general charge of debts upon real estate, with a direction to raise sufficient, "by mortgage or otherwise," to pay them, does not create an express trust in favour of creditors, or prevent the Statute of Limitations, 3 & 4 Will. 4. c. 27, from running against a specialty debt of the testator.

Payment of interest upon a specialty debt of a testator by one devisee of a moiety of his real estate, will not prevent the Statute of Limitations from barring the debt as against the devisee of the other moiety.

John Teasdale, on the 9th of November 1810, bound himself, his heirs, executors and administrators, in the penal sum of 861*l.* 10*s.*, subject to a condition, according to the bond, on his paying to William Robson, his executors, administrators or

(1) Johns. 669.

(2) 27 Beav. 175; s. c. 29 Law J. Rep. (n.s.) Chanc. 240.

assigns, the sum of 430*l.* 15*s.*, with legal interest.

John Teasdale, by his will, dated the 30th of January 1811, devised to each of his nephews, John Teasdale and Henry Proud, and their respective heirs and assigns, one moiety of his estate at Farlam, in the county of Cumberland, and he charged each moiety with the payment of *half his just debts* and funeral and testamentary expenses, in case his personal estate should fall short, and with the payment of one-half the mortgage-money and interest then charged upon the whole of his real property. He then bequeathed all his personal estate unto and equally to be divided between the said John Teasdale and Henry Proud, *subject to the payment of the testator's debts* and funeral expenses; and in case the same should be found insufficient for that purpose, then he charged *all his real estate whatsoever with the payment thereof*, and he directed his executors to raise such sum as might be sufficient by mortgage or otherwise of his said real estate, and he appointed his sister Sarah Proud, who is since dead, executrix of his will.

On the 1st of April 1811 the testator died. His personal estate was small, and insufficient for payment of his debts; but his nephews, John Teasdale and Henry Proud, entered into, and had since retained possession of their respective portions of the real estate devised to them.

Since the death of Sarah Proud no person had taken out administration to the testator. On the 20th of May 1830 William Robson died, having by his will, dated on the 8th of January previous, given all his personal estate to his daughter, the plaintiff Mary Dickinson, whom he appointed sole executrix of his will. The whole of the principal sum of 430*l.* 15*s.*, secured by the bond, still remained unpaid; but the defendant John Teasdale alone paid interest thereon up to the 12th of February 1845. This bill was filed by Mary Dickinson on the 23rd of April 1862, against Messrs. Teasdale & Proud, asking for payment of the bond debt and the arrears of interest, which together amounted to 1,350*l.* It alleged that the defendants, when applied to, had always admitted their liability to pay the principal and interest, but that they had stated that

the real estate of the testator was not sufficient to pay the bond debt, but that the plaintiff had lately discovered that the real estate was amply sufficient to pay not only the bond debt, but also all the other specialty debts of the testator John Teasdale.

It then charged that the will of J. Teasdale created a trust for payment of his debts out of the real estate, thereby devised, and that Messrs. Teasdale and Proud, upon taking possession of the real estate became, and had ever since been, and still were, bound to execute such trust. That if no such trust was created, still that the debts were a charge upon the real estate, which had been kept alive for the benefit of the plaintiff by the payment made on account of interest.

To this bill the defendant Henry Proud pleaded the Statute of Limitations.

Mr. Hobhouse and *Mr. Brodrick*, in support of the plea, submitted that no trust had been created for the payment of debts, and that assuming a charge of debts to have been created on the real estate, it was barred by the 3 & 4 Will. 4. c. 27, even though payment on account of interest had been made by John Teasdale.—

Jacquet v. Jacquet, 27 Beav. 332.

Dundas v. Blake, 10 Ir. Eq. Rep. 138.

Knox v. Kelly, 6 Ibid. 279.

Young v. Walton, 10 Ibid. 10.

Homan v. Andrews, 1 Ibid. 106.

3 & 4 Will. 4. c. 27. ss. 25, 40.

Mr. Kay and *Mr. W. D. Griffith*, for the plaintiff.—Each moiety of the estate was devised subject to a trust for the payment of debts, and in addition the direction to raise money by way of mortgage or otherwise, created an express trust which bound the parties to dispose of the estate, and was in effect a conversion for the benefit of creditors. The debt also was unaffected by the Statute of Limitations; interest had been paid upon it by John Teasdale; it remained, therefore, a valid and existing charge upon the entire estate of the testator.

Snow v. Booth, 2 Kay & J. 132; s. c.

8 De Gex, M. & G. 69; 25 Law J.

Rep. (N.S.) Chanc. 417.

Hargreaves v. Michell, 6 Madd. 326.

Burke v. Jones, 2 Ves. & B. 275.

Cox v. Dolman, 2 De Gex, M. & G. 592; s. c. 22 Law J. Rep. (N.S.) Chanc. 427.

Hunter v. Nockholds, 1 Mac. & G. 640; s. c. 1 Hall & Tw. 644; 19 Law J. Rep. (N.S.) Chanc. 177: reversing 18 Law J. Rep. (N.S.) Chanc. 410.

THE MASTER OF THE ROLLS.—In the construction of this will the debts must be considered as a charge and not a trust. It is unnecessary now to inquire whether this is the proper distinction to be made between charges and trusts; the statute has made a great distinction between them in cases where there is a charge for the payment of debts, and where a duty is imposed upon executors by mortgage, sale or otherwise, to raise the charge.

In *Jacquet v. Jacquet* the debts were charged on the whole of the property, but the trust affected one estate only, which the testator directed to be sold, and the proceeds applied in payment of his debts. In that case more than twenty years had elapsed since the death of the testator, and it was held that the statute barred all right to recover in respect of the charge, but that it did not bar the right to recover in respect of the property, on which a trust was created. In *Snow v. Booth* there was no express trust. In that case an annuity had been granted and charged upon the reversionary interest of the grantor in certain real estates; the estates themselves were demised to a trustee for a term of years, who in the event of the annuity falling into arrear, whether before or after the death of the tenants for life, was empowered to sell the estate and apply the proceeds as expressed by the deed.

If I were to adopt the argument that a charge was converted into a trust by a direction to raise money in aid of the personal estate, there would be an end of the distinction which the statute makes between a charge and a trust. It is impossible to say that a charge upon an estate, merely because a person is directed to raise it, can create a trust similar to that in which the same person is directed to sell the estate and apply the proceeds. In this case, therefore, the additional words, direct-

ing the executors to raise, by mortgage or otherwise, out of his real estate, what the personal estate should be insufficient to satisfy, do not give any additional force to the prior charge. This, therefore, must be considered to be a charge, and not a trust, upon the estate.

It is then said that the case is taken out of the Statute of Limitations by payment of interest within twenty years. It is obvious, however, that the payments made by John Teasdale cannot have created any such effect; one-half of the debts was charged on the moiety of the estate devised to him, and the other half of the debts was charged on the moiety of the estate devised to Henry Proud. As this must be considered to be a charge merely, is the case affected or made better by the general charge at the end of the will? It is clearly a charge of half the debts on A.'s moiety of the estate and half on B.'s moiety. If A. thinks fit to keep up the debt, that cannot affect B, as there was no privity between them. The case has been argued as if the charge was on the whole estate, but there was no privity between J. Teasdale, the nephew, and the testator. The nephew was not the testator's personal representative; he was simply a devisee. If, therefore, the testator had charged his estate with payment of a sum of money, and had then devised the estate to four different devisees as tenants in common, if one thinks fit to pay interest upon the charge it will bind him but not the others. It is unnecessary to refer to authorities upon this point.

In *Marten v. Wichelo* (1) it was held, in a creditors' suit, that the admission of a debt against a debtor who died in 1830, having refused payment of a promissory note dated in 1826, was not proved by proving a judgment obtained against the executor of the debtor in 1833, three years after the death of the debtor.

As this, therefore, is a charge and not a trust, and as there has been no payment which can bind Henry Proud, the plea must be allowed.

(1) Cr. & Ph. 257; s. c. 10 Law J. Rep. (N.S.) Chanc. 384.

ROMILLY, M.R. } WINKWORTH v. WINK-
Nov. 8. } WORTH.

WOOD, V.C. }
Nov. 13. } ARNOLD v. THOMSON.

*Practice—Payment out of Court —
Liberty to apply in Chambers.*

Where a petition is presented for payment of money out of court merely, and similar successive applications will have to be made, leave will be granted to make such future applications to the Judge in chambers.

This petition was presented by one of eleven children, who had attained twenty-one, and their guardian, asking that a sum of 379*l.*, his eleventh share in certain trust funds standing to the credit of the cause, might be paid to the petitioner. The whole fund was distributable among them as they respectively came of age. It also asked for liberty to apply in chambers from time to time for payment of the interest as well as the principal of the remaining shares as the same should become payable.

Mr. Higgins, for the petitioners, in addition to the order for payment of money out of court, asked that all future applications on behalf of the remaining children might be made to the Judge in chambers, as the parties desired to avoid the expense of a petition. Orders in this form had been made by Wood, V.C. (1).

THE MASTER OF THE ROLLS doubted whether he had jurisdiction to make such an order; as, however, such orders had been made in another branch of the Court, he could not object to follow them; he would make the order as asked.

(1) In cases in which these orders have been made the Court has been satisfied that no question upon the rights of the parties interested can arise on the subsequent applications; but that the payment out of court to the future applicants will depend only upon proof of a particular fact, or on the happening of a particular event.

*Practice—Dismissal of Bill for Want of
Prosecution of Proceeding at Law.*

Where a plaintiff's bill is retained in order that his right may be tried at law, he is bound to proceed at law with all reasonable diligence, and is not entitled to wait till the forms of common law procedure compel him to go on.

Mr. Humphreys moved in this case, on behalf of the defendant, to dismiss the plaintiff's bill for want of prosecution. The bill was filed in 1861, and on the 21st of June following a motion for an injunction was ordered to stand over, with liberty for the plaintiff to bring an action. The answer was filed on the 26th of July. An action was then brought in the Court of Queen's Bench, in which issue was joined on the 24th of January 1862. The plaintiff having taken no steps in the action since that date, the defendants caused him to be served with notice to proceed to trial, and also with notice of the present motion.

Mr. W. H. Lawson, for the plaintiff, argued that he had been guilty of no delay; he was not bound to proceed at law until called upon by the defendant to do so—*Bell v. Bell* (1). He also distinguished *Baker v. M'Clellan* (2).

Mr. Humphreys replied.

WOOD, V.C. said the plaintiff must undertake to proceed at law with all convenient speed. According to *Bell v. Bell*, he was entitled to a reasonable time, but he had had a reasonable time, and he was not to wait till by the forms of common law procedure he was compelled to go on.

He must give immediate notice of trial, and undertake to proceed in the action with all despatch. The costs of the motion to be costs in the cause.

(1) 14 Jur. 1129.

(2) 27 Law J. Rep. (N.S.) Chanc. 57.

ROMILLY, M.R. }
 July 19, 21; } BERNARD v. DAVIES.
 Nov. 4. }

Manager — Colonial Estate — Lien for Expenses.

If an absolute owner in fee of a West India estate appoints a manager, he is entitled to a lien on the inheritance for the full amount of what is due to him on account of his management, and the costs of the cultivation.

If a manager is appointed by a tenant for life he can acquire no lien on the inheritance of the estate for the costs of such management and cultivation after the death of the tenant for life.

If emblements are growing on the estate at the decease of the tenant for life, the manager will be entitled to a lien for the sums expended in their production, if the person in remainder is entitled to the benefit thereof.

If, upon notice, the manager refuses to give up possession to the remainderman, and claims a lien on the estate for monies expended during the life of the tenant for life, he will be treated as a mortgagee in possession, and on such principle accounts will be directed against him.

If a mortgagor (owner in fee) of a West India estate appoints a manager, and dies, the costs of management and cultivation are not a lien on the estate against the mortgagees, who have not acquiesced in the appointment.

This suit was instituted for the administration of the real and personal estate of William Davies, late of the island of Dominica, deceased.

Under advertisements for creditors Philip Carteret Bertrand carried in a claim against the estate of W. Davies for a large sum of money, alleged to have been received by him as manager of the Tabery and Wayanary estates on account of the produce thereof.

Philip Noel Bernard, the plaintiff, then took out a summons that the executor and trustees of William Davies the testator, and the consignees, and *ad interim* manager appointed in the cause, might be at liberty to retire from the cultivation of the estates on the 1st of July 1861, and for

directions as to giving up possession of the estates.

This summons was attended by Philip Carteret Bertrand and Thomas Bosville Bosville, and Daniel James Lee, the mortgagees of the Wayanary estate, who asked that immediate possession of both estates might be given to P. C. Bertrand.

The plaintiffs consented to give up possession of the estates subject to the lien of the executors and trustees of W. Davies, and of the consignees, W. Branley Harris and Philip Noel Bernard, appointed in this suit, for any balance due to them on taking the accounts of such estates in respect of monies expended by W. Davies in his lifetime, and by his executors and trustees since his decease, in furnishing supplies to and supporting and maintaining the estates.

The question, therefore, was adjourned into court to determine whether the trustees and executors of W. Davies could claim a lien on the estates, or on either and which of them, for any and what balance, and up to what time, which, on taking the accounts, might be found due to W. Davies at his death, or to his executors and trustees, or to the consignees, in respect of the cultivation and management of the estates, or either of them, and whether P. C. Bertrand was entitled to demand possession of the estates, or either of them, unconditionally, and without reference to such lien.

The facts of the case are sufficiently stated in the judgment: it is unnecessary to make any further statement.

Mr. Selwyn and *Mr. Bromehead*, for the plaintiff.

Mr. Bagshawe and *Mr. Dixon*, for other parties in the same interest.

Mr. Follett and *Mr. Holden*, for P. C. Bertrand and the mortgagees of the Wayanary estate.

Mr. Selwyn, in reply.

The following authorities were referred to:

Scott v. Nesbitt, 14 Ves. 438.

Frazer v. Burgess, 6 Jur. N.S. 327;
 s. c. 13 Moo. P.C.C. 314.

Farquharson v. Balfour, 8 Sim. 210.

Morrison v. Morrison, 2 Sm. & G. 564;
 s. c. 7 De Gex, M. & G. 214.

Shaw v. Simpson, 1 You. & C. C.C. 732.

Clare Hall v. Harding, 6 Hare, 273; s. c. 17 Law J. Rep. (N.S.) Chanc. 301. 3 *Burge's Colonial Law*, 357.

THE MASTER OF THE ROLLS. (Nov. 4.)—The question argued on this summons is twofold: first, whether the executors of a testator, who was the manager of certain West India estates, can claim a lien on those estates for the balance due to the testator, in respect of his management and cultivation thereof previously to his decease; and, secondly, whether the executors, who have continued that management since the decease of the testator, are entitled to a similar lien for the balance due to them in respect of such subsequent management.

There are two estates differently situated, and the questions accordingly divide themselves into several branches, though they will all be found to rest on the same principles. One estate is called "The Tabery Estate," and the other is called "The Wayanary Estate." They are both situate in the island of Dominica. The testator, William Davies, died on the 1st of September 1857. He was the manager of both estates from the 25th of June 1849 up to the time when he died. He was constituted manager by certain articles of agreement of the 25th of June 1849, made between Edmund Rufus Bertrand, the owner of the estate, of the first part, the testator, William Davies, of the second part, and various execution creditors of Edmund Rufus Bertrand of the third, fourth and fifth parts. The first clause of the deed provided that the testator was to manage both estates; and the remaining clauses provided for the manner in which he was to apply the proceeds. The estates themselves were differently limited. The Tabery estate was limited to Edmund Rufus Bertrand for life, with remainder to his first and other sons in tail male. The Wayanary estate was limited to Edmund Rufus Bertrand in fee. Edmund Rufus Bertrand died on the 26th of April 1855, leaving Philip Carteret Bertrand, his eldest son and heir in tail, surviving him. On the death of his father, Philip Carteret Bertrand called upon the testator, William Davies, to give up pos-

session of both estates to him, which he refused to do, unless he were paid the balance due to him for the management of the estates from 1849, when he was first appointed manager. In consequence of such refusal, Philip Carteret Bertrand did not obtain possession of the estates, and he took no active steps to obtain possession. Accordingly, the testator continued to manage both estates until his death in September 1857. Upon his death, Philip Carteret Bertrand again applied for possession of the estates to his executors, but the executors refused to deliver up possession unless they were paid the balance due to the testator for his management. Upon this Philip Carteret Bertrand took no active steps to enforce such possession, but gave them notice that he would not be answerable for any expenses, or any of the supplies furnished. Accordingly, since the death of the testator, his executors have continued in possession of both estates, and have continued to manage both estates down to the present time. The estates have always been worked at a loss. Philip Carteret Bertrand has received nothing from them, and a large balance is claimed against each estate.

With respect to the Tabery estate, the question of lien divides itself into three branches: first, whether there exists any lien on the estate for the sum due to the testator up to the death of the tenant for life on the 26th of April 1855, or for any and what part thereof. Secondly, whether there exists any such lien for the sums due to the testator in respect of such management from the 26th of April 1855 to the 1st of September 1857, when he died; and, thirdly, whether there exists any such lien in respect of what may have been expended by the executors for their management of this estate since the 1st of September 1857, down to the present time.

I do not make any distinction between the case of a consignee of West India estates in this country, and the manager of the estates themselves in the West India islands. They appear to rest on the same footing, and the principles applicable to one are applicable equally to the other. The principles which must govern this case are to be found in the cases of *Scott v. Nesbitt*,

Farquharson v. Balfour, Sayers v. Whitfield (1), and *Frazer v. Burgess*.

The three following propositions may be deduced from the above-mentioned cases: in the first place, that a lien on the estate exists for the costs of management, where the management has been conducted by a person authorized to do so by the owner of the property; in the second place, that, though there be no express appointment of the manager, yet if the persons interested in the estate know that he is performing the duties, and do not interfere, then they must be presumed to have acquiesced in his continuance in that office, and they cannot dispute his claim to a lien on the estate for the expenditure which, by their tacit acquiescence, they have encouraged him to make: in the third place, where a receiver or manager is appointed by the Court, in a suit properly constituted, such manager is to be considered as appointed on behalf of all persons interested in the property, and he is entitled to his ordinary commission and allowances, and also to a lien on the estate, as against all persons interested in it, for the balance, whatever it may be, that shall be found to be due to him on taking his accounts. This third proposition may be dismissed at once as having no bearing on this case. No such manager has been appointed by the Court of the estates, and all that can be said is, that, in the suit, no one has applied to have a manager appointed, or sought to change or confirm the existing management. The case, therefore, must depend on the manner in which the two first propositions are applicable to, and can dispose of, the matter in dispute.

The first proposition must be confined to giving the manager a lien on such interest in the estate as those persons had who appointed, or were privy to the appointment of, the manager. A person who has a life-interest only in an estate, by appointing a manager, gives him a lien on the estate for his acts of management, but it is only on the estate for life which the appointor had. He could not give, nor could the manager acquire, any lien upon the inheritance against a person who had no voice in the appointment, and who could

do nothing to alter or qualify it. If this were not so, a tenant for life, by an improvident appointment, might deprive a stranger of his property, and no case has been mentioned in which a claim for lien to this extent has been supported.

The testator, therefore, by reason of his management of the Tabery estate during the life of Edmund Rufus Bertrand, did not acquire any lien on the inheritance of the estate as against Philip Carteret Bertrand, the tenant in tail. But this again is subject to a qualification. It may be that shortly before the death of the tenant for life, he, or his manager, may have furnished supplies for the purpose of producing the crop which was first gathered after his decease, and of which the tenant in remainder would be entitled to have the benefit. I think that the owner of the inheritance cannot take the crop which accrued next after the death of the tenant for life, without paying for the supplies which have produced that crop. With respect, therefore, to the Tabery estate, the executors of William Davies, the testator and manager, are entitled to a lien on the Tabery estate against the defendant Philip Carteret Bertrand, for so much of the supplies furnished to that estate during the life of his father, as was necessary for the production of the crops that were gathered after the death of the father, the tenant for life, and of which Philip Carteret Bertrand had, or was entitled to have, the benefit, but not further; and the costs of management incurred during the life of the tenant for life in respect of the crops which were gathered in his lifetime, or which belonged to him or his estate, creates no lien on the Tabery estate in the hands of Philip Carteret Bertrand, and in respect of such costs the representatives of the testator must go against the estate of the tenant for life, and not against the inheritance of the Tabery estate.

With respect to the testator's management of the Tabery estate; acting upon the principle deducible from *Scott v. Nesbitt* and *Frazer v. Burgess*, I am of opinion that the right of lien depends on this fact to be deduced from the evidence, namely, whether the management of the estate by the testator was or was not acquiesced in by the remainderman, Philip Carteret Bertrand.

(1) Knapp, P.C.C. 133.

If it was, then the testator is entitled to a lien in respect of what is due to him from the estate on taking the accounts of such management; but if not, and if Philip Carteret Bertrand does not ask, as against him, for any account in respect of his management, then I am of opinion that the testator's executors cannot sustain a lien on the estate in respect of what might be due to the testator in case such accounts were taken. The same principle will also govern the question of lien for the management and cultivation of the estate by the executors of the testator subsequently to his decease. If Philip Carteret Bertrand sanctioned or acquiesced in their so doing, they have acquired a lien on the estate as against him, but not otherwise.

On examining the evidence on this subject, it appears that Philip Carteret Bertrand did not acquiesce in the testator's continuing in the management of the estate after the death of the tenant for life. The evidence on this subject is conclusive. What occurred on the death of the tenant for life was this: Henry David Watt, as the attorney for Philip Carteret Bertrand, expressly demanded possession of both estates from the testator, which he refused. This is proved by Peter Girand and by Mr. Watt and Robert Gordon, who, it appears, accompanied the testator, at his request, to the Government House, where H. D. Watt was residing, for the purpose of attesting to the fact of the testator's refusal. After this the testator must be considered as holding the estate by such title as he could support against the whole of the real owners. It is true that Philip Carteret Bertrand took no steps to remove him or to get possession of the estate, and thereby allowed him to remain the manager of the property until his death, which took place on the 1st of September 1857; and at first I considered that this circumstance might have some influence on the question. There can be no doubt that during the two years which so elapsed, Philip Carteret Bertrand might have required the testator to account for the profits made by him in the management of the estate; and if Philip Carteret Bertrand had come against the testator for an account of his management, he would undoubtedly have been compelled to allow him, or his

estate, such costs as had been properly incurred in the course of such management, before he could have obtained payment of the balance; and it might appear at first sight as if the circumstance of the estates themselves yielding a profit, or being worked at a loss, could not make any difference between the rights of the parties as between themselves; but on further reflection, I think that this was not the right mode of viewing it. I think that the remainderman was entitled, on the death of the tenant for life, to give notice to the manager that he was no agent of his; that he repudiated any authority emanating from him to manage his property; and that he could give the manager notice that he was to have no claims thereafter on the owner, or on his estate, for what he might do. After such notice the manager could only be in possession of the estate in one of two characters—either as a mortgagee in possession in respect of a prior existing lien, or as a person holding adversely to the real owner. In the latter character he could not claim any lien on the estate for his management. A person holding an estate adversely might, no doubt, after the lapse of the time required by the Statute of Limitations, have acquired an absolute interest in the estate as against the remainderman, but that question does not arise. The time has not elapsed; and as to the lien, it is clear that a mere wrong-doer, or a person holding over an estate against the will of the real owner, cannot claim anything against him in respect of acts done on the property, however beneficial they may have been.

The next question is, whether the testator was entitled to be regarded as a mortgagee in possession, and if so, whether he could be entitled to charge such costs of management against the remainderman, in his character of mortgagee in possession? There is no evidence on this part of the case; but for the purpose of considering this question, it may be assumed that, in accordance with the opinion I have expressed, the testator was entitled to a lien on the estate for the supplies provided in the last year of the life of the tenant for life, in order to produce the crop of the year following the death of the tenant for life, to which the owner in remainder was

entitled, and that there was a sum of money due to him in respect of such expenditure, in the same manner as a tenant for life of a farm in this country, which he cultivated himself, would be entitled against the tenant in remainder to the growing crops put in the ground in the ordinary course of husbandry, of which the remainderman would reap the benefit.

In respect of this the testator is entitled to be considered as a mortgagee in possession for the sum so due to him, and, accordingly, with respect to this sum, if the parties do not settle the matter and avoid the expensive inquiries and accounts consequent upon it, which must be directed for the purpose of settling this question, I must direct an inquiry in the following form, namely, Inquire what, if anything, was due to W. Davies, the testator, on the 26th of April 1855, the day of the decease of the tenant for life, in respect of the management of the estate, which was properly attributable to the crops then growing and afterwards gathered, to which Philip Carteret Bertrand was entitled.—Declare that the testator is to be treated as mortgagee in possession of the Tabery estate, in respect of such sum so found to be due to him, and take the accounts of the estate as against his estate, as in the case of a mortgagee in possession of a West India estate.

The mode of taking that account is fully set forth and explained in *Leith v. Irvine* (2). Under it the mortgagee is entitled to no commission, no salary, no allowance for services or loss of time. The consequences which will flow from the taking of this account will determine the remaining question relating to this estate, namely, whether the executors of the testator were entitled to hold the estate against Philip Carteret Bertrand on the death of William Davies. The evidence is quite distinct that Philip Carteret Bertrand required possession of the estate from the executors, that they refused to deliver it up, and that Philip Carteret Bertrand gave them due notice that they held the estate at their own peril, and that he would not sanction or be answerable for any expenditure or any supplies. If, on taking the account as

before specified, there was, at the death of William Davies, anything due to him, the executors were entitled to hold the estate as his representatives, and the account must be continued on the same principle as against them, *videlicet*, as mortgagees in possession down to the present time. And on the same principles, if on taking the account before mentioned, there was nothing due to the testator at his death, his executors were mere trespassers, and cannot claim any lien on the Tabery estate in respect of their management of it from that period.

Next, as to the Wayanary estate. This was differently situated; it was vested in Edmund Rufus Bertrand in fee simple. In July 1836, he had executed a covenant to pay Robert Newton Lee a sum of 1,556*l.* and interest at 5*l.* per cent. In October 1846, the whole of this, with a considerable arrear of interest, was due; and on the 24th of October 1846, Edmund Rufus Bertrand executed a mortgage to Mr. Bosville and Mr. Lee, the executors of Robert Newton Lee, who was then dead, to secure the whole amount then due, amounting to 2,356*l.* 16*s.*, together with the future accruing interest on the original sum of 1,556*l.*, at 5*l.* per cent. The mortgage included the Wayanary estate and two other estates, which are not in question here. The amount due on this mortgage is now 3,400*l.* The question of lien for the cost of management has to be considered as regards this estate both as against Philip Carteret Bertrand and as against the mortgagees. If the mortgagees were out of the question, the observations already made would dispose of this case so far as Philip Carteret Bertrand is concerned. Edmund Rufus Bertrand was owner in fee, and able to bind the inheritance; and therefore, as against him and his heirs, William Davies, the testator, was, in April 1855, entitled to a lien on the inheritance of the whole plantation, for the full amount due to him in respect of his management from the year 1849 until April 1855, and he was entitled to hold the estate until he was paid the amount; and therefore when Philip Carteret Bertrand demanded possession, and gave him notice that he was not his agent or manager, William Davies became holder of the Wayanary estate, as mort-

(2) 1 Myl. & K. 277.

gagee in possession for the amount then due to him in respect of his management of that estate, and the account between them must be taken against him in that character on the principle already referred to and laid down in *Leith v. Irvine* (2). The same thing occurs, on his death, as regards his executors. If, on taking that account, on the 1st of September 1857, anything was due to the testator in respect of that lien, his executors were entitled to hold on the estate, and the account must be continued in like manner as against them; but if nothing was then due, they can claim nothing in respect of the costs of their subsequent management of that estate.

But as regards the mortgagees, Mr. Bosville and Mr. Lee, the case is very different. If a mortgagee, not being a party to a suit in which a receiver or manager is appointed, or if a mortgagee allows his mortgagor to manage the estate and receive the produce of it without any interference on his part, he is not bound or affected by the previous management. He cannot require any account of past profits or past produce, and in like manner he cannot be injured by any of the costs of management which have been incurred subsequently to the date of his mortgage. As I understand the law, to be derived from the cases referred to, he may take possession of the estate at any period he may think fit. After he has done so, the account will be taken against him on the principle already mentioned; but he is not liable to, nor is his interest in the estate affected by, the previous course of management pursued by the mortgagor or his agent or manager. Therefore that, as against the mortgagees of the Wayanary estate, neither the testator nor his executors are entitled to any lien on the estate in respect of the balance, whatever it may be, which may be due to them in taking the accounts above directed in respect of the management of the plantation.

I have now stated the principles on which this case must be decided, all parties having come in and having submitted to be bound by the orders of the Court in the same manner as if they had been made parties to a suit properly constituted for the purpose of raising and deciding the questions. Whether

it will be expedient for the parties themselves to take the accounts and inquiries I have indicated, they can themselves alone judge. I should be disposed to think that the better course would be that the estates themselves should be sold, and when the amounts derived from that proceeding shall have been ascertained, they will be better able to determine whether it can be beneficial to any one to prosecute further the accounts — whether, by some arrangement between themselves, they might not stop further litigation and divide the small residuum which seems likely to be derived from these estates, which have been so long unproductive under their present course of management. At all events, whether the parties settle the matter or not, I shall think it proper to direct a sale, unless Philip Carteret Bertrand, the owner, and Messrs. Bosville and Lee, the mortgagees, oppose that course of proceeding, and then I shall direct the accounts I have already stated.

WOOD, V.C. }
Nov. 12, 14. } RUCKER v. SCHOLEFIELD.

Power—Excessive Execution.

The donees of a power which authorized the appointment of personal estate amongst their children, appointed it "upon the trusts following, that is to say"; then followed trusts for the benefit of some of the children, and to pay the interest to them for life, and after the decease of each child to dispose of her share amongst her children, who were not objects of the power:—Held, that the whole trust must be read together, and could not be treated as an absolute appointment in the first instance followed by an attempt to settle the shares; consequently, the appointees took only life interests, and the residue of the fund was unappointed.

By the settlement made in contemplation of the marriage of the Rev. Jeremiah Scholefield with Margaret Holmes, 6,000*l.* navy 5*l.* per cent. stock was settled upon trusts for Jeremiah Scholefield and Margaret Holmes successively for life, and after the decease of the survivor of them

in trust for all and every or such one or more of the children of the body of Margaret Holmes by the said J. Scholefield to be begotten, or of the issue of any such child or children born during the life of J. Scholefield and Margaret Holmes or of the survivor of them, at such ages, days or times, and if more than one in such parts, shares or proportions, and with the whole or any part or parts of the interest, dividends or annual proceeds, for or towards the maintenance of any such child or children or issue as they the said J. Scholefield and Margaret Holmes should jointly appoint; and in default of such appointment upon trust that the trustees should pay and assign the capital sum and such interest, &c., or so much thereof respectively whereof there should be no such joint appointment, unto and for the benefit of all and every the child and children of the body of the said Margaret Holmes by the said J. Scholefield to be begotten, who, being a son or sons, should live to attain the age of twenty-one years or die under that age, leaving issue living at or born in due time after his or their decease, or being a daughter or daughters should attain that age or be married; such payment, &c. to be made among them, if more than one, in equal proportions; but no child taking under any appointment to be made in exercise of the power was to be entitled to any share of the unappointed part of the trust fund without bringing his or her appointed share into hotchpot.

There were nine children of the marriage, viz., four sons and five daughters, all of whom had attained the age of twenty-one years, and were still living at the time of instituting the present suit.

On the 22nd of October 1844 Mr. and Mrs. Scholefield executed a deed-poll, by which, in pursuance of the power contained in the settlement, they jointly directed and appointed that the trustees should stand and be possessed of and interested in the said capital sum of 6,000*l.* navy 5*l.* per cent. annuities, and the interest, dividends and annual proceeds thereof which should arise or accrue from the decease of them the said Jeremiah Scholefield and Margaret his wife, "upon the trusts following (that is to say), upon trust thereout to appropriate one-fifth part or share of the said capital sum of 6,000*l.*, or the stocks, funds and securities in

or upon which the same may be then invested, to and for the benefit of each and every one of them, Katherine Margaret, Sophie Maria, Julia Susannah, Elizabeth Charlotte and Ellen Gertrude, children of the body of the said Margaret Scholefield by the said Jeremiah Scholefield begotten, exclusively of all other the children of them, the said Jeremiah Scholefield and Margaret his wife, and to pay and apply the interest, &c. of each such one-fifth part or share unto, or permit the same to be received by each and every of the said children for her own sole and separate use. . . . And upon trust from and after the decease of each such daughter to pay, apply and dispose of the said fifth part or share of such daughter so dying unto and amongst the children of such daughter so dying or their issue" in manner therein mentioned; and in case of the death or failure of issue of any one or more of them (the said five daughters), then the parts or shares of her or them so dying as aforesaid should be in trust for such of the sisters of such daughter or daughters as should be then living, and the issue of such of them as should be then dead leaving lawful issue, such issue to take *per stirpes*; but in case all the daughters should die without leaving issue, then in trust to pay and divide the capital trust fund unto and equally between the sons of Mr. and Mrs. Scholefield and their issue in like manner. Provided that the said trustees should hold the said capital sum and the interest, &c. thereof, subject to such of the trusts, powers, provisos, declarations and agreements concerning the same in the settlement contained as were undetermined and capable of taking effect.

Julia Susannah Scholefield, one of the five daughters, married the Rev. C. B. Calley, and there were issue of the marriage four infant children.

Mrs. Scholefield survived her husband, and died on the 8th of June 1861, whereupon questions arose between the parties as to the title to the fund now representing the 6,000*l.* navy 5*l.* per cent. annuities subject to the trusts of the settlement.

Mr. Wickens, for the plaintiffs, the trustees.

Mr. Hobhouse and *Mr. Currey*, for all the sons and daughters of the marriage, except Mrs. Calley.—The appointment is

good so far as regards the life interests, for a general power of appointment authorizes a gift of a life interest—*Alexander v. Alexander* (1). Nor is the general power of appointment given in the earlier part of the deed cut down by the hotchpot clause—

Sugden on Powers, 179, last edit.

Kampf v. Jones, 2 Keen, 756; s. c. 7 Law J. Rep. (n.s.) Chanc. 63.

Doe d. Bloomfield v. Eyre, 5 Com. B. Rep. 713; s. c. 18 Law J. Rep. (n.s.) C.P. 284; affirming s. c. 16 Law J. Rep. (n.s.) C.P. 64; 3 Com. B. Rep. 557.

Carver v. Bowles, 2 Russ. & M. 301; s. c. 9 Law J. Rep. Chanc. 91.

Mr. Daniel and Mr. H. Stevens, for the defendant Calley, his wife and children, supported the appointment.

Bray v. Hammersley, 3 Sim. 513; s. c. nom. *Bray v. Bree*, 2 Cl. & F. 453; 8 Bligh, N.S. 508.

Fry v. Capper, Kay, 163.

Thornton v. Bright, 2 Myl. & Cr. 230; s. c. 6 Law J. Rep. (n.s.) Chanc. 121.

Phipson v. Turner, 9 Sim. 227.

Sugden on Powers, 670, 8th edit.

Mr. Elderton, for a mortgagee of one of the daughters.

Mr. Hobhouse, in reply, referred to *Harvey v. Stracey* (2).

Wood, V.C. (Nov. 14.)—The question that arises in this case is as to the effect of an appointment made by Mr. and Mrs. Scholefield, pursuant to a power contained in their marriage settlement, whereby they were authorized to make an appointment in favour of their children; and the question is, whether that appointment can be so construed as that, applying the doctrine of *Carver v. Bowles*, the limitations over only should be held to be void, the appointment being absolute among the daughters, or whether the interest given to the daughters are only life interests in the first instance, and the limitations over fail for excess. In all cases the question depends entirely on the language of the instrument. If you find a clear gift in the first instance, and then limitations over grafted upon it, shew-

ing that the object is first to make the gift and then to settle it, the first gift takes effect, and the superadded limitations will simply not operate; or if there is a clear gift in the first instance, and afterwards words occur which divert it, the Court will uphold the gift, and reject the diverting words; but if the gift is so coupled with the limitations over as to make them part of the gift, you can only give effect to so much as is authorized by the power, and as to the rest the fund will go as in default of appointment. The question here is, how far this appointment falls within one or other of these constructions.—[His Honour read the words of the appointment.]—I confess I do not see how in this case the daughters can take more than a life interest, because the trustees are directed to stand possessed of the fund “upon the trusts following, that is to say,” so that you must take the whole trust as one, and you cannot stop short at any particular point. If you could stop short after the words “upon trust thereout to appropriate one-fifth part or share of the said capital sum of 6,000*l.*, or the stocks, funds and securities in or upon which the same may be then invested, to and for the benefit of each and every one of them,” those words would give absolute interests to the daughters; but the words I have already referred to, make the subsequent limitations part of the trust, and to stop there would be to stop in the middle of the trust. It is impossible to hold that this is more than a life interest. Accordingly, there will be a declaration that the several daughters here named each take for life the benefit of one-fifth part of the appointed trust fund, and the residue of the fund goes in default of appointment. With regard to the hotchpot clause I never had any doubt. The power authorizes a partial appointment, and a life interest, like everything else, is capable of being valued. I have no hesitation in saying the life interests of the daughters must be valued and the amount brought into hotchpot.

(1) 2 Ves. sen. 640; s. c. Tudor's L.C. on Real Property, 299.

(2) 1 Drew. 73; s. c. 22 Law J. Rep. (n.s.) Chanc. 23.

STUART, V. C. }
 April 29, 30; } LOFFUS v. MAW.
 May 30. }

Will—Representation—Fraud.

Where a niece had been induced to render valuable services to her uncle on the faith of his representation that by so doing she would become entitled to the benefit of the trusts created in her favour by a codicil to his will, and the testator afterwards revoked such trusts, it was held, that he had no right to make such revocation, and a decree was made that the trusts in favour of the niece declared by such codicil should be performed.

This was a suit against persons claiming under the will and codicils of a deceased uncle of the plaintiff, for the purpose of obtaining a declaration that the plaintiff was entitled to have and enjoy certain property belonging to her uncle, in accordance with a promise made to her by him that if she continued to live with him and take care of him he would make a provision thereout for her.

The bill contained statements to the following effect:—In March 1853, the plaintiff, Fanny Loffus, was residing at Laceby, in Lincolnshire, and by the death of her husband, on the 4th of that month, she was left, at the age of twenty-nine, a widow with a young child, and with no means of support except her own exertions as a laundress.

The plaintiff's uncle, Benjamin Gunnell, lost his wife about the 11th of the above month. He was at that time about seventy years of age and was residing at Hull. At her uncle's request the plaintiff upon the death of his wife went to keep his house, and shortly afterwards the plaintiff's child died. Her uncle promised to give her for taking care of him and his house 6*l.* 6*s.* per annum, by quarterly payments, as pocket money, and all proper food and clothing and other necessities, and to leave her something considerable at his death. The plaintiff accordingly remained and duly attended upon her uncle and received the six quarterly payments of the above sum of 6*l.* 6*s.* per annum, which became due in and prior to September 1854.

Gunnell afterwards became ill and re-

quired constant attendance, and in September 1854, the plaintiff having discovered that her uncle had left her a legacy of only 10*l.*, and finding that her constant attendance upon him was affecting her health, she told him that if he did not properly provide for her she should leave him.

Gunnell, thereupon, earnestly entreated her to remain with him, as he had no one else who would take care of him; "and promised that if she would, he would provide for her after his decease, by leaving her for life, the rents and profits of the houses Nos. 3 and 6, in Prospect Street, Hull, which belonged to him; and the plaintiff having been prevailed upon to agree to stay upon such terms, it was finally, in or about the month of September 1854, arranged and agreed between the plaintiff and the said Gunnell, that the said Gunnell would, in consideration of the plaintiff remaining with and taking care of him and his house until his death, leave her, upon his death, the rents and profits of such two houses for her life, and would do whatever was necessary for leaving and securing the same to her as aforesaid."

Upon the faith of Gunnell's performing that promise, the plaintiff remained with him; but as time passed on, and he neglected to fulfil his promise, she, on several occasions, threatened and prepared to leave him. At length he went to his solicitor, Mr. Atkinson, of Hull, and "directed him to draw out a document for leaving and securing to the plaintiff" a life interest in the above two houses. After repeated requests on the part of the plaintiff, and considerable delay, Gunnell, shortly after the 30th of March 1855, informed the plaintiff that he had executed a proper document at his solicitor's, and he requested her to attend at such solicitor's, which she accordingly did, and Mr. Atkinson, by the direction and in the presence of Gunnell, then and there read over to her a document whereby it was declared that the trustees of Gunnell's will should stand possessed of the two houses in Prospect Street, upon trust, as to the house No. 6, to allow the plaintiff to receive the rents for her separate use for life, and as to the house No. 3, to allow her to receive the rents until she married without the consent of the trustees of his will, or until her death. Mr. Atkin-

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son read over and explained the document to the plaintiff; and she was assured both by Gunnell and Atkinson that her rights were now perfectly secure; and having no person to advise her, relied upon Gunnell and such solicitor; and in perfect trust and confidence that they would not deceive her, and that she was made quite secure of the aforesaid provision, she returned to Gunnell's residence and continued to wait upon him until his death, to the great injury of her own health.

The document by which Gunnell had made provision as above stated for the plaintiff, was a second codicil to his will, which bore date the 30th of March 1855.

Gunnell died on the 28th of March 1858, and it was then found that he had, by a third codicil, dated the 19th of May 1856, revoked the provision made by him in the second codicil for the plaintiff.

The will of Gunnell was dated the 19th of May 1854, and his first codicil was dated on the same day.

The plaintiff submitted that Gunnell had not, after the agreement before stated, any right to alter the provision for her contained in his second codicil, and that the revocation thereof was a fraud upon her.

The bill was filed against Maw, the testator's acting executor, and certain persons claiming under his will and codicils, and it prayed for a declaration that the plaintiff was entitled to have and enjoy the two houses in Prospect Place in the manner mentioned in the second codicil of Gunnell; and that if necessary it might be declared that the third codicil, so far as it revoked the second codicil, was fraudulent and void, and ought to be set aside.

The defendants, by their answer, insisted upon the Statute of Frauds, and claimed the same benefit as if they had pleaded the same or demurred to the bill.

There was some conflict upon the evidence as to the degree of care and attention which had been paid by the plaintiff to her uncle during his illness and prior to his death.

Mr. Atkinson, the solicitor, on behalf of the defendant, deposed that he never received from the testator any instructions to prepare "a secure and irrevocable agreement," nor did he imagine that any such

document was to be prepared, and he did not hear of such a thing until he saw the bill. When the testator executed his third codicil he (Atkinson) read it over to him very carefully, and as it was executed at the testator's son's house, he asked him if it were done of his own free will. The testator said it was, and told the defendant that he had determined to revoke the devise to the plaintiff on account of her improper conduct.

Mr. Bacon and *Mr. T. A. Roberts*, for the plaintiff.

Mr. Roxburgh and *Mr. C. T. Simpson*, for the defendant, referred to

Montefiore v. Montefiore, 1 W. Black. 363.

Neville v. Wilkinson, 1 Bro. C.C. 543.

Hammersley v. De Biel, 12 Cl. & F. 45.

Allen v. M'Pherson, 1 H.L. Cas. 191.

Money v. Jorden, 15 Beav. 372; s. c.

2 De Gex, M. & G. 318; 5 H.L.

Cas. 185; 21 Law J. Rep. (N.S.)

Chanc. 893.

Kay v. Crook, 3 Sm. & G. 407.

STUART, V.C. (May 30.)—Relief is sought by the plaintiff in this suit on a principle which is well established. If she can prove by sufficient evidence that the testator induced her to continue her valuable services on the faith of his representation that he would leave her the property in question at his death, she is entitled to the assistance of the Court. Lord Cottenham's statement of the doctrine, in the case of *Hammersley v. De Biel*, has been repeatedly referred to and acted upon in recent cases:—"A representation made by one party for the purpose of influencing the conduct of the other party, and acted upon by him, will in general be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation." Even at law it was laid down by Lord Denman in the case of *Pickard v. Sears* (1), that, whatever a man's real intention may be, if he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation is bound by it.

(1) 6 Ad. & E. 469.

There is the clearest evidence in this case of the circumstances under which the testator executed the codicil to his will by which he gave to the plaintiff that property in respect of which she now sues. The testator executed the codicil, and took the plaintiff to his solicitor's office to shew it to her, and to make her aware of its contents, in order to satisfy her mind and to induce her to continue those services which she rendered to him on the faith of his representation that she would enjoy the property after his death. It has been argued for the defendants that there is no evidence in writing of the representation, except by the codicil itself, which, being a revocable instrument, is not binding; but there is no authority to shew that relief is to be refused unless the representation be in writing. The Statute of Frauds has no application to cases of this kind. No doubt, there must be the clearest evidence of the representation. Anything vague or indistinct in its nature would prevent the right to relief; but in the present case the codicil is adduced as evidence in writing of the fact of the representation, and for that purpose it is perfect evidence. In cases of this kind a representation that the property is to be given by a revocable instrument is binding. It is the law of the Court which makes it binding, although it be of the essence of the representation that the instrument is to be of a revocable nature. No evidence of the representation can well be stronger than the actual preparation and production of the instrument, whether revocable or not, and where the preparation and production and execution of the instrument all take place for the purpose of influencing the conduct of the other party who acts upon it, the principle applies in its full force. As to the reliance which the defendants' counsel placed on the decision of the House of Lords in the case of *Money v. Jorden*, although the decision in that case is no doubt binding, it cannot be considered as a reversal of the decision of the House of Lords in *Hammersley v. De Beil*; and the proposition attributed to Lord Cranworth in the printed report, that a statement or representation of what a person intends or does not intend is not sufficient, seems irreconcilable with the decision of the House of

Lords in *Hammersley v. De Beil*, and with the law as laid down by all Judges of the highest authority. It is remarkable that the case of *Hammersley v. De Beil* was not referred to by any of the counsel or Law Lords in the case of *Money v. Jorden*. It was argued that the grant of probate of the codicil is conclusive as to the revocation, and, no doubt, it is so. But it is the revocation which makes the assistance of this Court necessary. In cases of this kind, where the testator is bound by the effect of his representation, he cannot defeat the right to relief by bequeathing or devising the whole of his property to another person. Whoever claims under the will or codicil takes as a mere volunteer, and cannot escape the effect of any act of the testator which has bound the property in his lifetime. The testator's representation in this case, and any other case within the application of the doctrine, binds the property which he devised to the plaintiff as completely, according to the law of this Court, as if he had bound himself in consideration of money not to revoke the gift, and had made the person named in his will a purchaser of the property devised. If this be the correct view, a representation which affects specific property, must bind the property as effectually as a representation generally to leave a sum of money would bind the general assets, and the present plaintiff is entitled, not to have relief out of the general assets, but out of that specific property which the testator represented to her that she was to enjoy after his death, she having acted upon the faith of that representation, and performed those services which he by the representation induced her to render. There must, therefore, be a declaration, that, it appearing that the plaintiff had been induced to render valuable services to the testator on the faith of his representation that by doing so she would become entitled to the benefit of the trusts created in her favour by the second codicil to his will, the testator had no right to revoke the said trusts; and therefore order and decree that the trusts in favour of the said plaintiff declared by the said second codicil be performed, with liberty to the plaintiff to apply at chambers for any directions necessary for the due performance of the said trusts. The plaintiff's costs of the suit to be taxed

and paid by the defendants, William Anderson Gunnell and Edward Maw. Liberty to apply.

STUART, V.C. }
Nov. 6. } ALT v. ALT.

Settlement—Letter proposing Marriage with a young Lady, and Offering to settle her Fortune—Marriage without Settlement—Specific Performance.

A gentleman wrote a letter to a young lady's mother making a proposal of marriage with the young lady, who was then a minor, and saying "that if the latter had or might have money his wish and intention would be that it should be settled for her sole and entire use." The gentleman's proposal was accepted. The young lady was entitled to certain property, and the marriage took place while she was yet an infant, but without any settlement having been made of her property:—Held, that the plaintiff was entitled to have a proper settlement made upon her and her children of all her property present and future.

This was a suit by Mrs. Alt, by her mother as next friend, against Mr. Alt, the plaintiff's husband, for the purpose of obtaining a declaration that a letter, dated the 21st of February 1862, addressed by the defendant to the plaintiff's mother, and the acceptance by the latter of the offers made therein by the defendant, constituted a binding agreement on the defendant to make a proper settlement of all the property to which the plaintiff was or might become entitled; that the defendant might be decreed to make such settlement accordingly; that a proper deed for that purpose might be settled and approved by the Court, and that the defendant might be decreed to execute it; or that it might be declared that the plaintiff was entitled in equity to have a proper settlement made upon her and her children of all property present and future, and that the defendant might be decreed to make and execute such settlement thereof as the Court should direct.

On the 20th of February 1862 the defendant wrote and sent a letter to the plaintiff's mother making an offer of marriage to the plaintiff, who was a minor. In that

letter there was the following paragraph: "I can safely say that I have enough to maintain a wife upon. If your daughter has or may have money, my wish and intention would be that it should be settled for her sole and entire use."

The plaintiff's mother agreed to the proposals contained in the above letter, and on the faith and in the belief that a valid settlement would be made of all the property to which the plaintiff was or might become entitled, as offered by the defendant, consented to the proposed marriage, but desired that it should not take place until her daughter had completed her eighteenth year. The marriage, however, took place on the 15th of August 1862, before the plaintiff had attained that age, and without any settlement whatever having been made upon her of her property. The plaintiff was entitled to property as well in possession as in reversion or remainder, but the defendant refused to settle it upon her, alleging that the letter was not a binding agreement to make any settlement. This bill was thereupon filed.

Mr. Dickinson, for the plaintiff, contended, that the defendant was bound by his letter, and the acceptance by the plaintiff's mother of the offers therein made, to make the usual settlement of all the plaintiff's property present and future.

Mr. Shebbeare, for the defendant, submitted that he was not bound, under the circumstances of the case, to make any settlement; or, at all events, that the whole of the plaintiff's property, present and future, ought not to be settled.

STUART, V.C. said, that in his opinion the marriage took place on the faith of the express promise of the defendant to settle the whole of the plaintiff's property, present and future, to her sole and separate use; and therefore that the defendant was bound to make the usual settlement upon the plaintiff and her children of all her property, present and future. The costs of the suit and of the settlement might be paid out of the plaintiff's property.

WOOD, V.C. { THE CATHOLIC PRINTING AND
Nov. 13. { PUBLISHING COMPANY (LIMITED) v. WYMAN.

Practice—Costs—Entering Affidavits as read.

Where the Court refuses an interlocutory application with costs, without hearing the other side, affidavits, notice to read which in opposition has been given, and which have actually been briefed for that purpose, are to be entered as read, though not in fact read.

In this case one of the defendants had moved for the production of certain documents, and the motion had been refused with costs without hearing the other side. The consequence was, that certain affidavits which the plaintiffs and another of the defendants had given notice of reading upon the hearing of the motion, were not in fact read, and the Registrar had not entered them as read; the effect of which was that the successful parties would not be entitled to the costs of briefing these affidavits. Under these circumstances the defendant who had opposed the motion now moved that the minutes of the order might be varied by ordering the affidavits to be entered as read. The plaintiffs were served with notice of this motion.

Mr. W. M. James and Mr. Bevir, in support of the motion.

Mr. Rolt, for the plaintiffs, also supported the motion.

Mr. Willcock and Mr. Osborne opposed the motion.—Where the affidavits have not been specially filed for the occasion and have not been read, it is not the practice to enter them as read. With regard to the plaintiffs, they have no right to appear at all, being represented by the same solicitor as the moving defendant, and neither opposing the motion nor moving on their own account.

Mr. James was heard in reply.

WOOD, V.C. (after conferring with the Registrar).—The Registrar tells me that he considered that as these affidavits had not been filed expressly for the occasion, he did not think they ought to be entered as read. In that view I cannot concur. I take

the rule to be simply this: that when notice of motion is given, it is right that affidavits should be filed in order that parties may come prepared to meet the case made by the motion, and that unless there is something which under the practice of the Court renders it wrong that affidavits should be filed at all, (as for instance where there is a motion for production of documents admitted by the answer, and affidavits are filed to prove the possession of those documents,) then, however absurd the motion may in fact be, still if the affidavits have been really briefed on the motion, they should be entered on the order as read, unless the Court should for any special reason order the contrary. I must, therefore, order these affidavits to be entered as read. The respondent must pay the costs of the moving defendant; but I do not think he ought to pay two sets of costs, and I shall not therefore give the plaintiff his costs unless he asks for them against the moving defendant. It is true I could not have varied the minutes to his prejudice in his absence, but nothing of the sort has been asked for here; he appears by the same solicitor as the defendant who has moved, and unless he chooses to ask for them against him, I shall give him no costs.

Mr. Rolt declined to ask for the costs.

STUART, V.C. { SCAMMELL v. LIGHT.
Nov. 19, 20. }

Jurisdiction — Committee of Lunatic's Estate—Fraudulent Dealings by—Suit in respect of—Demurrer.

The Court of Chancery, in the exercise of its ordinary equitable jurisdiction, can entertain a suit against a committee of a lunatic's estate, asking for an account of his dealings therewith during the period of his committee-ship.

Where, therefore, persons claiming under the will of a deceased lunatic, made prior to his lunacy, instituted a suit against the committee of his estate, whom he had appointed his executor, alleging fraudulent dealings on the part of the committee with the estate of the lunatic during his committee-ship, and praying for the usual administration decree,

and for an account of his dealings with the lunatic's estate during such committee-ship, a demurrer by the committee to so much of the bill as asked for the account as last mentioned, upon the ground that the Court of Chancery had not jurisdiction to take such account, and that it should be taken in lunacy, was overruled.

This was a demurrer.

The bill contained allegations to the effect that for some time previous and up to the issuing of a commission of lunacy, as after mentioned, against the late James Sign, he and the defendant John Light had been in partnership together as timber-merchants and in various other transactions, and that at the time of issuing such commission considerable balances were due from Light to Sign, in respect of their joint dealings and transactions; that on the 20th of January 1849 a commission was held, upon the petition of Light, to inquire of the lunacy of Sign, and Sign was, thereupon, found to be a lunatic; that at the time when such commission was issued, the defendants Light and Thomas Tate were aware, as the fact was, that Sign had made a will, whereby he had appointed the two defendants executors and trustees thereof; that the defendants, acting in concert together, procured the defendant Tate to be, and he was appointed committee of the person and estate of Sign; that Light had not paid the balances due from him to the lunatic at the date of the commission; that Tate had, after his appointment as committee of the lunatic, allowed Light to get in the lunatic's outstanding personal estate; that Tate did not pass any account in the matter of the said lunacy other than and except an account for the first year after his appointment, which account did not contain or in any manner refer to any of the capital sums received by Light on account of the lunatic; that the plaintiff had been unable to procure and the defendants refused to discover the particulars of such account, a copy of which was in the possession of the defendants; that Tate, as such committee as aforesaid, let the real property to which the lunatic was entitled, and received the rents for the same, but never accounted for such rents; that Tate had also received other sums of money on account of the lunatic's estate, and that

no part thereof, save as aforesaid, had been accounted for by him; that the income of the lunatic's estate was more than sufficient to pay the expenses of his maintenance, and a considerable balance or sum of money arising from such income remained in each year, and in the whole, in the hands of the defendants; that Sign, before he became lunatic, made his will, dated the 10th of August 1848, whereby he appointed the defendants Light and Tate executors and trustees thereof, and gave his real and personal estate to his trustees, the defendants, upon trust for the benefit of the plaintiffs and other persons; that the testator died on the 8th of May 1856, and his will was proved on the 12th of July 1858, by the defendant Thomas Tate alone; that upon the death of Sign both the defendants acted in the execution of the trusts of his will; that the defendants, acting fraudulently and in collusion together, resolved that the monies in the hands of Light as aforesaid, should be retained by him for their common benefit, and that, in order to avoid the necessity of Light accounting for the same, which they were aware he would be compelled to do if he proved Sign's will, such will should be proved by Tate alone, who had little or no property, and that Tate should not require Light to pay any part of the monies in his hands on account of the testator's estate; that in pursuance of such fraudulent arrangement, Tate, acting in collusion with Light, refused to take any proceedings against Light to compel payment of the amount in his hands, on account of the testator's estate, or to procure an account of the monies received by Light in respect of such estate, and that very large sums of money arising from the testator's estate were now in the hands of the defendants, but they refused to pay the same or any part thereof. The bill prayed, first, for the administration of the estate of the testator; secondly, for an account of the dealings and transactions of the defendants respectively in respect of the testator's estate between the 11th of September 1848, the date of his lunacy, and his death, and of the monies received by the defendants in respect of such dealings and transactions; thirdly, that the clear residue of the testator's estate might be ascertained and secured in this Court for the benefit of the persons entitled

thereto; fourthly, that all proper accounts might be taken for effectuating the purposes aforesaid; and, fifthly, for a receiver.

The defendant Light put in an answer to the bill, and the defendant Tate answered so much of the bill as sought discovery and an account against him from the death of the testator; but he demurred to so much of the bill as prayed an account of the dealings and transactions with the testator's estate between the date of his lunacy and his death, on the ground that this Court had no jurisdiction, and that the proper jurisdiction was in lunacy.

Mr. Greene and *Mr. Caldecott*, for the defendant Tate, in support of the demurrer, contended that an account against a committee of an estate in lunacy, in respect of his committee'ship, ought to be taken in lunacy and not in this Court. They referred to

Grosvenor v. Drax, 2 Knapp, 82.

Wigg v. Tiler, 2 Dick. 552.

Ex parte Gilbert, 1 B. & B. 297.

Ex parte Catton, 1 Ves. jun. 156.

Ex parte Hall, Jac. 160.

Ex parte Clarke, Ibid. 589.

In re Fitzgerald, 2 Sch. & Lef. 432.

Tharp v. Tharp, 3 Mer. 510.

Shelford on Lunacy, 417.

Elmer's Lunacy Practice, 74.

Mr. Bacon and *Mr. Freeling*, for the plaintiffs, were not called upon.

STUART, V.C. (Nov. 20) said that the cases of *Wigg v. Tiler*, *Grosvenor v. Drax* and *Ex parte Gilbert* were distinct authorities in support of the proposition that the Court had jurisdiction in this case. This suit also asked for the administration of the testator's estate, and the accounts; the taking of which in Chancery was now resisted, could not be properly taken in lunacy, where all the proceedings were *ex parte*. For these reasons, and having regard to the allegations in the bill, in reference to the fraudulent dealings with the estate by the defendant Tate, and the collusion between him and the other defendant Light, he must overrule the demurrer, with costs.

LOKDS JUSTICES. }
Dec. 3, 4. } *In re HOOPER.*

Practice—Jurisdiction—Statute—25 & 26 Vict. c. 42.—(Chancery Regulation Act 1862.)

By the above-named statute (commonly called Roll's Act), it is obligatory on the Court of Chancery to decide all questions of law or fact on the determination of which the title to relief or remedy in equity depends.

This was an appeal from an order made by Vice Chancellor Stuart, on the 14th of November 1862, by which his Honour, in an administration suit, had given leave to Messrs. Clarke & Mead, claimants upon the estate of Mr. Hooper, to bring an action for the purpose of establishing their claim. The alleged debt arose upon a bill of costs for proceedings in the Divorce Court, instituted by them on behalf of the wife of Mr. Hooper for judicial separation on the ground of cruelty. The Vice Chancellor, on the hearing of a petition, ordered it to stand over, with the liberty before mentioned.

The executors of Mr. Hooper appealed.

Mr. Malins and *Mr. Cracknall*, for the appellants, argued that since the passing of the act, 25 & 26 Vict. c. 42. (Roll's Act), the Court was not at liberty to send any question "of law or fact" arising in a case before it, and on the determination of which the title of any party to relief or remedy in equity must depend, to be determined in an action at law, but must itself enter on the consideration of and try the question.

Mr. Greene and *Mr. Osborne Morgan*, for the claimants, supported the Vice Chancellor's order.

LORD JUSTICE KNIGHT BRUCE (Dec. 4.)—Speaking only for myself, I should, if the act of parliament had not passed, have thought the order in the present suit right. But the act of parliament was not brought pointedly under the Vice Chancellor's attention, and we do not know what he would have done if it had been so. From the best consideration I have been able to give to this act of parliament while the Court was sitting yesterday, and since, I am of opinion that we are bound to read it as rendering it com-

pulsory on this Court to decide the whole question. It is true the alleged creditor has in fact no option, for it was competent to him to sue at law during the life of the alleged debtor. He could then only have sued at law, and after the death of the alleged debtor he might have sued at law, but then the executor might have stopped him and required him to come in under an order or decree. But in the present case, the alleged creditor, without being compelled, did come in under the order or decree. Probably he was right in doing so. However that may be, we must, I think, under the compulsion of that act of parliament, decide the whole matter. Probably the case will not be, in the opinion of one side or the other ripe, in the present state of the evidence for decision ; and therefore, subject to what the Lord Justice may say, I am for giving liberty to enter into further evidence.

LORD JUSTICE TURNER.—I should hesitate to give an opinion on the act had I not considered it last night. Having done so, I feel that no further delay will alter my conclusions. The first consideration in considering the act is this, what evil was the act intended to meet? It is clear that it was intended to meet this mischief. Parties who come to a Court of equity for relief, could not have their case wholly disposed of by the Court of equity, but were sent to a Court of law to determine other points on which their rights depended. I think the true construction of the act is to diminish this mischief, and extend the remedy. These principles we must consider as guiding us in the construction of the act. The act says in the preamble, "Whereas the High Court of Chancery has power in certain cases to refuse or postpone the application of remedies within its jurisdiction until questions of law and fact upon which the title to such remedies depends have been determined or ascertained in one of Her Majesty's Courts of common law." The act thus applies itself not merely to rights but to remedies given by Courts of equity. "And whereas it is expedient that the said power should no longer exist." What is the said power? The power of refusing or postponing the application of remedies within the jurisdiction of the Court.—"And that in all

such cases, every question of law and of fact cognizable in a Court of common law arising in the said Court of Chancery, on which the right of any party to any equitable relief or remedy depends, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right should be determined by or before the said Court itself." The only question which can arise on it is, what is the meaning of the words "any equitable relief or remedy"? The previous part of the act has spoken of remedies within the jurisdiction of the Court. The word "equitable" before the words "relief or remedy" does not therefore apply, except to cases where the equitable remedy depends on a legal right. The question here is, whether a creditor who comes in under a decree is not to be considered as seeking a remedy within the jurisdiction of the Court. What is the position of a creditor who comes in under a decree? There may be, on further consideration, a direction to take a further account. The plaintiff may not prosecute the suit, and the creditor who has come in may apply for leave to prosecute it. He must be considered as a party who, when he comes in, is seeking a remedy under the jurisdiction of the Court. That this was the intention of the act is made more plain by the 4th section, which applies to the case of parties coming to a Court of equity on a purely legal title. There is no doubt that if a creditor filed a bill for administration, it would be the bounden duty of the Court to decide whether that purely legal debt on which the suit was founded was or was not a valid debt; and it is difficult to say that it was intended that a creditor suing on a purely legal debt should have the right to say that the Court should determine every question connected with the validity of that debt, while, when another creditor comes in under the decree on another purely legal right, the Court should have the right to insist on his going to law. I think we are, under the act of parliament, bound to determine the validity or non-validity of the debt, and I agree with the Lord Justice Knight Bruce, that the parties are entitled to have time to produce further evidence.

LOARDS JUSTICES.
Nov. 7, 8, 13, 23.

Ex parte CURRIE AND
OTHERS, *in re* THE
GREAT NORTHERN
AND MIDLAND COAL
COMPANY (LIMITED).

*Joint-Stock Company—Winding up—
Contributory—Directors—Paid-up Shares.*

Shares in a projected company, with limited liability, were allotted in payment of the purchase-money of property on which the intended company was about to carry on its business, and were accepted and treated by the vendor of such property as paid-up shares, and he afterwards transferred to each of the directors of the company 100 of them. One of the Commissioners of Bankruptcy in winding up the company placed the names of each of these directors on the list of contributories, and made a call upon them. On appeal, it was held, that as the shares had been allotted to a stranger as paid-up shares, they must be so considered, and the directors' names be removed from the list in respect to them.

The directors of the company made an order awarding fees to those of their body who should attend their board-meetings, and afterwards allotted shares to those members who attended, according to the number of their attendances, which shares they deemed to be fully paid-up shares; and, on appeal, it was held, that the Court had no power to alter the agreement which had been come to, and that the shares having been issued as paid-up shares must be so treated.

This was an appeal from a decision of Mr. Commissioner Goulburn, who, in the proceedings of the winding up of the above-named company, had placed the names of the appellants on the list of contributories, and had made an order for a call of 3*l.* per share upon them.

The appeal was presented, by Capt. Currie, and Messrs. Hacker, Longcluse, Fitzpatrick and Parker, five of the seven subscribers to the articles and memorandum of association of the company, who had been placed upon the list of contributories and ordered to pay 3*l.* per share on the shares after mentioned, viz., Currie on 8 shares, which, with 13 taken by him (and respectively transferred to persons named Morris, Whitaker and Waller), made up 21, the

number subscribed for by him under the memorandum, and Hacker, Longcluse, Fitzpatrick and Parker for 21, under the same circumstances. The five appellants were also placed upon the list and ordered to pay as follows—Currie on 26 shares, Longcluse 24, Hacker 9, Fitzpatrick 11, and Parker 13, respectively appropriated to themselves as free or paid-up shares, and sought to be deducted from the 21 subscribed for, as payment or remuneration for their attendances as directors at meetings. They were also placed on the list and ordered to pay on 100 shares each taken by them from Mr. George Butcher. The sixteen months' history of the company was this. It was registered on the 31st of August 1860, and the petition for winding it up was presented in December 1861. The memorandum of association was signed by the appellants each for 21 shares. The assets of the company in December 1861, besides the plant &c. of the business, consisted of 18*l.* at their bankers', and no more. By the articles of association every director was required to hold 100 shares in the company. The directors, the appellants, did not take or pay on any shares, except as to Capt. Currie, who alleged he took 13, which he claimed to be entitled to set off against the 21 for which he signed the memorandum. In January 1861 the appellants, in the name of the company, entered into an agreement with a Mr. Butcher for the purchase of a coal business carried on by him, with the plant and effects thereof, for 8,500*l.*, 3,000*l.* to be paid in money and 5,500*l.* in 1,100 shares of 5*l.* each fully paid up. This agreement was authorized by the articles of association. The appellants paid to Mr. Butcher a sum of 500*l.* on account of the purchase, and Mr. Butcher gave to the appellants, and transferred to them, 100 shares each of his fully paid-up shares, and the appellants were duly entered on the register of shareholders for those shares. In the same month of January 1861 the appellants passed a resolution at a board of directors that each of them should be entitled to one guinea for every attendance. They drew cheques on the bankers of the company for these fees, and took shares in the company to the amount, and paid in to the company's bankers the amount they had so received for fees. Only

720 shares in the company were subscribed for, and 2*l.* per share paid on them. This money was spent, and the company not being in a position to complete their agreement with Butcher, the agreement was forfeited according to a clause in it, and Butcher retained possession of all that had been sold to the company, and which it appeared from the judgment of the learned Commissioner was subsequently sold under Butcher's bankruptcy, as his property, for about 400*l.* or 500*l.* The company was then ordered to be wound up, and the appellants were placed on the list for the 100 shares received from Butcher, the 21 shares for which they had signed the memorandum, and also for the shares taken in respect of their fees, there being no authority in the articles for the payment of any remuneration to the directors. An order for a call of 3*l.* per share was, on the 12th of July last, made by the learned Commissioner on all the contributories, including the appellants, which order was the subject of the present appeal.

Mr. Daniel and *Mr. Hardy*, in support of the appeal, contended that, as to the 100 shares, they were free shares, upon which, according to the articles, no call could be made, and that they were only accepted as free shares, and, if the appellants were contributories in respect of those shares, it could only be upon the terms of being discharged from calls; that, as to the twenty-one shares, they had, in fact, by means of the shares accepted by them in payment of their fees more than exhausted that number, and that, at all events, if they were to be liable upon the twenty-one shares, they were not so in respect of the shares taken for their fees, as they were fully paid-up shares, upon which no call could be made.

Mr. Bacon and *Mr. Roxburgh*, for the official liquidator, supported the Commissioner's order, and argued that as to the 100 shares taken from Butcher, that was a clear fraud and breach of trust. They affected to give Butcher 5,500*l.* in paid-up shares, whereas, in truth and in fact, 3,500*l.* they kept themselves, taking 100 shares each to qualify them; that calling them paid-up shares was a mere sham, as nothing had ever been paid upon them; and that, even treating them as paid up, they were trustees for the shareholders to the extent

said to be paid up, and remained the owners of the shares denuded of any payment, and, consequently, liable to the call. As to the shares taken for their fees, there was no authority for any payment; they took those shares and paid for them with the company's money, which was in effect no payment; and to say that they could repudiate the shares unless they could have them as paid-up shares would be to countenance a course of proceeding which this Court would never uphold. They accepted those shares as well as the 100, and were registered as the owners of them. As to the twenty-one, the case was too plain for argument, the only question being whether they could set off the shares taken for fees against them; which, for the above reasons, it was contended they could not.

Mr. Daniel was heard in reply.

LORD JUSTICE TURNER (Nov. 13).—This case has been argued before us so recently, that it is unnecessary to recapitulate the facts at length. There are in it three points to be considered: the first, as to the 100 shares held by the directors; the second, as to the shares taken by them in lieu of fees; and the third, the question of those shares for which the directors subscribed the memorandum of association. With respect to the 100 shares, I am of opinion—subject, however, to any further argument which may be addressed to the Court—that the appellants are not liable to be called on to contribute; contribution must be made according to the liability of the parties at law or in equity. Those shares have not been issued to the directors, but have been allotted to Butcher as part of the agreement with him, as paid-up shares. That agreement with Butcher was either valid or invalid. If the agreement was valid, then neither Butcher himself nor any alienee from him can be called upon to contribute in respect of those shares. But if, on the other hand, that agreement is invalid, the transaction must be disregarded altogether. For it would not be possible for a Court of law or of equity to alter the terms of the agreement itself, and to treat as shares not paid up, shares which had been issued expressly as paid up. Fraud, if established, would warrant the Court in treating the transaction as void, and setting

it altogether aside; but there can be no ground for substituting such terms for those which were actually employed. Then, with respect to the shares taken in lieu of attendance fees by the directors, I am again of opinion that the directors cannot be called upon to contribute. These also were taken as paid-up shares, and the same principle which applies to the 100 shares will apply to them also. The transaction might have been in itself void, and if so it might have been wholly set aside, but it cannot be altered or varied in its terms. It has been argued for the appellants that these shares taken by the directors for attendance fees, might be taken to be part of the shares for which they had subscribed the articles of association; but with this argument, seeming to me as it does to be a mere evasion, I cannot agree. As to the third question, I am of opinion that the appellants must be held liable for the twenty-one shares subscribed for by them under the articles of association, subject, however, as to those taken by Capt. Currie to his discharge with respect to such of them as have been transferred by him, which may be absolute as regards some of them, and contingent only as regards others. The case is thus entirely disposed of, so far as it has been argued before the Court; but on looking through the papers sent up to me, I find that, at a meeting held on the 10th of August 1860, at which these parties, or some of them, were present, a resolution had been adopted which was thus stated on the minutes: "Present—Mr. Longcluse, Mr. Parker, Capt. Currie, Mr. Fitzpatrick, Mr. Hacker, Mr. Pattison, Mr. Rochussen, Mr. Butcher. Resolved, that a company be incorporated to carry out the undertaking as detailed in the prospectus. Each of the gentlemen present agreed to hold 100 shares in the company, and also to execute the articles and memorandum of association when ready, and to act as directors of the company. (Signed) M. J. Currie." Now, nothing has been said in the course of the arguments as to the effect of this resolution. It may, however, admit of argument whether the resolution ought not to affect the decision of the Court as to the 100 shares, either on the ground that those shares, though nominally paid up, ought to be treated as not paid up, or on the ground

that the above resolution, by the acceptance of the shares, would distinguish this case from that of *The Marquis of Abercorn* (1), and so make the appellants liable upon them. On either of these points, we shall be ready to hear further arguments.

LORD JUSTICE KNIGHT BRUCE concurred.

On the 23rd of November, on referring to the following resolution—"Resolved, that a company be incorporated to carry out the undertaking as detailed in the prospectus; each of the gentlemen present agreed to hold 100 shares in the company, and also to execute the articles and memorandum of association when ready, and to act as directors of the company"—

Mr. Roxburgh, on this point, argued that the case differed wholly from that of *Lord Abercorn*, inasmuch as his Lordship never acted as a director, and never took or intended to take any shares in the company; while in this case the directors, by the above resolution, took the shares as a qualification, and acted from the beginning to the end of the company.

Mr. Daniel (with *Mr. Hardy*) was heard in opposition.

Their LORDSHIPS thereupon discharged the order as to the directors' fee shares, and referred the matter back to the Commissioner as to the 100 shares, and retained the order as to the twenty-one shares (2).

(1) 31 Law J. Rep. (N.S.) Chanc. 828.

(2) The Commissioner, in giving judgment, which he pronounced on the 12th of July, said that there was no doubt that the present appellants were contributories for the twenty-one shares for which they had signed the memorandum of association, which was quite according to the form prescribed in the schedule to the Joint-Stock Companies Act, 1856. It was clear that, as to the 100 shares accepted by each of them from Butcher, they ought to be placed upon the list. It was not necessary to consider whether these were paid-up shares or not; there were cases which shewed that persons who held paid-up shares might be placed upon the list, although it might be contended that they could not be liable for calls—*Ex parte Jones* (3). His Honour thought, looking to the memorandum of association, which prohibited directors from being concerned with, or participating in, the profits of any contract entered into on behalf of the company, that there could be no doubt that this was a corrupt agreement with Butcher;

(3) 27 Law J. Rep. (N.S.) Chanc. 666.

WOOD, V.C. } THE BEDFORD AND CAM-
 Nov. 7, 8; } BRIDGE RAILWAY COMPANY
 Dec. 5. } v. STANLEY.

Railway Company — Specific Performance—Contract with Promoters—Mutuality.

An agreement, by a landowner, with the promoters of a railway company, that in the event of their obtaining an act of parliament he will sell them such land as they require at a fixed rate, is binding upon him, although the company has no existence at the time of the contract; and it is no objection on the ground of want of mutuality that the company are not bound to take the land.

If, however, the company exercise their compulsory powers, and take proceedings under the sections in the Lands Clauses Consolidation Act relating to the purchase of lands otherwise than by agreement, they cannot afterwards enforce the agreement.

This bill was filed, by the Bedford and Cambridge Railway Company, and two of the promoters of the company, for specific performance of an agreement entered into by a landowner with the agent of the promoters before the formation of the company, by which he agreed that in the event of the company obtaining an act of parliament, he would sell them such land as might be required at the rate of thirty years' purchase upon the annual rental.

The bill stated that in the year 1858 William Henry Whitbread and William Ekin associated themselves together for the purpose of applying to parliament for an act incorporating the Bedford, Potton and Cambridge Railway Company, the proposed line of which would pass over certain lands

for they, being by their position trustees for the company, had taken upon themselves to receive back these shares from him. In respect of those shares, then, they must be included as contributories. Lastly, as to the fees; there was no authority in the articles of association to allow any fees to directors. They had, therefore, no right to take any shares as the equivalent of fees, and as they had chosen to do so, they must be made liable for them, and made liable for them as unpaid shares. His conclusion, therefore, was this: that each of the present appellants who had signed the memorandum would be entered on the list as a contributory for 121 shares, with so many more as each of them had accepted on account of his fees as a director.

in the parish of Long Stow, in Cambridge-shire, of which the defendant Sidney Stanley was the owner in fee; and the defendant and other landowners, being desirous of having the railway made, entered into and signed the following agreement with Mr. Trethewy as the agent for the proposed company:

"We, the undersigned, being desirous to obtain railway communication between Bedford and Cambridge, hereby agree with Henry Trethewy, as agent for the Bedford and Cambridge Railway Company, that in the event of an act being passed in the sessions of 1859 or of 1860 to enable the making of a railway from Bedford to Cambridge, we will sell, each one respectively, such land as may be required from us for its construction, at the rate of thirty years' purchase upon the annual rental, including all compensation of every kind, excepting tenants' compensation. We further agree to adjust the accommodation works necessary for our estates on the most moderate scale, in order in every way possible to assist the promoters of the undertaking in carrying it into effect."

In consideration, and on the faith of this undertaking, the plaintiffs Whitbread and Ekin incurred considerable expense in preparing parliamentary plans, &c., and they introduced a bill into parliament in the session of 1859; but it was strongly opposed by the Eastern Counties Railway Company, and rejected. In the session of 1860, however, the application to parliament was renewed; but, in order to meet the objections that had been made to the line of railway on the previous application, the course of parts of the proposed line, and, amongst others, of that part which passed through the defendants' lands, was slightly altered. The defendant was served with the usual notice of the proposed alteration, and he assented thereto, and executed the subscription contract on the renewed application, and ultimately the bill received the royal assent on the 6th of August 1860. The subscription contract recited, amongst other things, that the then proposed application to parliament was, in effect, a renewal of the former application for the Bedford, Potton and Cambridge Railway.

On the 2nd of May 1861 the company, in pursuance of the 18th section of the

Lands Clauses Act, caused the defendant to be served with a notice, dated the 30th of April, of their intention to purchase and take for the purposes of their act certain pieces of land therein described, and which by the act they were empowered to take, demanding from him a statement in writing of the particulars of his estate and interest therein, and of his claims in respect thereof; and on the 4th of June following they caused him to be served with another notice, that having adopted the agreement entered into by him with Mr. Trethewy they were willing to purchase the lands described in the former notice on the terms of that agreement.

The defendant, however, declined to treat on the footing of this agreement, and caused the company to be served with a counter-notice, referring to the notice of the 30th of April, and appointing an arbitrator to treat on his behalf in the manner pointed out by the Lands Clauses Consolidation Act, 1845.

The bill was thereupon filed on the 20th of July by the company, joining Messrs. Whitbread and Ekin as co-plaintiffs, for specific performance of the agreement of October 1858, and to restrain the defendant from proceeding under his notice or taking any other proceedings under the Lands Clauses Act for determining the amount of purchase-money and compensation.

On the 22nd of July the company caused the defendant to be served with a notice that, subject to their right to insist on specific performance of their agreement, they had appointed an arbitrator under the 23rd section of the Lands Clauses Act; and in September following, having caused the land to be valued, and delivered a bond pursuant to the 85th section of the act, they entered into and took possession of the lands described in the notice of the 30th of April.

The defendant, by his answer, insisted upon the variation in the line as having rendered the agreement inapplicable. He also objected that it was void for want of mutuality, and that the giving the notice of the 30th of April, and the joining in the arbitration, and in particular the giving of the bond amounted to an abandonment of the agreement, if it were not otherwise void.

Mr. Rolt, Sir Hugh Cairns and Mr. Speed, for the plaintiffs.

Mr. W. M. James and Mr. Bovill, for the defendant, relied upon the grounds of defence stated in the answer. They also contended that no contract could be entered into with a company which was not in existence at the time; and that if any agreement had been entered into it was entirely superseded by the act; and the provisions of the agreement not having been inserted in the act, it must be considered as waived.

Mr. Rolt replied.

The following authorities were cited:

Hawkes v. the Eastern Counties Railway Company, 1 De Gex, M. & G. 737; s. c. 5 H.L. Cas. 331; 20 Law J. Rep. (N.S.) Chanc. 243; 22 Ibid. 77; 24 Ibid. 601.

The Caledonian and Dumbartonshire Railway Company v. the Magistrates of Helensburgh, 2 Macq. H.L. Cas. 391.

Stuart v. the London and North-Western Railway Company, 1 De Gex, M. & G. 721; s. c. 21 Law J. Rep. (N.S.) Chanc. 450.

Webb v. the Direct London and Portsmouth Railway Company, 9 Hare, 129; s. c. 1 De Gex, M. & G. 521; 20 Law J. Rep. (N.S.) Chanc. 566; 21 Ibid. 337.

Chesterman v. Mann, 9 Hare, 206; s. c. 22 Law J. Rep. (N.S.) Chanc. 151.

Edwards v. the Grand Junction Railway Company, 1 Myl. & Cr. 650; s. c. 1 Rail. Cas. 173; 6 Law J. Rep. (N.S.) Chanc. 47.

Lord Petre v. the Eastern Counties Railway Company, 1 Rail. Cas. 462.

Stone v. the Commercial Railway Company, 9 Sim. 621.

The King v. the Hungerford Market Company, 4 B. & Ad. 327.

WOOD, V.C. (Dec. 5).—In this case the bill, which is filed, by the Bedford and Cambridge Railway Company and two private gentlemen, against Mr. Sidney Stanley, seeks the specific performance of an agreement averred in the bill to have been made between Mr. Stanley and the agent for the promoters of the undertaking before the formation of the company, by which Mr. Stanley is alleged to have agreed to

sell for the purposes of the railway such land as might be wanted by the company for the purposes of their act, as soon as that act should be passed, at a fixed price of thirty years' rental of the land.

The case was extremely well argued, on the part of the defendant, by Mr. James, who suggested every possible difficulty that could be urged, and I heard a remarkably able reply to those difficulties.

The first class of difficulties raised by Mr. James was of this description. He said, first, that Trethewy is described as agent for the Bedford and Cambridge Railway Company, which was not in existence at the time, and in reality, therefore, there was nobody with whom any contract could be entered into by the parties signing that agreement; that the plaintiffs had felt that difficulty, and had therefore joined Mr. Whitbread and Mr. Ekin, as being two of the promoters of the intended company; and yet Trethewy is not described as acting on their behalf in the form of agreement. It was further urged, that even if it were possible to consider it an agreement with the future body when it should be incorporated, such agreement, according to the recent *dicta* in the House of Lords on the subject, could not be considered as binding on the railway company when it should be incorporated. It was further said, that this agreement would be void in respect of there being no mutuality in it. It was further said, that there was no consideration for the agreement passing from any persons who might be considered the other parties to the contract with Stanley. It was further said, that it was too vague in its terms, and especially vague in the form of construction contended for by the plaintiffs, namely, that even when a change in the intended line had taken place, this agreement was to extend to the next session; and it was said, finally, that it was intended evidently as a mere guide to the assessment of compensation, for the assistance of any arbitrator or jury who should be called in to award compensation. That was one large sweeping class of objections which were urged; and I think those objections were satisfactorily answered. In the first place, as regards its not being an agreement on behalf of any existing body, it is averred in the bill, and indeed admitted by the

answer, that there was an intended company, (which was intended at one time to take a name a little different, but always consisting of the same persons,) called the Bedford, Potton and Cambridge Railway Company, of which Mr. Whitbread and Mr. Ekin were two of the promoters; that they had signed the subscription contract, and had agreed to do that which is a very serious thing to do, namely, to take upon themselves the expense of procuring the passing of a bill through parliament, with all the risk and consequential expense of failure. No doubt, when an act passes, there is always a clause providing for the payment of all the expenses incurred in obtaining the act; but anybody who undertakes the passing of an act through parliament at his own expense incurs a very great and serious responsibility in case of the bill being rejected. It appears to me, therefore, that when we speak of the agent for the Bedford and Cambridge Railway Company, everybody knowing what was the state of circumstances, he must be taken to be the agent for that body of men who had associated themselves together for the purpose of obtaining the sanction of the legislature to their undertaking, and that the agreement is made by Stanley with that body of men, through Trethewy, their agent. Neither do I think the matter at all falls within the observations of the Lord Chancellor, in *The Caledonian and Dumbartonshire Railway Company v. the Magistrates of Helensburgh*, tending in some degree to shake the judgment of Lord Cottenham in *Edwards v. the Grand Junction Railway Company* and similar cases, in which he held that a company, taking advantage of an agreement entered into by the promoters before the passing of the act, would itself be bound by the agreement. The case of *Hawkes v. the Eastern Counties Railway Company* really places the thing in its true light. If an agreement of this description is entered into before the passing of the act, which it would be competent to the directors of the company as soon as the act should be passed to enter into, it is known of necessity, from the character of acts of parliament governing these matters, that those powers will be included in the act when it is passed; and if the contract be beneficial and *intra vires* of

the directors when the act shall be passed, there can be no conceivable reason, as it appears to me, for saying that parties are not bound by an arrangement of that kind, entered into by the promoters of an intended company, for the benefit of that company, as soon as the act is obtained. I compared it, and I think it is a just comparison, with the case, which very frequently occurred before a Judge at chambers, of an agreement entered into by a person desirous of purchasing or taking a lease of an infant's land, or the like, before that very beneficial act of Lord Cranworth's was passed, enabling the Court to effect leases and sales of settled estates. A person went to the trustees of these settled estates, and said, "If you will obtain an act of parliament at your expense, enabling you to sell to me, I agree to give you such a price." I cannot have any doubt that as soon as that act is passed, the person entering into that agreement could not possibly recede from it, or raise any contest about its being made on behalf of non-existing persons, or in any manner that was not lawful; but that the agreement would have to be performed. I think also that the question of consideration is disposed of in the same way. The consideration is a very important and valuable consideration, passing from the promoters of the undertaking to the defendant, viz. that they incur considerable risk and expense in the hope of benefitting themselves and him by obtaining this act. It is a consideration of very great value to him, and of which he has had the benefit; and the company, in fact, upon the passing of the bill, adopt the agreement in that sense that they pay the consideration by the mere fact of obtaining the act.

Mr. James, amongst his numerous objections, also likened the case to an agreement followed by a deed between the parties, and said that when the deed is executed the agreement is at an end, and if you do not find the terms of the agreement embodied in the deed you must assume that the agreement is waived. I do not think that that has any application to a case of this description. It is not necessary, nor is it customary, to insert these special agreements which are made with landowners in acts of parliament. The question was very much discussed at one time whether it was not

a fraud upon parliament not to do so. From the case of *The Vauxhall Bridge Company v. Spencer* (1) to that of *Lord Petre v. the Eastern Counties Railway Company*, it is clear that it never has been the custom to insert these special agreements in the act; and it appears to me that where an agreement is wholly and entirely for the benefit of the company, and one which clearly the directors might enter into immediately after the passing of the act, an objection of that kind cannot prevail any more than the other objections which were made as to the want of consideration and as to the want of contracting parties. Then it is said that the agreement is unilateral, and could not have been enforced by the defendant. Of course that is a fallacy which is answered at once, by considering what is the character of every agreement of this kind. It is an agreement by which the person who undertakes to enter into certain expenditure in consideration of the other party entering into the agreement, buys for himself an option of purchasing at a certain price. Of course, in one sense, until you exercise the option, it is unilateral, because it does not follow that you will exercise the option; but it is not unilateral in this sense, that you have paid your money and bought the option, which is what you wanted to buy. So far from being unilateral, it is an executed agreement, of which the consideration has been paid, and the option only remains to be exercised by the person who has purchased that right for himself. As I said before, although those objections were very fully and ably argued before me, it does not appear to me that any of them ought to prevail.

Then comes the objection that the agreement is too vague. It was urged that it was vague, in this sense more especially, as illustrated by the claim of the plaintiff, namely, that under an act to be applied for in the second year—for this agreement applies to two years—they were entitled to vary the line through the land of the defendant, or of any other persons parties to this agreement, so as to alter the position of the parties. Now the agreement obviously does not point to any special piece of land

(1) Jac. 64.

that is to be taken. It points to two years as the time within which the work is to be completed. Of course, it is well known to this gentleman, as to everybody dealing with matters of this description, that if the act of parliament is not passed in the first year, that may be for a variety of reasons, and one of the reasons may be that opposition is made by some particular landowner or tenant, and it is desirable to avoid him, or for other reasons; a change in the line may be desirable, and therefore they avoid tying down the company to any given line, and simply say, We will give you such part of our land as you may require for the purposes of your railway in consideration of your getting the railway. It might be something indeed if it did not pass through the land at all, because you then might possibly say, "I expected more accommodation than the railway provides." Here the railway does pass through the defendant's land, but, he says, in a different and more objectionable manner than before. It is said, on the part of the defendant, According to your argument you might have carried your railway straight through my house under any act of parliament to be passed in the second year; but the answer to such an objection as that is, at once, that it would raise a special case either for you to oppose the railway in parliament if you supposed yourself tied down by such an agreement, or to give notice that you would not be bound by such a contract, on any special hardship being shewn by something not provided for. Undoubtedly here it would be a very strong argument against specific performance, and it would be a strong argument before the legislature for exempting you from the operation of such an agreement, if you had brought forward such a case. Such a circumstance might occur, but I do not think that is any reason for saying that the agreement cannot be performed where the circumstances have not occurred. But what has occurred is this: the railway passes somewhat nearer to the defendant's barn than was intended before, and one of his witnesses thinks there is danger of its being burnt; otherwise there is nothing whatever in the least altering its character. It passes through agricultural land now, and it passed through agricultural land before.

The defendant says, in point of fact, he did object, when the bill failed in the first year, to be bound by the arrangement, and that he stated his objection to the persons who came to ask his name to the subscription contract in the second year; but this is not proved: and if it had been proved that the objection was made to either of those persons, it does not appear to me that they would have been the proper persons to bring home knowledge of the objection to the company, and the defendant could not be excused from performing the agreement after allowing representations to be made to parliament, as it seems to me they were in this case, and allowing the expenditure to go on, which is the main point, without letting any one who was incurring that expenditure know that he would not be bound by the agreement. All these points weigh but little with me.

The last part of the case is the most difficult, and I have given it a great deal of anxious consideration. It is this: if this agreement is to be treated as a valid agreement, the mode of proceeding would be to apply to the defendant to fulfil it, and, if he declined, to apply to the Court to compel him; but the service of the notice which was served has occasioned me a very great deal of doubt and hesitation in coming to a conclusion on what ought to be done in the present case. The notice to treat is served after this agreement, and is clearly a process of compulsory taking otherwise than by agreement. I do not rely on the mere heading of the marginal note in the Lands Clauses Act, but there is a set of clauses down to the 15th section which refer to taking land by agreement; and then there is another set of clauses as to taking land otherwise than by agreement: and under this latter set of clauses the compulsory process originates by serving just such a notice as was served here, asking the defendant what he claimed for compensation and for the value of his land. I think the service of that notice was a mistake. I have a strong impression that the plaintiffs did not intend any such operation as the law would give to that instrument. Of course, when that notice is served all the compulsory process is immediately set in action, and the defendant is entitled to say, one of the first parts

of your prayer is to prevent my proceeding by arbitration, whereas that is the mere legislative sequence of the course which you have adopted. You have served your notice, and the sequence of that notice is arbitration or a jury; I was bound to send in my claim within three weeks, and if I had not sent in my claim before three weeks had expired, you had a right to summon a jury; and it is not until a month after the original notice was served that the company say, we hold you bound by your agreement. Possibly, if that stood alone, it might be got over, though I think it is difficult; but I have considered it in various points of view, and it appears to me that there is something more than mere accident and mere error in this. It is said that it was necessary to give a notice for the purpose of defining the land; but clearly not such a notice as that. A notice defining the land would simply have stated what land was wanted, and if that was not complied with, a bill should have been filed; but on this notice being served the defendant is entitled to say he is under a compulsory course of proceeding by this notice; and so he is.

Another thing is this. If there happened to be a bad title, it would be a great advantage to the company to give this notice rather than proceed by agreement; because I take it to be quite clear that, although the defendant could, as owner in fee, make such a contract as he did enter into, he could not if he had been tenant for life have made that same agreement anterior to the act on behalf of those interested in remainder. I do not think that would have been possible for him to do; because it is one thing to say that the company may derive a benefit on behalf of its shareholders anterior to the act, and that a contract may be made by a person who is a trustee, with them, as soon as the act is passed; and another thing to say that anterior to the passing of the act any tenant for life with a limited interest, or with a deficient title or the like, could make a contract which should bind those in remainder. If, therefore, the company found this gentleman's title failed when they came to discuss the question of the agreement, then, of course, the notice would have been absolutely necessary. They might make a new agreement with him as tenant

for life, but they could not rely on the agreement which had been made before the passing of the act. They must either make a new agreement or serve a notice, and serving the notice would render it unnecessary to take any such proceeding. At the same time I felt so strongly, and still feel strongly, that that was not the intention of the company in serving the notice, that I was anxious in every way to get over this difficulty.

But then comes the giving of the bond. I quite agree that the bond saves all rights; and if it had rested merely on the giving of the bond, I should not hold the bond binding at all. But what the company do is this: they avail themselves of the act, and take possession by virtue of that bond; and certainly, upon reading the 85th section, I agree with Mr. James that that mode of proceeding does not apply to the case of agreement. The mode of procedure by bond is pointed out in case the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to — and here the promoters say the agreement has been come to — or an award made or verdict given, &c., thus clearly referring to the two branches of the act, and the two modes of carrying out the second branch.

Now, the act really has no application to a case in which an agreement has actually been made, and the parties are intending to enforce their agreement. It appeared to me from the first that their course would have been to have stated how much land they wanted, and to have insisted on their right, and filed this bill at once in case of refusal, instead of giving this notice to treat; if they had done that, it is clear to my mind that, acting on the agreement and acting on the bill filed, they would not be entitled to enter under the 85th section in that summary manner. Their course would have been to apply to the Court to do what was right between the parties in the event of any difficulty occurring. They might have come to the Court and said, "there is a gentleman who has entered into an agreement; he has delayed us in having the land valued; and we want to know the rental and the proportionate value per acre that we are to pay for this land at thirty years' purchase; and therefore let us

into possession on such terms as the Court may think fit, or on the payment of such money into court as the Court may direct." I think it was not competent for them to proceed as they have done here, unfortunately, in two ways. They have proceeded by filing their bill, and they have proceeded under the compulsory powers of the act by giving this notice, which I have been so anxious to get over. They not only serve the notice, but they follow it up by acting under the 85th section, and treating this as land not taken by agreement, because they want to take it before the agreement is come to, and before the award is made or the verdict given. According to their view, an award or verdict could never have been given. The agreement being come to, it is the only thing that could be applied by them in reference to this subject-matter. I felt very great regret in the case, because I felt that the giving of that notice was a slip. I think it is very probable that it was overlooked at the time it was given; but I think the other slip has been more deliberate; and you cannot avail yourself of that section of the act, which is only applicable (as it seems to me) in the case of a party declining a jury, or delay taking place in the award being made, and at the same time say, we protest against being bound in consequence of that act which we have done, consisting, not merely in giving the bond, but actually in taking possession and ousting the party from his land, not on a price fixed by this Court, but on a security which is ascertained by two magistrates in the mode pointed out by this act on an *ex parte* valuation by the surveyor.

Under these circumstances, after a great deal of consideration of the case, I have felt that it is not competent to me now to enforce that agreement, which otherwise I think a valid one, and I am obliged to dismiss the bill; but regard being had to the defence which has been made, on the part of this gentleman, of the waiver of this agreement, giving no notice to those who were principally concerned, and who were spending their money on the faith of it, and taking an objection, except for which objection the case might just as well have been argued on demurrer as on the hearing, I think it is not a case in which I ought to

give costs. I think, therefore, I must dismiss the bill, without costs.

LORDS JUSTICES.
Nov. 3, 6.

Ex parte COTTERELL, in
re THE NATIONAL ASSUR-
ANCE AND INVESTMENT
ASSOCIATION (THE BANK
OF DEPOSIT).

*Joint-Stock Company—Winding up—
Contributory—Director's Qualification—
Creditors' Representative—Costs.*

A company was in process of being wound up. By the deed of settlement of the company it was provided that no person should be or continue a director unless he was the holder of a particular amount of stock. The company was managed by a board of directors at the chief office in London, and by boards in various towns, in the latter of which local agents or deputies, called provincial directors, had conferred upon them limited authority. C. was one of these provincial directors, but held no shares in the company, and, on a question of his liability to be placed upon the list of contributories,—Held, that the clause requiring the qualification for directors did not apply to those who held the office of provincial directors, and that C. was not liable to be placed on the list of contributories.

The creditors' representative is not as of right entitled to appear separately on such appeal; and it appearing in this case that he had no interest distinct from the official manager, the greater part of his costs were disallowed against the estate.

The above-mentioned company was in course of being wound up in the chambers of the Master of the Rolls, and in the course of these proceedings the name of Mr. Cotterell, a provincial director at Bath, had been included in the list of contributories; but his Honour had directed it to be removed. The official manager thereupon appealed, and the creditors' representative, though he did not join in the appeal, appeared, though the appeal itself was sanctioned by the Master of the Rolls.

For the particulars relating to the Bank of Deposit, it will be sufficient to refer to the cases of *Mrs. Davies* and of *The Marquis of Abercorn*, reported at length 31 *Lanc*

Journal Reports (N.S.) Chanc. 828, and to state that the chief office of the association was established in London, but that the country business was managed at branch offices in various cities in England, which were placed under the superintendence of "provincial directors." One of these offices was in Bath, of which Mr. Cotterell was the provincial director. The deed of settlement of the company, by its 45th clause, provided "that until the holding of the ordinary general meeting in the year 1857, no person shall be or continue a director of the association unless he shall hold stock to the amount of 100*l.* at least, or shall hold a mutual policy or mutual policies to the amount of 999*l.*" In the case of the Marquis of Abercorn, who was a London director who had never qualified by the acceptance of stock or otherwise, the Master of the Rolls held that his Lordship must be taken to have had notice of the qualification required by the deed; and that by accepting the office of director he had accepted the amount of stock necessary for its qualification, and placed his name on the list of contributories. As before stated, the Marquis appealed, and this decision was reversed.

When the case of Mr. Cotterell was originally before the Master of the Rolls, his Honour considered that the case was similar to that of the Marquis, though Mr. Cotterell was not a London, but a provincial director, and that his name must also be placed upon the list.

After the appeal of the Marquis of Abercorn, the Master of the Rolls, considering that the case of the Marquis governed that of Mr. Cotterell, ordered the name of that gentleman to be removed. From the latter decision the official manager, at the instance of the creditors' representative, and with the sanction of the Master of the Rolls, appealed.

Mr. Selwyn and *Mr. Roxburgh*, for the official manager, supported the appeal.

Mr. Baggallay and *Mr. Cracknall*, for the creditors' representative, appeared to support; but

The Solicitor General objected that, in such a case as this, the creditors' representative was not entitled to be heard, he having no interest separate from that of the official manager.

[LORD JUSTICE KNIGHT BRUCE (after conferring with LORD JUSTICE TURNER) said, that certainly the creditors' representative, as a general rule, was not entitled to be heard, but in this case it was desirable; but their Lordships begged that the case might not be drawn into a precedent. It was, indeed, desirable that expenses should not be needlessly increased; but in the present instance their Lordships considered that the creditors' representative might be heard, but it must be expressly without prejudice to any question of the general right.]

The Solicitor General.—If that be your Lordships' view, I withdraw my objection.

Mr. Baggallay and *Mr. Cracknall* then, for the creditors' representative, argued that the official manager represented the shareholders only, and not the creditors of the company, and stated that no creditors' representative had been appointed until after the appeal in *The Marquis of Abercorn's case* had been decided. The effect of that appointment was, that all proceedings by creditors themselves were restrained, and therefore it was important that their representative should be heard.

The Solicitor General and *Mr. Hobhouse*, for Mr. Cotterell, argued that that gentleman was not a director within the meaning of the act of parliament referred to by the appellant; that he was an officer appointed by those who were directors and receives salary or pay, and was removable by his employers; and that as a provincial director (which position alone he held) he required no qualification whatever. It was plain, therefore, that Mr. Cotterell was not a contributory, and ought not to be placed upon the list.

Mr. Roxburgh was heard in reply.

LORD JUSTICE KNIGHT BRUCE (Nov. 6).—It is not material or necessary for any purpose in the present case for the Court to express any opinion upon what has been done in the case of *Lord Abercorn*, and I shall therefore wholly abstain from doing so. It appears to me plain, from the evidence in the present case, that this gentleman, Mr. Cotterell, is not shewn to be a contributory, or to have been in such a position that he could properly be placed upon the list, unless he has so acted as to render it

impossible for him justly to deny that he has been one of the shareholders of the company. The argument for including his name was this: Though he was not a shareholder, though he had never intended to become a shareholder, he held a situation, and acted in a situation, in which he could not have acted with propriety or legality unless he was the holder of stock to the amount of 100*l.* at least; therefore, that it was not competent to him to deny that he was a shareholder to that amount, and that, consequently, he must be placed on the list in that character. The validity of that argument will, of course, depend upon the deed of settlement; and that deed provides that directors should have that particular qualification at the least, and that no one should be or continue a director without it. Now, what is the meaning of the word "director" as used there? Looking at the whole of the deed, I think that it clearly and plainly means the London board of directors, who constitute the managing body of the association. It is quite true that the gentlemen who managed the local affairs of the company at Bath and elsewhere in the country are allowed to call themselves, and do, in fact, call themselves, "provincial directors." But that is nothing more than a name. To call them so has not the effect of making them anything more than local agents, or local deputies, with certain limited powers, who act under the orders of the London board, and are removable by the London board at pleasure. I am of opinion that whatever distinctive title they may have been called by, the provisions of the deed do not render any qualification necessary for such a position. The circumstance that they acted in discharge of the duties of that position, such as it was, and allowed themselves to be called, and were called, provincial directors, does not embody any representation that they are shareholders, or that they hold any qualification. It appears to me, therefore, that there is an absence of any case against Mr. Cotterell; and whether the grounds on which the Master of the Rolls has proceeded to relieve him are precisely those upon which this Court is proceeding, or not, I think that there is no reasonable ground of appeal against his Honour's decision. As his Honour has, from what-

ever consideration, refused to place Mr. Cotterell upon the list, that refusal ought not to be disturbed, and the appeal must be dismissed with costs.

LORD JUSTICE TURNER.—I concur in the conclusion of my learned Brother. I also am of opinion that there is a distinction between the directors generally and the provincial directors; and if so, there is no liability on the part of Mr. Cotterell, who is simply one of the provincial directors. But assuming that there was a liability on his part, that would be a liability arising from a totally different source—it would arise from his having made representations by which persons were induced to trust their money to this association. That, however, will not create a liability for the debts of the company, within the meaning of the term "contributory" in the act of parliament; it would be an independent liability arising from a distinct representation to individuals, and would have no relation to the debts of the company. Thus, if any person induced another to trust the association or an individual, he might well render himself liable to the person whom he had thus induced; but he would not therefore render himself liable for all the debts of that association or individual. Neither upon the act of parliament, nor on the ground of Mr. Cotterell's representations, nor on the construction of the deed, can I think there is any reason for this appeal, and it must therefore be dismissed with costs.

Mr. Baggallay then asked for the costs out of the estate, of the creditors' representative, and cited—

In re the Mexican and South American Company, ex parte Aston, 4 De Gex & Jo. 320; s.c. 26 Beav. 172, 182; 28 Law J. Rep. (N.S.) Chanc. 631.

Ex parte Hyam, in re the Mexican and South American Company, 1 De Gex, F. & Jo. 75; s.c. 29 Law J. Rep. (N.S.) Chanc. 243.

Ex parte Budd, in re the Electric Telegraph Company of Ireland, 31 Law J. Rep. (N.S.) Chanc. 4; and

In re the Saxon Life Assurance Company, 2 J. & H. 408.

The costs of the creditors' representative had been paid out of the estate.

LORD JUSTICE TURNER. — There may well be cases in which the interests of the shareholders and of the creditors may be opposed or at variance, and then it may be proper that the official manager and the creditors' representative should appear separately; but there seems no such necessity here. I see no reason why the creditors' representative has not joined in the present appeal.

LORD JUSTICE KNIGHT BRUCE. — My own inclination is to direct that the official manager shall pay to Mr. Cotterell his costs of the appeal, and shall be allowed to reimburse himself out of the estate, and to retain thereout his own costs also. But to the creditors' representative I think that only a small definite sum could be allowed out of the estate, as I see no reason why he should not have concurred in the official manager's appeal. I am most unwilling to increase unnecessarily the costs of winding up, which must of course be borne by the contributories, and I suggest that five guineas should be allowed from the estate towards the costs of the creditors' representative.

LORD JUSTICE TURNER concurred, and it was so ordered.

Wood, V.C. }
Nov. 11. } **THORNTON v. M'KEWAN.**

Guarantie—Advances beyond Amount guaranteed—Proof of Debt in Creditors' Suit—Right of Guarantor against Dividend after compulsory Payment of Amount guaranteed—Equitable Right not lost by not pleading a Set-off to Action.

*A surety gave to a creditor a guarantie to the extent of 5,000*l.*, against losses that might arise from advances to be made to his principal. Advances were made to the principal to an amount considerably exceeding 5,000*l.*, and after his death the creditor proved in an administration suit for the whole debt, and received dividends thereon. He afterwards recovered the 5,000*l.* in an action against the surety. Upon a bill filed by the surety,—Held, that he was entitled to be paid such a proportion of the past and future dividends as was received in respect of the 5,000*l.*, and that he had not lost*

his equity by not pleading a set-off to the action.

In 1856 the plaintiff was in treaty with Mr. Edmund Smith, a contractor for public works, for a partnership, and having ascertained from the defendant, who was the manager and one of the registered public officers of the London and County Joint-Stock Banking Company, that the amount of his debt to them was 18,000*l.*, he, in anticipation of the partnership, lent to Smith 4,000*l.*, and shortly afterwards signed and gave to the defendant on behalf of the bank the following letter :

“London, July 23, 1856.

“To the London and County Bank,—In consideration of your advancing to Mr. Edmund Smith the sum of 5,000*l.* from time to time as he may require, I hereby guarantee and hold you harmless from any loss that may arise to you in consequence of such advances, and this shall be to you a continuing guarantie to the extent of 5,000*l.* James Thornton.”

Mr. Smith died in October 1857, without any partnership having been formed between himself and the plaintiff, and in the same month a creditors' suit (*Gray v. Smith*) was instituted against his executors, in which the bank carried in a claim, and were admitted to prove for 50,645*l.* 0*s.* 5*d.* balance due to them, including 5,000*l.* advanced upon the plaintiff's guarantie, upon the whole of which sum they received dividends amounting to 8*s.* 9*d.* in the pound.

In June 1861 the defendant, as the public officer of the bank, commenced an action against the plaintiff on his guarantie, and recovered judgment for 5,000*l.* and costs, which he paid in ignorance, as he alleged, of any dividend having been received. On the 2nd of December 1861, the plaintiff's solicitor wrote to the solicitor of the bank, claiming the dividends paid and to be paid in respect of this sum, and on the next day received the following answer : “Dear Sir, —Your client guaranteed the London and County Bank against loss in respect of advances to Edmund Smith to the extent of 5,000*l.* After giving credit for the dividends received upon their debt, the bank are still creditors for much more than 5,000*l.* We are at a loss to apprehend the ground

of your client's claim, and will appear for the bank to any process which you may think fit to issue."

The plaintiff then filed his bill against the defendant, as the registered public officer of the banking company for a declaration that he was entitled to be paid by them such a proportion of the dividends received and to be received by them, in respect of their proof in the suit of *Gray v. Smith* as was or should be received by them in respect of so much of the debt proved by them against the estate of Smith as was guaranteed by the plaintiff, with interest, and for consequential relief.

The defendant put in a voluntary answer, submitting that the guarantie was a guarantie against any loss which the company might incur in respect of Smith's account, and that the bill was filed too late.

Mr. Giffard and *Mr. Bagshawe*, for the plaintiff, cited

Ex parte Rushforth, 10 Ves. 409.

Paley v. Field, 12 Ibid. 435.

Bardwell v. Lydall, 7 Bing. 489; s. c. 5 M. & P. 327; 9 Law J. Rep. C.P. 148.

Raikes v. Todd, 8 Ad. & E. 846; s. c. 1 P. & D. 138; 8 Law J. Rep. (N.S.) Q.B. 35.

Ex parte Holmes, in re Garner, Mont. & Ch. 301; s. c. 9 Law J. Rep. (N.S.) Chanc. 33.

Ex parte Hope, in re Fernandes, 3 M. D. & De Gex, 720.

Davies v. Stainbank, 6 De Gex, M. & G. 679.

Sir Hugh Cairns and *Mr. H. Stevens*, for the defendant, referred to *Harrison v. Nettleship* (1), and contended that the plaintiff ought to have pleaded a set-off to the action at law, when he knew or ought to have known that dividends were being paid out of the estate and that, not having made use of this defence at law, he could not now come into equity to assert his claim.

Wood, V.C., without hearing a reply, said it was clear that the guarantie was a guarantie for a part of the debt and a part only, and therefore if the persons holding the guarantie got their 5,000*l.* from the surety, and afterwards proved against the

(1) 2 Myl. & K. 423; s. c. 3 Law J. Rep. (N.S.) Chanc. 26.

estate of the principal debtor for the whole debt, and took a dividend on the whole debt, including that very 5,000*l.*, the surety was entitled to the dividend on that sum, —*Bardwell v. Lydall*; and if he had this right, he was not precluded from asserting it in equity because he had not insisted upon it by pleading a set-off at law—*Davies v. Stainbank*. *Harrison v. Nettleship* only shewed that, after a verdict at law, equity had no jurisdiction in cases of account, unless some special grounds for its interference could be shewn, and in this case such special grounds were shewn. There was no doubt it was the common right of the surety to stand in the place of the principal creditor, and to use all the means that the principal creditor could avail himself of for the recovery of his debt. With regard to the future dividends he had clearly a right to file his bill, and there would be a declaration that the plaintiff was entitled to stand in the place of the bank as regarded the proof made by them against the estate of the deceased to the extent of 5,000*l.*, and that the bank ought to account for and pay the dividends received by them on their proof to that amount, with interest at 4*l.* per cent. from the time of the filing of the bill.

STUART, V.C. } *Re GOODWIN'S SETTLED*
Nov. 17. } *ESTATES.*

Vendor and Purchaser—Sale by Court
—*Sub-sale at Profit before Confirmation of*
—*Practice.*

The Court will not grant an application by a sub-purchaser to be substituted as the purchaser of an estate sold by public auction under an order of the Court, where neither the original purchaser nor the vendor consents to the application.

On the 15th of August 1862 Mr. C. W. Hoffmeister was declared the purchaser, for the sum of 3,095*l.*, of certain property situate at West Cowes, Isle of Wight, which had been put up for sale by public auction on that day, pursuant to an order of the Court, made under the act for the leases and sales of settled estates.

On the 25th of the same month, and before the sale to Hoffmeister was confirmed by the chief clerk, Hoffmeister entered into

an agreement with Capt. Legard to sell to him the property, which he had purchased, at an advance of 500*l*. Thus Capt. Legard was to purchase the property sold to Hoffmeister, for 3,595*l*.

Upon consulting their professional advisers, Mr. Hoffmeister and Capt. Legard ascertained that if Capt. Legard were to be substituted as purchaser in the place of Mr. Hoffmeister, the additional 500*l*. must be paid into court for the benefit of the vendors of the estate, inasmuch as the agreement between Mr. Hoffmeister and Capt. Legard had been made before the sale was confirmed.

Under these circumstances, Mr. Hoffmeister was willing to give the additional 500*l*., and to be deemed the purchaser. Capt. Legard, however, insisted that as according to the rule of the Court he was, as between himself and the vendors, bound by his sub-contract, he ought also to have the benefit of it, and to be declared the purchaser at the advanced price.

This was an adjourned summons on the part of Capt. Legard, that he might be substituted as the purchaser in the place of Mr. Hoffmeister.

Mr. Bacon and *Mr. Robson*, for Capt. Legard, contended that the sub-purchaser was absolutely in the position of the original purchaser. In this case the sub-contract had been entered into in ignorance of the rule of the Court. They admitted that the vendors could claim the advance of price, but urged that they were entitled to nothing more; and that as between Mr. Hoffmeister and Capt. Legard, the former was bound by his agreement.

They referred to—

Rigby v. Macnamara, 6 Ves. 515.

Hodder v. Ruffin, Tam. 341.

Holroyd v. Wyatt, 2 Coll. 327.

2 *Daniell's Practice*, 3rd edit. 937.

Sugden's Vend. & Pur. 13th edit. 78.

Mr. Malins and *Mr. Casson*, for Mr. Hoffmeister, contended that as the agreement was made in ignorance of the rule of the Court, that any advanced price obtained upon a sub-sale made before the sale was confirmed must be paid into court for the benefit of the vendors, he was not bound by the agreement; and that he was entitled to be declared the purchaser at the advanced price.

Mr. Craig and *Mr. J. N. Higgins*, for the vendors, asked for a re-sale, upon the party now applying undertaking to bid the advanced price, and paying the extra costs to which he had put the vendors.

STUART, V.C. said, that no case had been cited in which a sub-purchaser was declared to be entitled, against the desire of the original purchaser and the vendors, to be confirmed absolutely as the purchaser of an estate sold under the order of the Court. With the consent of these parties, no doubt, he might be so treated; but here Mr. Hoffmeister insisted upon remaining purchaser at the advanced price, and the vendors wanted the property to be again put up to sale. Under the circumstances, he considered this last was the proper course, and he would order accordingly, upon Mr. Hoffmeister undertaking to bid the advanced sum. He conceived that he had no jurisdiction upon this application to decide any question as between Mr. Hoffmeister and Capt. Legard; and as both of these gentlemen had entered into their agreement without any desire to act contrary to the rule of the Court, and the estate would be largely benefited by what had occurred, he would make no further order as to costs than to give the trustees their costs, as between solicitor and client, out of the estate.

KINDERSLEY, V.C. } *In re* BIDWELL'S
Dec. 12. } SETTLEMENT.

Power, Exercise of—Election.

By marriage settlement certain property was settled on the husband and wife for life, and afterwards to such children as the husband should by deed or will appoint, and in default of appointment to the children equally at twenty-one or on marriage. There were three children: one died an infant, another attained twenty-one and died before the father, and the third married and survived. The father by his will gave the residue of his estate and effects which he might die possessed of or entitled to, including the stocks, funds and securities which should be in the names of the trustees of his marriage settlement upon the trusts thereof, and which

he directed should be considered as part of his residuary personal estate, to trustees to pay the interest to his wife for life, and then to his daughter:—Held, that it was not the testator's intention to exercise his power of appointment under the settlement, but only to dispose of that moiety of the trust funds which became his own absolutely by the death during his life of the child who had acquired a vested interest.

By the settlement made on the marriage of Thomas Bidwell, dated the 26th of February 1805, a sum of 4,000*l.* stock was settled upon Thomas Bidwell for life, with remainder to his wife for life, remainder to such of the children of the marriage as Thomas Bidwell should by deed or will appoint, and in default of appointment to all the children of the marriage upon their attaining twenty-one, or the daughters being previously married. There were three children of the marriage, namely, Thomas Bidwell, who attained twenty-one and died in the lifetime of his father, unmarried; Sarah Bidwell, who died an infant before the death of her father; and Fanny Bidwell, who married Nathaniel Surtees and was the present petitioner. Thomas Bidwell the settlor, by his will dated in December 1849, after bequeathing various legacies, gave all the residue of his estate and effects which he might die possessed of or entitled to, including the stocks, funds and securities which should be in the names of the trustees of his marriage settlement upon the trusts of such settlement, and which he directed should be considered as part of his residuary personal estate, to W. C. Bidwell and G. F. Francklin, upon trust, after payment of his debts, to convert into money and invest the same in manner therein directed, and to pay the income to his wife for life, and after her death to his daughter Fanny Surtees for life, for her separate use, and after her death to Nathaniel Surtees her husband for life, and after his death to the children of the marriage, with a power of appointment to Fanny Surtees among the children, and in default of appointment to the children equally, with an ultimate gift to the testator's next-of-kin. The testator died in May 1852; and his widow having since died, the trustees had paid into court, under the Trustees' Relief Act, the moiety of the fund

to which Mrs. Surtees was entitled under the settlement in default of appointment.

A petition was now presented by Mrs. Surtees, by her next friend and by Mr. Surtees, asking for payment of the fund to her.

Mr. Toller and Mr. Fisher, for the petitioners, contended that the testator had only disposed of the moiety to which he became entitled upon the death of his son, and that he did not intend to exercise the power of appointment, and consequently that Mrs. Surtees took the moiety to which she was entitled under the settlement in default of appointment, and that she took the second moiety under the terms of the will.

Mr. Shapter and Mr. Berkeley appeared for the grandchildren of the trustees of the will, and

Mr. Bailey, for the trustees of the settlement.

The following cases were cited:

Reid v. Reid, 25 Beav. 469.

Harvey v. Stracey, 1 Drew. 73; s. c. 22 Law J. Rep. (N.S.) Chanc. 23.

Chester v. Chadwick, 13 Sim. 102.

Rooke v. Rooke, 2 Dr. & Sm. 38; s. c. 31 Law J. Rep. (N.S.) Chanc. 636.

KINDERSLEY, V.C.—The question involved in this case is one of intention, and to determine that it is necessary to look through the will to ascertain what the testator's intention was. The consequence of the disposition of the property is not a question now to be disposed of, though in some cases the consequences might be so absurd as to form a sufficient ground for saying that such could not have been the intention of the will. The testator had three children: one died an infant in his lifetime; another attained twenty-one, and then died during his life, having obtained a vested interest in the property, so that the testator became entitled to the moiety which he would have taken; and the third child (Mrs. Surtees) survived the testator, having attained a vested interest in the other moiety, subject to be divested by the exercise of the power by her father; and if he died without executing the power, she would be entitled to that moiety. Upon this will three constructions or intentions are possible. The testator might have intended

to exercise the power and deal with the whole fund, and if he did, subsequent questions would arise with respect to how far he had exercised it; or, secondly, he might have intended to deal with the property, which was not his own, as if it were his own,—that is, he might have given it all, without referring to the power, as if he had been absolute owner of the whole; or, thirdly, assuming that he considered himself the owner of one moiety only, and his daughter the other moiety, unless he exercised the power of appointment, he might have intended not to exercise the power, but to deal only with the moiety, which was his own property owing to the death of his child. First, then, as to the exercise of the power. There is no language in the will importing such an intention; the word “appointment” is not used, and there is no reference to the power; and though it does not therefore follow that he did not mean to exercise the power, it not being necessary to use terms importing an appointment, if there is in the instrument a reference to the property and a disposition of it, still, upon this will the gift is so inconsistent with that notion that such an intention cannot be attributed to the testator. Without going into the question whether there was a partial appointment, was it the testator’s intention to deal with all the property, some of which was not his own? The language of the will is not inconsistent with this supposition, although it does not necessarily imply it. There is a description of the property. He knew he was only entitled to a moiety, but might have intended to put his daughter to her election. The words are large enough to embrace all the property in the hands of the trustees of the marriage settlement. It is a plain rule that where this question arises, in order to come to such a conclusion you must find an unmistakeable intention unambiguously expressed; and the question here is, whether the words are so plain that they can have no other meaning. It appears to me that they are not so strong as necessarily to imply that such was his intention. There is much in them that might have a tendency that way, but they are capable of the supposition that he only meant to dispose of the moiety which belonged to him absolutely. The only words

presenting any difficulty are, “which I direct shall be considered part of my residuary personal estate.” Why should he direct that which was his own to be so considered? No doubt, he was aware of the state of things—of the 4,000*l.* being in the names of the trustees—and that he was the owner of that for life, and after his death his wife for her life; and he knew that when he made his will, if he did not choose to exercise the power, he was owner of one moiety and his daughter of the other, and that he could only dispose of the whole by treating as his own that which was not his own. It was necessary, however, for him to indicate what he intended to do, and therefore he said, “I mean the moiety to form part of my residuary estate,” using those words to shew that he did not mean to exercise the power, and that is sufficient to account for the use of those words. They might refer to property which did not belong to him, but they may be accounted for on the other supposition. I think, therefore, that the testator has only dealt with the property belonging to himself, and has left the other moiety to go in default of appointment to Mrs. Surtees.

LOARDS JUSTICES. }

Nov. 10;

Dec. 4.

OGDEN v. FOSSICK.

*Specific Performance—Lessor and Lessee
—Agreement for Lease—Personal Service.*

A bill was filed for the purpose of enforcing the specific performance of an agreement between the plaintiff and defendant, whereby the defendant agreed to grant to the plaintiff a lease of a wharf and premises for twenty-one years, and the plaintiff agreed to employ the defendant as manager at the wharf at a salary and commission, the agreement providing that the employment should be co-extensive with the tenancy. One of the Vice Chancellors decreed specific performance of the contract, on the ground that it might be divided, and made a decree for granting the lease. On appeal, the Lords Justices considered that the contract must be considered as one entire contract, and that it did not come within the equitable jurisdiction of the Court as applied to specific

performance, and held, that when the Court cannot do complete justice between parties it will not interfere partially, and therefore their Lordships dismissed the bill.

The cases in which the Court of Chancery has decreed specific performance of part only of an agreement, are cases in which the part enforced was considered as independent of that part which could not be enforced.

This was an appeal from a decree pronounced by Vice Chancellor Wood, dated in November 1861.

The decree was for the specific performance by the defendant Samuel Fossick and his mortgagee the defendant George Fossick of an agreement, by which the former agreed to grant to the plaintiff John Maude Ogden an underlease. At the time of the agreement Samuel Fossick was lessee of the premises comprised in the agreement for a term of twenty-one years, from the 25th of December 1852, with an option of an extension of ten years more. George Fossick (Samuel's brother) was a mortgagee, but consented to the making of the underlease. The agreement was as follows :

"Memorandum of agreement made and entered into this 13th of October 1858, between Samuel Fossick, coal-merchant, of Ashton's Wharf, Blackwall, in the county of Middlesex, and John Maude Ogden, of Sunderland, in the county of Durham. The said Samuel Fossick agrees to let, and the said John Maude Ogden agrees to take, the wharf and premises known as Ashton's Wharf, Blackwall, aforesaid, with the use of the engine, machinery and buildings (including the part held by Paselsen & Madsen), at the yearly rent of 230*l.*, the said John Maude Ogden to pay all rates, taxes and outgoings in respect of the said premises for the time he so is in possession under the following restrictions ; that is to say, that the said John Maude Ogden may give up possession of the said premises on giving one month's notice during the first year, or at any subsequent year at one month's notice ; and if after the first twelve months of the said term the said J. M. Ogden should feel disposed to take a lease of the said premises, he the said Samuel Fossick hereby agrees to grant unto the said J. M. Ogden a lease of the said premises, at the yearly rental aforesaid, for

fourteen years, and a further term at the expiration thereof for ten years, at the yearly rental of 250*l.* per annum, free from all costs, charges and deductions, the said leases to contain all the usual covenants for repairs, and the privilege of abandoning the same after six months' previous notice. And the said Samuel Fossick engages his services to the said J. M. Ogden for the sale of the coals, and landing and shipping goods, and generally, in consideration of his receiving the sum of 200*l.* per annum, to be paid weekly, for such services, and in addition to such salary a guarantee commission of 10*s.* per 100*l.* on the amount of sales when remitted. During the first six months Mr. Fossick is to make up a cash account every Monday for the previous week, deducting the cash payments of that week, and remit the balance on Monday night. After the first six months, Mr. Fossick is to balance and pay up cash for all coals previously gone out, deducting payment as before, and so continue every following Monday to remit cash for all coals gone out, less such payments during the previous week. And the said J. M. Ogden agrees to maintain the said premises and buildings and machinery in as good condition as they now are during the time of his holding. The said Samuel Fossick is to attend to the business of the said J. M. Ogden, and not to engage with any other person ; and the said Samuel Fossick, whilst so engaged, shall be at liberty to load the coals sold from the wharf at the usual costs and charges paid for such loading, with the accommodation the said wharf and premises afford for his horses and conveyances, or cause the same to be delivered by carters in the usual way, and allowed for accordingly, unless the said J. M. Ogden prefers to load the coals himself, which Mr. Fossick agrees he shall be at liberty to do at any time he chooses ; and the said Samuel Fossick shall be considered to be engaged as aforesaid during the period that the tenancy shall exist. And it is further agreed that the rent, taxes and expenses of the said wharf and premises shall commence and be payable by the said J. M. Ogden on the discharge of the first vessel, and from that time until the tenancy shall be determined, according to the terms herein contained.

"Samuel Fossick."

The plaintiff entered into possession of the wharf and premises, and so continued, and he alleged the performance of the agreement on his part. Samuel Fossick entered into his service as stipulated, but, the parties ultimately disagreeing as to commission, the bill was filed, praying specific performance, and damages against the defendants for the commission of certain acts alleged by the bill to have been wrongfully committed by them. At the hearing, before the Vice Chancellor, it was insisted, on behalf of the plaintiff, that the agreement was not one entire agreement, but two separate agreements, and that the agreement to grant a lease was independent altogether of the agreement as to the employment; while, for the defendants, it was argued that the agreement was one entire agreement, and such a one as the Court would not decree to be specifically performed, inasmuch as it could not enforce the performance of the whole, and compel the plaintiff to employ the defendant. His Honour held that the agreement might be divided, and made a decree for granting the lease, and the defendants both appealed (1). The appeal came on

(1) The Vice Chancellor's judgment was as follows: "Really I think the equity of the cases, especially as to the case of *Gervais v. Edwards* (2), is entirely with the plaintiff, and that justice ought to be done to him. In this case, so far as the merits are concerned, this gentleman seems to me to have done all he agreed to do, and the only default is on the part of the defendants in not performing their part of the agreement. This gentleman having done all he ought to do, supposing these agreements to have been one entire agreement, that ought to be performed by the Court or not at all: even on that assumption the only suggestion is, that, instead of allowing the defendant Samuel Fossick to execute all sales, so as to get the commission on all sales, on his part he insists that there is somebody over him, who, by making sales, deprives Fossick of the profits which otherwise would redound to him in respect of each sale. Now some possible question might arise on the construction of the contract as to that; but that has been clearly interpreted by the parties themselves, that although the agreement is not to be varied by subsequent acts, yet it gives the Court great satisfaction to find that the subsequent acts shew what it was that the parties intended to enter into. The agreement is silent as to whether or not other salesmen were to be employed, although on the first personal of it, it appears that Fossick and Ogden are only to be employed; but he distinctly stated to the brother George that there should be a superinten-

for hearing in March last, and stood over that it might be seen what form of lease the Vice Chancellor would settle in chambers, as it might be in such a form as the

dent. and as far as regards Fossick himself the very gentleman by whom the agreement was entered into, namely, Mr. Lamb, is sent down and explains exactly what his position is. Samuel Fossick accepts his explanation, and says: 'If you are the gentleman to be employed, I shall be glad of it,' and tells him the different forms for carrying on business, and, in fact, in every way recognizes it as being consistent with this agreement, which, worded as it is, might have given rise to such suggestions (if there had been any misapprehensions upon it) as might have precluded the Court from directing a specific performance, against the intentions of the parties. I say that it is, happily, an explanation of what their intention was, and that there never was a doubt between Samuel Fossick on the one hand and the plaintiff on the other, but there should be a superintendence of that description. Here you have a guarantee to him of 200*l.* a-year during the employment, and 10*l.* per cent. commission upon sales, which I suppose would only be upon sales effected by him, and which would not necessarily exclude the plaintiff from having sales effected by another person, to whom he would give the like commission when that person executed the sales. It appears to me plain on this agreement that they have mixed up (as Mr. Faber pointed out, and which had not escaped my attention) one passage in one agreement with another passage in another agreement, yet they are plainly two distinct and separate agreements. The considerations are separate, and the things to be done are of an entirely different character. It is very well to say I should not have entered into agreement A unless you had entered into agreement B; but that does not constitute them as one agreement. The two agreements are to be performed separately, and to be executed just as if they had been written on two separate pieces of paper. It is not that one is the consideration for the other, but it is, 'We are talking about two matters: if you take the lease, that shall be settled, and there shall be an agreement between us about that; then I will enter into an agreement with you;' for it rather took that form, not in the least indicating it as a consideration, but it begins so: 'There being an engagement and undertaking on the part of the defendant Fossick that he will serve for a certain consideration,'—that is how it commences, and these two things were to be executed on the same day, but they are perfectly distinct agreements: one is a lease, if the plaintiff is minded to ask for it, at a certain rent. It appears that the original rent reserved was 230*l.* a-year for the first fourteen years, and an increased rent of 20*l.* per annum for the next ten years, and the consideration for that lease is of course the payment of the rent and the performance of the covenants. There are to be in that lease, as it says, all usual and proper covenants for repairs, and the privilege of abandoning the same after six months' previous notice on the part of the plaintiff. Well, then there comes a totally separate agreement, which is

(2) 2 Dru. & War. 80.

defendant would not object to, including a covenant as to the employment, and a proviso for re-entry on breach.

The lease was settled in chambers by the Vice Chancellor, and before engrossment was, by the direction of the Lords Justices,

this, that Samuel Fossick engages his services for doing these various things mentioned in consideration of having 200*l.* per annum paid him, and this guarantee commission of 10*s.* on the 100*l.* Now the two things are naturally so distinct in every way, that there is no possibility of combining in any ordinary course the two things together, unless you find the agreement particularly providing for it. If it was intended that the two things should be put together, it would have been stated: 'The lease shall contain a covenant that this gentleman, during his tenancy, shall continue to employ, and the other shall faithfully serve,' and so forth, and there would have been a provision for putting such a covenant in the lease. Nothing of the kind is done. It would not have been a very reasonable thing to do, because the circumstance that the employment is to continue during the tenancy involves this difficulty, that if you are to dovetail the two together, the gentleman might die, he might possibly become bankrupt, or he might assign over his lease; there is no proviso against assigning the lease hereby agreed to be given, and then the question might arise, if you are to consider the two as inserted in each other and to constitute one agreement, what is to be done with regard to the lease? Is the whole title of the lease to be embarrassed with the question, what is to be done in case the executor or the assignee in bankruptcy or any other person does not choose to perform the special covenant during the tenancy, whatever the covenant may mean? I think if anything of that kind was intended, namely, to mix the two together, that would have been expressed in the agreement, and that you would not have had the lease treated as one part of the case, and the consideration treated separately and distinctly as another part of the case. It is quite true that when they are dovetailed in—when the two distinct objects are included in one instrument—you do get a provision on the one hand about keeping the premises in their present state of repair (I think that is the word), or some words to that effect—'he shall maintain the premises and buildings and machinery in as good condition as they now are during the time of his holding'; there are to be the common covenants for repairs, but whether that is to be in aid of the covenant I do not know. Then there is added after that, that this gentleman is to be employed during the period the tenancy shall exist. It seems to me to be a simple agreement to grant a tenancy of a certain duration, and an agreement for quite a distinct consideration, in consideration of a certain salary, to be paid weekly, to serve during a certain definite period. Now, the difference between this case and the case of *Stocker v. Wedderburn* (3) is this—in *Stocker v. Wedderburn* I held it to be all

produced to them; and they intimated their opinion that it was in conformity with the decree as it stood, and was consistent with justice, but that there ought to be inserted covenants, properly worded, for the employment of Samuel Fossick, and a proviso for re-entry on breach properly guarded. The lease, as finally settled in chambers, contained mutual covenants on the part of the plaintiff and the defendant Samuel Fossick to observe and perform the terms of the agreement of the 13th of October 1858, a copy of which was added in a schedule; and there was a proviso, that in

one agreement. That was a case in which there was an agreement to form a company. The person who had got the patents, being an active and energetic individual, there was an agreement that the patent should be assigned, and that he should render his services. It appeared to me that the whole was one thing, that the company was to be formed on condition of getting his active services, and that the assignment was to be taken on condition of those services being rendered, or else the company would not have formed themselves, nor would they have taken the assignment. That was part and parcel of the arrangement entered into between the parties. Here the two matters seem to me to be perfectly separate. I have not heard a single syllable to shew the shade of an equity to resist the specific performance of this agreement. Now, the disagreement seems to have arisen in this way: George does not think his brother Samuel gets enough, and I see in a subsequent correspondence he says he will not execute the lease unless his brother is to be paid something more. It is said the brother relied on this as a security. The answer is, that he never took an assignment of his brother's salary, and that is no part of his security. The assignment is made over to him, as I am told, since this suit was instituted, or at any rate since the contest has arisen. He only takes an assignment of the lease, he does not take an assignment of his brother's salary; and of course he never expected to find any covenant for the payment of his salary or the continuance of his employment; at least he does not say so. When it is said it is idle to suppose the brother would have entered into this agreement on the supposition that he was to be without security, there is a letter, I think, which shews why he entered into the agreement. In the letter of the 10th of May 1858 he says, 'In reply to your favour, although the lease was sent to me as a security, as it is I hope to do my brother good, I will waive my claim on it, and be a consenting party to the underlease to you'; that is to say, 'I will not look to my security so much; my object has been all along to push my brother forward in business, and to get him on as well as I can, and therefore, if there is a good opening for him in business, I shall be induced to waive my claim.' It is an inducement, no doubt, among other things, for him to consent to the lease, there being this collateral agreement as

(3) See *post*, page 77.

case of non-payment of rent, or non-observance or non-performance by the plaintiff of those covenants of the original lease, upon the breach of which a re-entry might be enforced, or in case of the non-observance or non-performance of any of the covenants in the lease (so settled) contained on the part of the plaintiff, it should be lawful for the defendant George Fossick to re-enter on the demised premises. It was objected that the right of re-entry ought to be limited to such acts or omissions by the plaintiff as would give a right of re-entry to the original lessors; and, on the other hand, it was contended that the right of re-entry should provide for any breach of the covenants of the agreement as to employment and salary of Samuel Fossick. And on those points the appeal was again brought on.

Mr. Roll, Mr. W. M. James and Mr. Marten, in support of the decree, contended that the defendants were not entitled to the covenants which were in the draft of the lease, but said that the plaintiffs had no objection to the draft as the Vice Chancellor had at first settled it. The proviso for re-entry was altogether objectionable, as being too wide in its operation, and, properly, should be limited to the non-payment of rent. In support of this point they cited

Chambers on Landlord and Tenant, edition of 1823, p. 445.

Church v. Brown, 15 Ves. 258.

Blakesley v. Whieldon, 1 Hare, 176; s. c. 11 Law J. Rep. (N.S.) Chanc. 164.

Leases and Sales of Settled Estates Act, 19 & 20 Vict. c. 120. s. 2.

Sugden on Powers, 8th edit. 818.

Davidson's Precedents, last edit. part 1, pp. 392, 408.

With respect to the contract, the subject-matter of the suit, they contended that it was in fact two agreements; that relating to the lease could be provided for, to the employment of the other defendant. It seems to me that it is entirely collateral. There is not a word on the face of the agreement to shew that either party contemplated that there should enter into the engagements, covenants or stipulations to be contained in the draft of the lease. I think I must treat them as two separate pieces of paper,—one as an agreement to take the lease, the other as an agreement to employ this gentleman for the consideration there mentioned. I think, therefore, I ought to decree specific performance; and, under the circumstances, with costs."

while that pertaining to other matters could be enforced by a money payment. On the point of specific performance, the learned counsel referred to the following cases:

Gervais v. Edwards, 2 Dru. & War. 80.

Green v. Low, 22 Beav. 395, 625.

Gibson v. Goldsmid, 5 De Gex, M. & G.

757; s. c. 18 Beav. 584; 24 Law J.

Rep. (N.S.) Chanc. 279.

Fennings v. Humphrey, 4 Beav. 1; s. c.

10 Law J. Rep. (N.S.) Chanc. 251.

Croome v. Lediard, 2 Myl. & K. 251,

293; s. c. 3 Law J. Rep. (N.S.) Chanc.

98.

Davenport v. Whitmore, 2 Myl. & Cr.

177; s. c. 6 Law J. Rep. (N.S.) Chanc.

58.

Crouch v. Waller, 4 De Gex & Jo. 43,

302; s. c. 28 Law J. Rep. (N.S.) Chanc.

514.

Sir Hugh Cairns and Mr. Roxburgh, for the defendant Samuel Fossick, insisted that as it was quite impossible for the Court, guided by its universal principle, to enforce specific performance, the bill ought to have been dismissed. The decree was a mere nullity. As to the lease, the covenants inserted in it as to the services of Samuel Fossick could not be enforced; and those services were a very essential, and indeed an integral part of the agreement. The learned counsel cited

Stocker v. Wedderburn, 3 Kay & J. 393;

s. c. 26 Law J. Rep. (N.S.) Chanc. 713.

Hills v. Croll, 2 Ph. 60; s. c. 14 Law J.

Rep. (N.S.) Chanc. 444.

Fairbrother v. Arkill, unreported.

Lumley v. Wagner, 1 De Gex, M. & G.

604; s. c. 5 De Gex & Sm. 485;

21 Law J. Rep. (N.S.) Chanc. 898.

Pickering v. the Bishop of Ely, 2 You.

& Coll. C.C. 249; s. c. 12 Law J. Rep.

(N.S.) Chanc. 271.

Johnson v. the Shrewsbury and Birmingham

Railway Company, 3 De Gex,

M. & G. 914; s. c. 22 Law J. Rep.

(N.S.) Chanc. 921.

The Shrewsbury and Birmingham Rail-

way Company v. the Stour Valley

Railway Company, 2 De Gex, M. &

G. 866.

Mr. G. M. Giffard and Mr. Faber, for the defendant George Fossick, sustained the same argument.

Mr. Roll was heard, in reply.

LORD JUSTICE KNIGHT BRUCE (Dec. 4).—This case has been twice before us, and on the latter occasion we had the advantage of knowing what are the terms and provisions which Vice Chancellor Wood has thought proper to be inserted in the lease, which he by his decree—the decree now under appeal—ordering specific performance by each of the appellants, wholly or in part, of the agreement of the 13th of October 1858, has directed them to execute. It is contended, on behalf of the appellants, that the case is one in which, from the nature of the agreement, the remedy of specific performance, according to the principles of the Court of Chancery, would be refused. If they are so far right, we ought to dismiss the bill. It is suggested, on the part of the respondent, that the agreement may be substantially treated as divided into two contracts, as to one of which there cannot be any good objection to specific performance; but my opinion is not so. I think that all the stipulations of the instrument must be considered together, and that the contracts must be considered as one entire contract, and that the stipulations as to the employment of the defendant Samuel Fossick, and the service to be rendered by him to the respondent, are a material and important part of it. Thus viewing the document, there appears to me to be no title to specific performance. It was said, on behalf of the respondent, that the decree was not a decree for specific performance, but a decree that the appellants should execute a lease containing certain covenants, including covenants to perform certain services. This seems to me to make no difference, nor is it material that the agreement has been in part performed on either side, or that there has been expenditure of money on the faith of it. I assume the case of *Lumley v. Wagner* to be correctly decided, but it does not assist the plaintiff. Nor if the services agreed to be rendered had been defined by the agreement—that is, in case the words “and generally” had been omitted—should I have thought this contract within the equitable jurisdiction of specific performance. The presence of these words is of itself enough to render it necessary to dismiss the bill. I think that, not merely out of regard to the opinion of the

learned Judge from whom this appeal is brought, but looking at the nature of the dispute, there ought to be no costs, and that the dismissal ought to be without prejudice to any action that either party may be advised to bring. It might be as well to add, that whether the agreement of the 13th of October 1858, according to its true construction, provides for the execution by any person of any instrument containing any special covenants or not, is a matter on which I wish to give no opinion; and also upon the disputed question whether, on the supposition of the decree being substantially right, the draft lease settled in the Vice Chancellor's chambers, at which we were, by the consent of the counsel on both sides, allowed to look, is in all respects right, I prefer not saying anything.

LORD JUSTICE TURNER.—This was an appeal from a decree of Vice Chancellor Wood. The bill was filed, by J. M. Ogden against Samuel Fossick and George Fossick, for specific performance of an agreement for a lease of a coal-wharf. The memorandum of agreement contains the following provisions. [His Lordship here read the agreement.] The plaintiff appears to have been let into possession of the wharf under the agreement, and to have laid out money in improving it; and he has, according to his own view, faithfully employed Samuel Fossick in the business. Disputes having arisen between them, he has filed this bill for specific performance. At the hearing of the cause the Vice Chancellor decreed specific performance, and directed the lease to be settled in chambers, in case the parties differed. The appeal is by the defendants from this decree. On the appeal coming on for hearing, in March last, we thought it desirable that the appeal should stand over, in the hope that a lease might be settled by the Vice Chancellor which would be agreed upon by the parties. This has not been the case. The lease, as settled, has been objected to by the defendants, and we have therefore to dispose of the appeal. The first question must be, whether the appeal is well founded, whether the plaintiff is entitled to a decree for specific performance or not. It is objected to this decree that the agreement for which specific performance has been decreed contains other terms, and provisions as to services

and employment of the defendant Samuel Fossick, the specific performance of which cannot be enforced by this Court; and that the Court, being unable to carry into effect the whole agreement, ought not to enforce part of it. That there are terms and provisions in this agreement which the Court cannot carry out, there is no doubt. The Court cannot compel the plaintiff to carry on the business, or to employ the defendant. It is not the practice of the Court to decree specific performance of part of an agreement when there are other parts of it which the Court cannot carry out. The cases cited establish this principle, that when the Court cannot do complete justice, it will not interfere partially. Cases have, it is true, been cited where the Court has decreed specific performance of part of an agreement; but all these cases were cases in which the parts of the agreement which were enforced were considered by the Court to be independent of the parts which could not be enforced. Cases of injunction on negative agreements were also referred to by the plaintiff as instances that the Court could enforce part of an agreement, though it had no power to enforce other parts. But these cases rest on the jurisdiction of the Court to issue injunctions to restrain irreparable injury. It is one thing to interfere by way of injunction, in which the Court proceeds to some extent in another branch of its jurisdiction, and another thing to decree specific performance. The cases cited by the plaintiff do not seem to affect the present case, except to this extent, that the Court, when a party is called upon to perform part of an agreement the whole of which cannot be specifically performed, is bound to see that the part to be performed is independent of the part which cannot be performed. It is by this test that the case before us must be tried. I am of opinion that specific performance ought not to have been decreed. I think that in this agreement the lease and the employment were meant to be welded together. The obligations on the one side and on the other were meant to be, as expressed by Lord St. Leonards in *Lumley v. Wagner*, "correlative." The form of the agreement seems to prove this. It is said that the performance of the agreement might be effected by covenants in the lease for the employment of

Mr. Fossick, to be enforced by a general condition of re-entry; but looking at the effect of the agreement, I do not think this would be possible. I cannot doubt that the purpose of the employment of Samuel Fossick was that he might continue his connexion with the business without its being diverted to other channels. In this respect the above mode of carrying the agreement into effect would not avail for Samuel Fossick. He would be driven to his remedy at law, and in the mean time his business would be broken up. It was contended by the plaintiff that he ought to be left to his remedy at law; but what has been said already applies to this part of the case. Reliance was placed on the expenditure by the plaintiff; but we cannot alter the agreement on that ground. Having regard to the nature of the case, we think this had better be left to a Court of law. The bill must be dismissed without costs, and the decree may be expressed to be without prejudice to any proceedings at law which the parties may institute.

STUART, V.C. }
Dec. 10. }

HILL v. KING.

Partnership—Interest on Capital.

Where each of two partners, upon entering into partnership, agreed to advance an equal sum of money in respect of capital, but did not make any stipulation as to interest on such sum, and it appeared that one of the partners advanced his share of capital, but that the other did not do so, the former was allowed, in taking the partnership accounts, interest at 5l. per cent. per annum during the period of the partnership upon the amount brought into the partnership by him, in addition to his share of the profits.

On the 1st of January 1844, the plaintiff, John Hill, and the defendant, Henry King, entered into co-partnership as meat-salesmen in the city of London. It was one of the terms of the partnership that each of the partners should bring into the co-partnership concern the sum of 500*l.* The stipulation as to that sum was made by parol, and nothing was said with respect to interest upon it. The partnership continued up

to the 3rd of October 1857, when it was dissolved. This suit was subsequently instituted for the purpose of taking the partnership accounts, and a decree for that purpose had been made.

The chief clerk certified to the effect, that the plaintiff had, in accordance with the above stipulation, brought the sum of 500*l.* into the partnership, but that the defendant had failed to prove that he had brought into the partnership the sum of 500*l.* or any part of that sum, and he accordingly credited the plaintiff in account with the sum of 343*l.* 17*s.* 9*d.* in respect of interest at 5*l.* per cent. per annum on the 500*l.* paid by him, from the 1st of January 1844 to the 3rd of October 1857, the period at which the partnership was dissolved, in addition to his share of the profits.

This was an adjourned summons on the part of the defendant to vary the chief clerk's certificate, by disallowing the sum of 343*l.* 17*s.* 9*d.* to the plaintiff for interest, as above stated.

Mr. Malins and *Mr. Woodroffe*, for the defendant, in support of the summons, said that not only was there no agreement between the plaintiff and the defendant with reference to interest on the sum of 500*l.*, but that the plaintiff had never been credited in the partnership accounts with any sum in respect of such interest, nor had there been anything said about it during the period of the partnership. They relied on *Stevens v. Cook* (1).

Mr. Craig and *Mr. W. W. Cooper*, for the plaintiff, were not called upon.

STUART, V.C.—The question is as to the interest upon the capital advanced by the plaintiff. What I find stated by the defendant on that subject in the accountant's report, made to the chief clerk, is, that both the plaintiff and the defendant agreed to provide 500*l.* each; and the defendant states he brought in his 500*l.* The defendant admits that the plaintiff brought in 500*l.*; but when the evidence came to be looked at, it appeared that there was not sufficient proof that the defendant had brought in 500*l.*, and upon the accountant's report the matter is left. There is no motion to vary the chief clerk's certificate upon any such ground as

that the defendant did not get credit for the capital he paid to the partnership. But in the same report the accountant states, not that the plaintiff claimed interest for his 500*l.*, but that, having brought in the whole capital, and knowing that the defendant never could bring in any, and saying that the defendant never did bring in any, he claimed, instead of interest, to be allowed one-seventh more of the profits. That claim was not allowed. The claim made by the plaintiff, and his statement in the accountant's report in respect of it, amount to this: that the compensation he required in consideration of his having brought in the whole capital, was not interest upon it, but an additional share of profits.

What is now to be decided is, whether or not, in a case in which the defendant admits that each partner was to bring in 500*l.*, and it has been proved that the plaintiff has brought in his 500*l.*, but the defendant has not proved that he brought in his 500*l.*, the partnership accounts can be taken upon the gross profits, unless the plaintiff be allowed interest upon the sum of 500*l.* in addition to his share of the profits. It has been said, the agreement was that the plaintiff should supply the whole expenditure, and the defendant only his labour. If that had been the agreement, it would not be a just way of taking the account to allow the plaintiff interest upon his capital. The defendant, however, must be held to be bound by his statement as to the agreement to find the 500*l.* capital.

It has been said that this point has already been decided in the case of *Stevens v. Cook*. I do not believe that any such thing was ever decided by me. Such a decision would be contrary to principle. I can well understand that the same principle would not be applicable where the terms of the contract are that one partner should find the capital and the other contribute the whole of his labour. My opinion, therefore, is, that there is no ground whatever for altering the certificate of the chief clerk. I must decide the case upon the footing that each partner was to advance an equal amount of capital; and it appearing that the defendant never advanced his share of the capital at all, the plaintiff must be allowed interest.

ROMILLY, M.R. { THE RIGHT HON. LADY
1862. { MARY ELIZABETH TOP-
April 23, 24, 25; { HAM v. THE DUKE OF
June 30. { PORTLAND.

Power of Appointment—Undue Exercise of—Re-settlement by Appointee—Parental Influence—Intention to defeat intended Marriage.

If a power is executed in favour of an object of the power, in order that other deeds may be executed by the appointee to raise inducements for a daughter of the donee of the power, also an object of the power, to abstain from marrying with a person objected to by him, the appointment cannot be supported if questioned in a Court of equity.

Semble—It is immaterial whether the agreement by the appointee to carry out the desire of the donee is entered into before or after the appointment.

This bill was filed, by Lady Mary Elizabeth Topham, the wife of Sir William Topham, by her next friend, against the Duke of Portland, Charles Eaton Ellis, the Right Hon. Lord Henry Cavendish Bentinck and Lady Harriet Cavendish Bentinck, Sir William Topham, and John James, asking that she might be declared entitled to a sum of 18,686*l.* 2*s.* 8*d.*, 3*l.* 5*s.* per cent. annuities, purchased with the sums of 8,000*l.* and 8,000*l.* appointed to Lord H. C. Bentinck by certain deeds-poll, dated the 13th and the 28th of October 1848, and the accumulations thereof; or if she was not so entitled, then that it might be declared that the appointments made by the said deeds-poll were void as against the plaintiff so far as the same related to the sums of 8,000*l.* and 8,000*l.*, and that the settlement thereof was also void as against her, and might be set aside; and that proper directions might be given for raising and paying the amount due to the plaintiff. That so much of the fund standing in the names of the Duke of Portland and C. H. Ellis, as trustees of a settlement of the 24th of November 1848, as had arisen from the income of the sums of 8,000*l.* and 8,000*l.* might be paid to the plaintiff, and that the residue thereof might be transferred to John James, as the trustee of the settlement made on the marriage of the plaintiff with Sir W. Topham.

NEW SERIES, 32.—CHANC.

That the plaintiff might be declared to be entitled to one moiety of the income of the fund, subject to the trusts of an indenture of the 24th of June 1843, and to one moiety of an annuity of 2,720*l.* appointed by deeds-poll of the 21st of September 1854, and the 19th of December 1854, to Lady Harriet C. Bentinck, and to the accumulations thereof; or that it might be declared that the appointments made by the deeds-poll were void and inoperative as against the plaintiff, and that she was entitled to one moiety of the income accrued due since the death of the late Duke of Portland on the fund, subject to the trusts of the indenture of the 24th of June 1843, and to one moiety of the annuity of 2,720*l.* comprised in the indenture of the 24th of November 1848, and that the balance thereof, after giving credit for the sums of 320*l.* and 717*l.* 7*s.* 4*d.*, might be paid to her accordingly.

It also asked for the appointment of a receiver of the interest of the funds comprised in the indenture of the 24th of June 1843, and of the annuity of 2,720*l.* granted by the indenture of the 24th of November 1848, and that the bank annuities standing in the names of the Duke of Portland, Lord H. C. Bentinck, and Lady Harriet C. Bentinck, which had arisen from the moiety of the income of the stocks and of the annuity, might be transferred to the credit of the cause.

It also asked that the accounts might be taken.

The facts of the case will appear from the statements made in the judgment.

The Solicitor General (Sir R. Palmer), Mr. Rolt, Mr. Follett, and Mr. Rowcliffe, for the plaintiff, cited

In re Marden's Trusts, 4 Drew. 594;

s. c. 28 Law J. Rep. (N.S.) Chanc. 906.

Carver v. Bowles, 2 Russ. & M. 301;

s. c. 9 Law J. Rep. Chanc. 91.

Scroggs v. Scroggs, Amb. 272.

Wellesley v. Mornington, 2 Kay & J. 143.

Farmer v. Martin, 2 Sim. 502.

Jackson v. Jackson, 4 Bro. C.C. 462.

Fry v. Capper, Kay, 163.

Russell v. Jackson, 10 Hare, 204.

Sandeman v. M'Kenzie, 1 J. & H. 613;
s. c. 30 Law J. Rep. (N.S.) Chanc. 838.

M

Chadwick v. Doleman, 2 Vern. 528.

Salmon v. Gibbs, 3 De Gex & Sm.
343; s. c. 18 Law J. Rep. (N.S.)
Chanc. 177.

*Sir Hugh Cairns, Mr. Hardy and
Mr. A. Bailey*, for the Duke of Portland,
cited

Stroud v. Norman, Kay, 313; s. c. 23
Law J. Rep. (N.S.) Chanc. 443.

Birley v. Birley, 25 Beav. 299; s. c.
27 Law J. Rep. (N.S.) Chanc. 569.

Proby v. Landor, 28 Beav. 504; s. c.
30 Law J. Rep. (N.S.) Chanc. 593.

Wallgrave v. Tebbs, 2 Kay & J. 313;
s. c. 25 Law J. Rep. (N.S.) Chanc.
241.

Ingram v. Ingram, 2 Atk. 88.

Lomax v. Ripley, 3 Sm. & Gif. 48;
s. c. 24 Law J. Rep. (N.S.) Chanc.
254.

Daubeny v. Cockburn, 1 Mer. 626.

M^{rs} Queen v. Farquhar, 11 Ves. 467, 479.

Keily v. Keily, 4 Dru. & W. 38.

Watt v. Creyke, 3 Sm. & Gif. 362; s. c.
26 Law J. Rep. (N.S.) Chanc. 211.

Routledge v. Dorrill, 2 Ves. jun. 357.

Sadler v. Pratt, 5 Sim. 632.

Fearon v. Desbrisay, 14 Beav. 635;
s. c. 21 Law J. Rep. (N.S.) Chanc.
505.

Beere v. Hoffmister, 23 Beav. 101;
s. c. 26 Law J. Rep. (N.S.) Chanc.
177.

Bristow v. Warde, 2 Ves. jun. 336.

Maddison v. Andrew, 1 Ves. sen. 57.

Robinson v. Hardcastle, 2 Term Rep.
241.

Richardson v. Simpson, 3 Jo. & Lat.
540.

Askham v. Barker, 12 Beav. 499; s. c.
17 Beav. 37; 22 Law J. Rep. (N.S.)
Chanc. 769.

Alexander v. Alexander, 2 Ves. sen.
640.

White v. St. Barbe, 1 Ves. & B. 399.

Goldsmid v. Goldsmid, 2 Hare, 187;
s. c. 12 Law J. Rep. (N.S.) Chanc. 113.

Wright v. Goff, 22 Beav. 207; s. c.
25 Law J. Rep. (N.S.) Chanc. 803.

Lassence v. Tierney, 1 Mac. & G. 551;
s. c. 2 Hall & Tw. 115.

Saunders v. Vautier, 4 Beav. 115; s. c.
1 Cr. & Ph. 240; 10 Law J. Rep. (N.S.)
Chanc. 354.

Palmer v. Wheeler, 2 Ball & B. 18.

Foster v. Cautley, 3 Sm. & Gif. 96;
s. c. 24 Law J. Rep. (N.S.) Chanc. 252;
6 De Gex, M. & G. 55.

Re Gosset's Settlement, 19 Beav. 529.

Mr. Lloyd and Mr. Hobhouse, for C. H.
Ellis.

Mr. Osborne and Mr. F. P. Morris, for
Lord Henry Cavendish Bentinck, com-
mented on some of the cases previously
referred to, and cited—

Rowley v. Rowley, Kay, 242; s. c. 23
Law J. Rep. (N.S.) Chanc. 275.

*Mr. Giffard, Mr. T. Stevens, and Mr.
Freeling*, for Lady Harriet Bentinck, also
relied upon many of the cases previously
cited.

Sugden on Powers, 613, 528, 618, ed. 8,
was also referred to.

The Solicitor General was heard in reply.

THE MASTER OF THE ROLLS (June 30).—
This suit is instituted by Lady Mary Top-
ham, contesting the validity of various
appointments relating to two sums of
8,000*l.* each, an annuity of 2,720*l.*, and to
the income of a fund originally consisting
of 52,000*l.*, 3*l.* 10*s.* per cent. annuities,
but since increased and varied by accumu-
lations and changes of security. The bill
prays, first, that the plaintiff may be declared
entitled to the sum of 18,686*l.* 2*s.* 8*d.* 3*l.* 5*s.*
per cent. annuities, purchased with the two
sums of 8,000*l.* and 8,000*l.* appointed to
Lord Henry Cavendish Bentinck by two
deeds-poll, dated respectively the 13th and
28th of October 1848, and the accumula-
tions thereof; or, in the alternative, that
the appointments may be declared void;
and it then proceeds to ask for similar relief
as to the appointment relating to the two
other funds.

The appointments which relate to the
two sums of 8,000*l.* rest on different in-
struments, and require a distinct con-
sideration from the appointments of the
annuity and the 52,000*l.* In August 1795,
the marriage of the late Duke and Duchess
of Portland took place. On that occasion
the English estates of the Duke, and the
Scottish estates of the Duchess, were set-
tled by two contemporaneous indentures. By
that which bears date the 4th of August
1795, in the events which have happened,

the English estates of the Duke were charged with 40,000*l.* in favour of the younger children of the marriage, in such shares and proportions as the Duke and Duchess or the survivor should appoint; and, in default of appointment, among such younger children equally. At the same time, and on the 3rd of August 1795, the Scottish estates of the Duchess were charged with 70,000*l.* in favour of the younger children of the Duchess by any marriage, who, or their issue, should survive their father and mother. Of this sum 40,000*l.* was limited to belong to the younger children of the first marriage in such shares as the Duke should appoint, and in default thereof as the Duchess should appoint, and in default of any appointment amongst them equally. Those are the two powers the mode of exercising which by the late Duke is complained of by the plaintiff.

In June 1814, the Duke executed two indentures: by the first he charged his Nottingham estates with a jointure and rent-charges in favour of the Duchess, and subject thereto created a term of 1,000 years in such estates, vested in two trustees. By the second he declared the trusts of that term to be for the purpose of raising the 40,000*l.* settled by the indenture of the 4th of August 1795, during the life of the late Duke, as he should direct, or if not, after his decease; and he supplied a hotch-pot clause for any portion of the 40,000*l.* which might remain unappointed, which clause had been omitted from the original settlement. In 1828 that deed, the validity of which was subject to the same question, was confirmed by private act of parliament, the 1 Geo. 4. c. xxxvi. There were nine children issue of the marriage. The eldest son, the Marquis of Titchfield, died in 1824; Lady Caroline Bentinck died in 1828; Lord George Bentinck died in 1848. The remaining six survived their parents: viz, the present Lord Henry Bentinck; Lady Charlotte, the wife of the Right Hon. Evelyn Denison; Lady Lucy, now Lady Howard de Walden; Lady Harriet Bentinck; and the plaintiff. On the marriage of Lady Charlotte, in 1827, there being at that time seven younger children of the marriage in existence, one-seventh of the 40,000*l.* charged on the Nottingham estates was appointed

to be raised for her, on the death of the survivor of her father and mother. The Duke paid the whole of that amount on her marriage; and thereupon, and in consideration thereof, the sum so appointed was assigned to a trustee for the late Duke to form part of his personal estate. And in like manner one-seventh of the 40,000*l.* charged on the Scottish estates was appointed to Lady Charlotte, and on payment of that amount by the Duke that share also was assigned for his benefit as part of his personal estate. On the marriage of Lady Howard de Walden in November 1828, there being then only six younger children of the marriage in existence, the same course was adopted with respect to her; with the exception that one-sixth of each sum of 40,000*l.* was appointed, paid and assigned as in the case of Lady Charlotte Denison: and in January 1829 further shares were appointed, paid and assigned in like manner to Lady Charlotte Denison, to make up her portion, one-sixth of the two sums of 40,000*l.* each.

In June 1843, by an indenture, made between the Duchess of the first part, the late Duke of the second part, the present Duke and Lord George Bentinck of the third part, three sums of stock and 9,000*l.* due on the bond of the late Duke were assigned to the present Duke and Lord George, as trustees, in trust to pay the dividends and interest to the late Duchess for her life, and after her death to set apart so much of the trust-fund as would produce 800*l.* per annum on the trusts thereafter declared, and, subject thereto, absolutely for Lord Henry Bentinck, or, if he should die before the Duchess, for Lord George Bentinck; and, as to the fund so set apart to produce 800*l.* per annum, that was to be held upon trust during the life of the plaintiff, provided the Duke of Portland for the time being should by deed, executed in the manner thereafter mentioned, direct (but not otherwise) to pay an annual sum, not exceeding 800*l.* per annum, to and for the benefit of the plaintiff, in such manner and subject to such restrictions as should be expressed in such deed of direction, and, subject thereto, in trust for Lord Henry Bentinck; provided he did not die before the late Duchess, without leaving any issue; but if he did, then it was to go to Lord

George Bentinck. That deed neither relates in any way to the two sums of 8,000*l.* each; nor is it, or anything done in consequence of it, complained of; but it is material as being the first act which contains any indication of the intention to impose fetters on the disposition of the plaintiff.

In 1844 the late Duchess died; and since her death the 800*l.* per annum has been paid to Lord Henry Bentinck, who invested the same half-yearly in the purchase of new 3*l.* per cents., having so done at the request of the late Duke; at whose request he also executed a declaration of trust of the 1st of September 1844; undertaking to accumulate the dividends, and to hold the fund during the life of the plaintiff, in trust for her at such time and in such manner as the Duke of Portland for the time being might in writing direct; and in the absence of any such direction, for himself or his personal representatives absolutely.

In 1848 Lord George Bentinck died; and thereupon, the younger children of the marriage being reduced to five, the late Duke was desirous of making up the appointments in favour of the younger children to the sum of 8,000*l.* each; and for that purpose, in October 1848, he, by two deeds-poll, bearing date the 13th of October 1848, appointed 1,333*l.* 6*s.* 8*d.* to Lady Charlotte Denison, and a like sum to Lady Howard de Walden, out of the remainder of the sum of 40,000*l.* charged on the English estates; and on payment of the money, amounting to the sums so appointed, he took an assignment of the shares so appointed as part of his personal estate. By a deed-poll, of even date with the other two, viz. of the 13th of October 1848, he appointed 8,000*l.* out of the remainder of the 40,000*l.* to Lady Harriet Bentinck; and he appointed 16,000*l.*, the residue of the sum of 40,000*l.*, to Lord Henry Bentinck. All these sums were appointed to be paid at the decease of the appointor; but, on payment by the late Duke at once of the amounts so specified, and in consideration thereof, he took assignments of the share so appointed for his own benefit as part of his personal estate.

On the 28th of October 1848, the late Duke executed a deed of direction and appointment, distributing the remainder of the 40,000*l.* charged on the Scottish estates.

By that deed, he appointed and distributed two sums of 1,333*l.* 6*s.* 8*d.* each to Lady Charlotte Denison and Lady Howard de Walden; 8,000*l.* to Lady Harriet Bentinck, and the remaining 16,000*l.* to Lord Henry Bentinck. In those cases also the Duke made the like payments at once of the amounts so appointed, and took assignments of the shares as on the former occasions.

The question raised by the plaintiff relates to the shares so appointed to Lord Henry Bentinck, or, at least, to one-half of them. There is no question but that one-half of those two sums of 16,000*l.* each was intended for Lord Henry Bentinck for his sole use and benefit. The question in this cause relates to the remaining moiety, viz. the two sums of 8,000*l.* each from the sums charged on the English and Scottish estates.

The manner in which those sums were dealt with was this: immediately after the 13th of October 1848, 16,000*l.* was carried at Messrs. Drummond's, by order of the late Duke, to the account of Lord Henry; and on the 30th of October, two days after the execution of the deed of the 28th of October, 16,000*l.* more was, by the direction of the late Duke, carried to the account of Lord Henry by Messrs. Drummonds. On the same day Lord Henry gave Messrs. Drummonds an order to invest 16,000*l.* in the purchase of 3*l.* 10*s.* per cents., in the joint names of the present Duke and of Mr. Ellis, and directed the dividends of that fund to be placed to their credit, to an account to be marked "M"; and on the same day Mr. Ellis (who was the man of business of the late Duke, and who, by his instructions, conducted the whole matter) wrote informing him of what had been done, and also informing him that a declaration of trust would be forthwith executed.

That indenture bears date the 24th of November 1848, being about a month subsequent to the date of the last deed, making the appointment of the residue of the 40,000*l.* charged on the Scottish estates. It was made between Lord Henry of the one part, and the present Duke and Mr. Ellis of the other part. It recites that Lord Henry had invested the 16,000*l.* in the purchase of 18,686*l.* 2*s.* 8*d.* 3*l.* 5*s.* per cents., in the name of the present Duke and Mr. Ellis, with the intent, from the natural love and affection he had for the plaintiff, his sister,

that a provision might be made for her in the contingency thereafter expressed ; and thereupon the indenture witnessed, and the present Duke and Mr. Ellis undertook that they would stand possessed of the said stock and the dividends to be thereby produced, "upon trust henceforth and until the expiration of the term of twenty-one years from the day of the decease of Lord Henry Bentinck, or until previously thereto any such appointments shall be made as would entitle the plaintiff, Lady Mary, to the transfer of the whole stocks, funds and securities now intended to be settled, and of the accumulations therefrom which are hereinafter provided to be made, or until the plaintiff, Lady Mary, shall previously die without the appointment of the whole thereof having been made to her, or for her benefit." Then, that the present Duke and Mr. Ellis "do receive and invest and accumulate at compound interest the dividends on the sums of stock." "And upon further trust, that the said trustee or trustees for the time being do, at the expiration of such period for accumulation as aforesaid, or at any time or times previously thereto, when and as such one of the said Marquis of Titchfield and Lord Henry Bentinck as for the time being may be Duke of Portland, shall by any writing under his hand so direct, transfer, assign and pay all or any part of the stocks, funds and securities which, whether from original investment or from accumulation for the time being may be subject to the trusts or provisions of these presents, unto or for the benefit of Lady Mary Bentinck, in such manner as the Duke of Portland for the time being may direct, and subject to the trusts or purposes aforesaid, or when and as the same shall be no longer capable of taking effect ; and as to the said trust-monies, stocks, funds, securities and accumulations, and the dividends, interest or income thereof, of which respectively there may not have been any such appointment unto or for Lady Mary Bentinck as aforesaid, stand possessed of the said trust-monies, stocks, funds, securities and accumulations, upon trust for Lord Henry Bentinck, his executors, administrators or assigns, absolutely." And it was by that indenture provided, that in the event of any partial appointment being made in favour of Lady Mary Bentinck, the

accumulation thereby directed should continue as to the residue of the trust-funds ; and the indenture contained the usual powers for varying the investment of the trust-fund, and for the appointment of new trustees.

That is the transaction on the validity of which the Court has to determine. Under the power the late Duke might, if he pleased, have appointed the two sums of 16,000*l.* each to Lord Henry, for his own benefit ; and further, when they had become his own property Lord Henry might, if he had thought fit so to do, have applied the whole or any part of such sums for the benefit of his sister, the plaintiff, either absolutely or in the qualified manner expressed by the last-mentioned deed. The real question is, whether, having regard to the facts established by the evidence given in this cause, and to the inferences to be drawn from the contents of the deeds themselves, that is the real character of the transaction ?

It was contended, on the part of the plaintiff, that the transaction was merely a colourable appointment, executed with a view to effect an object which was not within the scope of the power : that it was not and never was intended to be an appointment in favour of Lord Henry ; that it was an appointment in favour of the plaintiff, but contrived in such a manner as to make her obtaining it dependent on her marrying, or abstaining from marrying, according to the wishes of the late Duke ; that it must be treated exactly as if in making the appointment the trusts of the indenture of the 24th of November 1848 had been contained in the same instrument executed by the Duke ; and that in that event one of two conclusions is inevitable : either it is an appointment in favour of Lady Mary, and that the subsequent limitations imposing fetters on her enjoyment of it and control over it are void ; or if that be not the conclusion come to, then that the whole appointment is void, and that the two sums must go as in default of appointment.

On the first of those contentions it is impossible to adopt the view of the plaintiff. I cannot treat this as an appointment absolutely in her favour, and reject the limitation and condition contained in the

deed of November 1848. It would be to make a perfectly new deed with fresh limitations if the Court were so to act. The only question respecting which any reasonable doubt can be entertained is, whether the appointment was or was not wholly void on the ground that it was for an object foreign to the purpose for which the power was intended? In order to shew the object with which this appointment was made, evidence has been adduced, the result of which, it was contended on the part of the plaintiff, establishes that the intention of the late Duke, the donee of the power, was so to appoint the fund as to give the plaintiff one equal share with her brother and sisters, provided she did not marry her present husband, and that if she did she was to have no benefit from or enjoyment of any portion of the fund during her coverture with Sir William Topham. What I have to consider is, first, how far such evidence can properly be taken into consideration for the purpose of determining on the validity of the execution; and, secondly, whether, if taken into consideration, it establishes that the object to accomplish which this appointment was made is so foreign to the purpose for which the power was given, as to render the exercise of it invalid.

All the cases which bear on this subject establish that it is the duty of the Court to receive and examine the evidence of the motives for which the power is exercised. On the second point, also, the cases all establish the same principle. In *Alleyn v. Belchier* (1) Lord Northington lays it down, "that no point is better established than that a person, having a power, must execute it *bonâ fide* for the end designed; otherwise it is corrupt and void." Sir William Grant, in *Wheate v. Hall* (2), says, "I cannot conceive that a Court of equity will sanction the application of a power to purposes clearly and obviously foreign to those for which it was originally intended." The Court, in all the cases, examined into and considered the evidence of such intention; and if such intention was proved to exist, it held the power to have been unduly exercised, and the execution of it void. The real difficulty in these cases lies in defining accurately

what, to use the words of Lord Northington, is "*bonâ fide* the end designed by the power," or, to use the words of Sir William Grant, which import the same thing, "*what comes within the purposes for which the power was originally intended?*"

In this case there can be no question that the appointments of the two sums of 16,000*l.* to Lord Henry were valid executions of the power at law. In equity the question is, whether they were made to him wholly or in part, for purposes clearly and obviously foreign to those for which the power was originally intended? It was argued that there are three classes of cases which, if established by evidence, vitiate the execution of the power. The first, when the donee appoints to an object of the power with the view of gaining a personal pecuniary benefit himself; such as that of a father appointing to a dying infant child, in order that he may, as next-of-kin, take the fund on the death of the intestate child—*Wellesley v. Mornington*. That class of cases has no reference to the present, and may be dismissed from consideration. The second class of cases is, where the instrument executing the power gives to the appointee the property coupled with a condition expressed on the face of the instrument itself; which condition, if complied with, would effect an object plainly foreign to the purposes for which the power was intended. That class of cases may also be dismissed from consideration; the instruments of appointment here contain no such condition. The third class of cases is stated to be that, where the donee of the power and the appointee agree that if the appointment be made, the appointee will deal with the fund appointed, or with a portion of it, in a manner foreign to the purposes for which the power was intended. The question is, whether the present case comes within the letter or spirit of such a rule?

It was contended, on behalf of the defendants, that the present case does not come within that class; that it is necessary, in order to bring it within that class, that the agreement should precede the appointment; but that in the present case it is proved that no such agreement was entered into, and the case of *Proby v. Landor* was referred to as being confirmatory of that proposition. That proposition is stated too broadly when

(1) Eden, 132.

(2) 17 Ves. 80.

it is contended that the agreement to pervert the fund from the original purpose for which the power was intended must be previous to the execution of the power. It is difficult to see the distinction, in a moral point of view, between an appointment made to one who previously agrees to deal with the fund as the appointor desires, and an appointment made without any such previous agreement, but where the appointee is bound by such moral ties as to be unable, after the appointment is made, to contest the will of the appointor. If it be clearly established that the appointment was made solely by reason of the well-founded reliance which the appointor placed in his influence over the appointee, it seems that the result must be the same, in the consideration of equity, whether that influence be exerted before the appointment or after it; provided that, in both cases, it secures the consent of the appointee to fulfil the wishes of the appointor. If an appointment made by a father to a dying infant child be void, although there be no agreement beforehand, I am at a loss to conceive on what just principle of reasoning an appointment to an adult son, one of several children, would be valid, if made solely on the well-founded belief and conviction that such son would, at the request of his father, pay him over a portion of the fund appointed. In every moral and common-sense point of view, the case is the same, whether the appointee be bound by the previous agreement or by inevitable influence. From whatever source it may spring, the effect is the same. In both cases the influence which acts on the appointee existed before the appointment was made; in both cases the reliance placed on that previously-acquired influence is the motive which induces the appointor to make the appointment. In neither case, in a legal point of view, is the obligation binding. In the one case the previous agreement could not be enforced by any proceedings either at law or in equity; and in the other case the appointee may, if he have the moral power, resist the influence of the appointor. But as, in both cases, the appointment is made solely in consequence of the confidence felt by the appointor that the influence acquired by him over the appointee, whether by contract or by any other cause, will effect his object, it is difficult to under-

stand why equity should declare it to be invalid in the one case and valid in the other. The influence possessed by parents over their offspring is a recognized branch of equity, against the exercise of which influence this Court will relieve where it is employed for purposes not warranted by the rules of equity and good conscience. It is on that ground, and on that alone, that *Re Marsden's Trusts* is founded. It goes the full length of supporting the proposition as stated. It is cited also in *Sugden on Powers*, p. 528, 8th edition, without comment, as illustrating the ordinary rule. In that case there was an absence of any previous agreement; but the mother, relying on the effect which the expression of her wish would have upon her daughter, appointed the whole fund to the daughter, in order that, afterwards, such wish might be communicated to her, and that she might thereby be induced to carry it into effect. Consider the position of the appointee in such circumstances. If he refuse to give effect to the wishes of the appointor, he gets what it was never intended that he should have, and enjoys property which, if his conduct could have been foreseen, might, and probably would, have been given to another. But the case is the same whether the consent, or the agreement to act as desired, be given or entered into before or after the appointment. The Court also would be placed in this dilemma: if it did not enforce compliance with the wishes of the appointor, it would be sanctioning the appointee's taking property never intended for him; and if this Court were to enforce it as binding in conscience on the appointee, it would enforce the execution of a power in favour of persons who were not objects of it. In *Birley v. Birley* it did not appear that there was any previous agreement: and the subsequent deed merely recited an understanding which, for aught that appeared, was merely an understanding on the part of the appointor; but the appointment was held to be void.

In the present case the fact of the existence of the previous influence of the late Duke over Lord Henry is established by the evidence; and also that the appointments of the two sums of 16,000*l.* were made to him on the faith that he would act in the matter as the father desired. He had in

fact in 1843 undertaken the performance of a similar trust with reference to the annuity of 800*l.* per annum granted by the Duke and Duchess by the deed of the 29th of June 1843. Independently of other evidence, the dates are conclusive that Lord Henry merely acted in the matter as the instrument of his father's wishes. On the 13th of October 1848, 16,000*l.* charged on the English estates is appointed to him, and immediately after carried to his account with Messrs. Drummonds, of which, however, no information was given to him at the time. On the 28th of the same month the 16,000*l.* charged on the Scottish estates is appointed to him; and two days afterwards, viz. on the 30th of October, the amount is carried to his account at Messrs. Drummonds'. The first intimation he has of that fact is in a letter of Mr. Ellis, written on the same day, and inclosing an order to Messrs. Drummonds, to be signed by him, directing investment in 3*l.* 10*s.* per cents. of one-half of each sum in the names of trustees; and immediately thereupon a deed is prepared, containing a declaration of the trusts on which such stock is to be held. The deed bears date the 24th of November following, not four weeks after the payment of the money. It is impossible to read the answers of the defendants, the letters of Mr. Ellis and the depositions, and not to see that this was all one transaction, effected by the influence of the late Duke, and in order to carry out his wishes, all which is strongly confirmed by the contents of the documents themselves. The conclusion therefore is this, that these appointments were so made by the Duke with the view and for the purpose of carrying into effect his intention with regard to his daughter Lady Mary. I am, therefore, compelled again to recur to the evidence for the purpose of ascertaining what the intentions were, and whether the effectuating such intentions was within the scope and object of the purposes for which the power was originally given.

The evidence establishes that for many years a mutual attachment had existed between the Lady Mary and Sir William Topham; that the late Duke had objected to the marriage, and had offered every obstacle in his power to its solemnization; that Lady Mary had frankly stated her intention

not to oppose the will of her father during his life, but that she considered that her father's control over her on that subject ought not to extend beyond his life; and she expressed her intention, when freed from that control, to unite herself to the object of her affection. The late Duke set himself to work to see in what manner he could make his control over his daughter extend beyond his life, and he considered that the powers contained in the settlements executed on his marriage, some forty years before, afforded him the means of doing so. They were exclusive powers of appointment; and accordingly, if he had thought fit, he might have distributed the whole of the two sums of 40,000*l.* amongst his four other younger children, leaving Lady Mary destitute. But that obviously would not have answered his purpose, or advanced the accomplishment of his wishes. If Lady Mary had been left with nothing, having nothing to gain by remaining single, and nothing to lose by marrying, it is obvious that she would marry the moment the parental control was removed; but if a sum of 16,000*l.* was provided for her, and placed in such a situation that she could have the benefit and enjoyment of it if she did not marry Sir W. Topham, but would lose it if she did, then there was some reason for supposing that Lady Mary would not make so great a sacrifice, but would prefer single affluence to a marriage with the object of her affections, coupled with straitened means. That is the clue to the whole transaction (which, indeed, is scarcely veiled at all); and what I have now to consider is, whether the accomplishment of that object was within the purposes for which the power was originally intended, or whether it was foreign to those purposes?

On that point my opinion is in favour of the plaintiff.

By no construction of an ordinary power contained in a marriage settlement for raising and distributing portions amongst younger children, can it be made subservient to the accomplishment of any particular fancies or inclination which the donee of the power may have as to the profession in life which any of the objects of the power may choose to adopt. It might as reasonably be applied to prevent a son from entering the church or the army, as to prevent a daughter from entering into the

state of marriage; and if it could not be so applied generally, as little can it be employed for the purpose of preventing a son from taking any particular living or entering into any particular regiment, or a daughter from marrying any gentleman in particular on whom she may by preference have fixed her affections. If I am right in that, then this result follows: the whole appointment of each sum of 16,000*l.* to Lord Henry is void. The plaintiff seems by her bill merely to have contested the validity of the appointment so far as regards the moieties of these two sums; but there are no means by which the moieties can be separated. The appointment, if void in part, is void *in toto*. It is impossible for the Court now to surmise how much the late Duke was influenced in his appointment of the two sums of 16,000*l.* to Lord Henry, by his conviction that Lord Henry would devote the moieties of each sum towards the accomplishment of his wishes. If Lord Henry had refused to be instrumental in any respect to the imposition of such conditions on his sister, and had shewn by his previous conduct that his concurrence for that purpose could not have been reckoned upon, it may well be that the Duke would have appointed little or nothing to him. But, as it was, the whole of both sums was given to him, half for his own exclusive benefit, coupled, however, with a condition, not expressed, but implied, and afterwards consented to by Lord Henry, and acted upon by him—such consent and such action being produced by the influence of his father—that the other halves of each sum should be applied for the accomplishment of the purpose which his father had in view. Acting on the principle laid down in *Daubeny v. Cockburn*, I am of opinion that the portion which is good is not separable from the portion which is bad, and that, as the whole appointment is bad in part, it is bad *in toto*; that the object to accomplish which was the cause of the exercise of the power, and the condition on which it was executed, taints the whole appointment; and that the fund, that is, the two sums of 16,000*l.* each, appointed to Lord Henry by the deeds of the 13th and 28th of October 1848, must go as in default of appointment.

The other matters which are the subject of this suit, and respecting which the plain-

tiff also asks for relief, arise out of separate and distinct transactions, although they partake somewhat of the same character; that is to say, that the execution of the appointment in question seems to have arisen from the same wishes as those which so strongly took possession of the mind of the late Duke, and influenced the execution of the appointments.

By an indenture dated the 24th of June 1843, the late Duke covenanted with the present Duke, Lord George and Lord Henry, to transfer 52,000*l.* 3*l.* 10*s.* per cents., into their names, upon trust to invest and accumulate the dividends at compound interest; and after the decease of the late Duke, to hold the trust-fund and the accumulations thereof upon trust for Lady Harriet Bentinck and the plaintiff, or for one of them, exclusively of the other who should be living at the time of the appointment after mentioned, and the issue then living of both or either of them, in such shares and proportions, or for such times, with such limitations over, as the person who should be Duke of Portland during the life of Lady Harriet and the plaintiff, or the life of the survivor, should, by deed to be executed as therein mentioned, direct or appoint; and in default of and until such appointment, upon trust, during the joint lives of Lady Harriet and the plaintiff, to pay the dividends unto them and their respective assigns in equal shares as tenants in common, and after the decease of either of them to pay the dividends to the survivor for her life; and after her decease, that fund was to be in trust for the person who should then be the Duke of Portland, and the 52,000*l.* 3*l.* 10*s.* per cents. were transferred to the trustees accordingly.

On the 24th of November 1848, an indenture was executed by the late Duke of the first part, the present Duke and Lord Henry of the second part, and Mr. Ellis of the third part, by which the late Duke limited his Marylebone estate to Mr. Ellis in fee, upon trust, after the death of the Duke, to raise several annuities after specified, and subject thereto in trust for the late Duke in fee. The indenture, after providing for the raising of several annuities therein mentioned, declared that in case Lady Harriet and the plaintiff should survive the late Duke, Mr. Ellis, his heirs or assigns, should thereupon raise an annuity of 2,720*l.* during

the joint lives of the two ladies, and pay it to the present Duke of Portland and Lord Henry, and the survivor of them, his executors, administrators and assigns, to the intent that they should pay the annuity of 2,720*l.* to Lady Harriet and the plaintiff in such shares and proportions, or to either of them in exclusion of the other, and subject to such conditions and restrictions, as the present Duke, during his life, or as Lord Henry, after his decease, or after the death of the survivor as the personal representative of the survivor should from time to time by any writing direct or appoint; and in default of and until such appointment, unto the two ladies in equal shares and proportions; and after the death of one, to raise and pay an annuity of 1,360*l.* during the life of the survivor, in such manner either apart from any husband, or to withhold the payment of the whole or any part thereof for any time and in such manner and subject to such conditions as the Duke during his life, or after his decease as Lord Henry, or after the death of both as the personal representative of the survivor, should by writing direct, and in default thereof to pay the annuity to the survivor; and as to so much as under the limitations and restrictions aforesaid should not be paid—that is to say, as to the prohibited portion—it was to sink into the estate for the benefit of the person entitled to the hereditaments out of which the annuity would have been payable.

Those are the two deeds creating the powers at present in question.

The late Duke died on the 27th of March 1854. On the 21st of September following, the present Duke executed two deeds-poll. By the first, in exercise of the power contained in the deed of the 24th of November 1848, he appointed that, until the 1st of December 1854, the annuity of 2,720*l.* should, as from the 27th of June 1854, be paid to Lady Harriet for her own use and benefit; but the Duke goes on to declare that the appointment so made shall be subject to such revocation and further and other appointment as might be made by means of the power of revocation and new appointment contained in the indenture of the 24th of November 1848. By the second of the deeds-poll, the Duke, in exercise of the power contained in the indenture of the 24th of June 1843, directs

and appoints that the dividends and interest of the 52,000*l.*, 3*l.* 5*s.* per cent. annuities, or of the securities on which the same or any part thereof was invested, should, until the 1st of March 1855, be paid to Lady Harriet Bentinck, for her sole use and benefit; with the same reservation as to revocation and further appointment as was contained in the contemporaneous appointment of the annuity of 2,720*l.*

On the execution of the deeds-poll, the annuity and the income of the fund created by the deed of the 24th of June 1843 were, by order of the Duke and Lord Henry, carried over in the books of Messrs. Drummond, the bankers, to the account of Lady Harriet Bentinck. On the 5th of October 1854 the plaintiff intermarried with her present husband, Sir William Topham. On the 18th of October following, Lady Harriet signed an order directing that one-half of such sum should, from time to time, be invested in the purchase of consols, in the name of the Duke, Lord Henry and herself. At that time the fund created by the deed of the 24th of June 1843 consisted of 50,000*l.* invested on mortgage of real estates, and 21,400*l.*, 3*l.* 5*s.* per cents. The order for investment given to Messrs. Drummond, and signed by Lady Harriet Bentinck, was sent to her for that purpose in a letter written by Mr. Ellis, which was to the following effect:—"Dear Madam,—I have the honour to inclose an order for your ladyship's signature; and in doing so I should explain that the Duke lately executed deeds revocable at any time, but under which no payment beyond 600*l.* a-year can for the present be paid to Lady Mary. The half-year's dividend on 21,400*l.*, 3*l.* 5*s.* per cents., will this month be paid to your credit by the trustees, as well as 680*l.* less property-tax for the quarter's double annuity. The arrangement made, which will be completed by the inclosed order (setting aside and making a fund for future disposal), has appeared to be the best, if not the only mode of faithfully carrying into effect the late Duke's views and intentions." And on the 28th of October 1854, the Duke, Lord Henry and Lady Harriet executed a power of attorney to Messrs. Drummond to receive the dividends on the consols so purchased from time to time, and also sent them an order to receive such

dividends and invest them in the purchase of more stock until further order. On the 19th of December 1854 the Duke executed two deeds-poll, by one of which he gave the dividends and interest of the fund created by the deed of the 24th of June 1843 to Lady Harriet, reserving to himself and the person who, during the lives of Lady Harriet and Lady Mary, and the life of the survivor, should be the Duke of Portland, power to revoke the same and declare new trusts thereof in favour of Lady Harriet and Lady Mary, or their issue: and by the other of such deeds the Duke made a similar disposition of the sum of 2,720*l*.

The plaintiff insists that all the appointments were, so far as regards one-half of the income of the fund, created by the deed of the 24th of June 1843, made, not for the benefit of Lady Harriet, but for the benefit and advantage of the plaintiff, and that in the circumstances detailed she is entitled to one moiety of each respectively. If the plaintiff fail in that, she insists that the object of the appointment to Lady Harriet of the whole fund was to accomplish something which was not within the scope of the power, that it renders the whole void, and that the whole of the past dividends and annuity must go as in default of appointment. It is clear, for the reasons stated with reference to the former appointments, that these appointments cannot be allowed so as to consider them made exclusively, as to one-half, for the benefit of the plaintiff. If she is entitled to any relief in respect of them, it can only be on the latter branch of her contention, and which in the case first considered led to the conclusion that the appointments were void. There is, however, a marked distinction between the case arising out of the execution of the powers contained in the deeds of the 24th of June 1843, and the 4th of October 1848, and the case arising out of the execution of the powers contained in the marriage settlement of the late Duke and Duchess. Under the settlement of the 4th of August 1795, the issue of the marriage of the late Duke and Duchess were within the consideration of marriage for which the deeds of settlement were executed. The plaintiff, therefore, was a purchaser for valuable consideration of whatever she might have become entitled to under the settlement.

The object for which the powers over the two sums of 40,000*l*. each were created, was to provide for the younger children of the marriage; and the manner in which the power was executed by the late Duke was foreign to the object, and a departure from the purposes for which the power was originally intended. But under the subsequent deeds the matter presents a very different aspect. These deeds were executed to accomplish a particular object. By the first of them, on the 24th of June 1843, the Duke settles 52,000*l*., 3*l*. 10*s*. per cents., on Lady Harriet and the plaintiff; by the second, on the 29th of June 1843, the Duke and Duchess settle an annuity of 800*l*. per annum on the plaintiff; by the third, on the 24th of November 1848, the late Duke settles an annuity of 2,720*l*. on Lady Harriet and the plaintiff.

Proceeding upon the principle stated with reference to the two sums of 8,000*l*. each, the questions are, first, what was the purpose for which the powers were originally intended; and, secondly, whether the appointment has attempted to accomplish something foreign to that purpose? It is to be observed that all these deeds are voluntary; and so far as the plaintiff is concerned, it is obvious that they were all three executed for the same purpose. The second, viz. the annuity of 800*l*. per annum, accomplishes its object without the necessity of any subsequent appointment; and, accordingly, it is not and could not be impeached by the plaintiff. But the first and the third of these deeds do, in truth, aim at accomplishing the very same object by means of powers vested in the present Duke. The evidence, the contemporaneous correspondence, and the form and contents of the instruments themselves, plainly indicate that these deeds were executed by the Duke, so far as regards the plaintiff, with the view and for the purpose of holding out the strongest motive which the Duke could create to induce the plaintiff not to marry her present husband. The instruments themselves, and the powers thereby intrusted to the present Duke, as to the payment of the annuity, and of the income of the 52,000*l*., or of the securities on which it might be invested, were originally framed with that view; and the mode in which the present Duke has executed the powers of appointment so vested in him is

fashioned in accordance with and to accomplish the purposes for which the powers were originally intended.

If that view be correct, there is an end of the question.

It might possibly have been argued that the whole purpose, being in restraint of marriage, was void; but it would obviously be superfluous to enter into any discussion whether that purpose be legal or not; as, if illegal, the only effect might be to invalidate altogether the instruments creating the powers and settling the funds. But, in truth, the object aimed at by the deeds is not illegal; they are not intended to effectuate any general restraint on marriage, but are for the purpose of preventing the marriage of a daughter of the settlor with one specified person. Assuming, as I believe the fact to be, that nothing can be breathed against the character of the gentleman, and assuming also that he was, in the estimation of all persons but the late Duke himself, worthy of obtaining the hand of his daughter, still all that would not make the purpose illegal, or one which, if the late Duke had expressly introduced it into the deeds themselves, would have made them invalid; and in that case, however reluctantly, this Court would have been compelled to give effect to them. All that was as clearly understood by all the actors in these two transactions, as it was in the case of the deeds-poll of the 13th and 28th of October 1848. The present Duke and Lord Henry have only acted in accordance with those views in the acts which they have subsequently done; but the distinction between the two cases lies in this, that in the case of the deeds of the 13th and 28th of October 1848, the appointor endeavoured to accomplish an object wholly foreign to the purposes for which the power was intrusted to him: whereas, by the deeds of the 21st of September 1854, the present Duke has merely endeavoured to carry into execution the purposes for which the powers were created by the late Duke, and for which purposes they were entrusted to him.

In the first case, therefore, there must be a declaration that the appointments of the two sums of 16,000*l.* each to Lord Henry Bentinck by the deeds of the 13th and 28th of October 1848, are wholly void, and that the sums so appointed must go and are dis-

tributable as in default of appointment; and as to all the rest of the relief prayed the bill must be dismissed. In a case between such near relations and of this character, in no event would the Court be disposed to give any costs. As it is, however, a case in which the plaintiff partially succeeds and partially fails, the decree will be made without any order as to costs on either side.

WOOD, V.C. }
1862. } *Re THE SOUTH LADY BERTHA*
June 14, 16, } COPPER MINING COMPANY.
26. }

Winding up — Jurisdiction — Court of Stannaries.

The 32nd section of the 18 & 19 Vict. c. 32, extending the jurisdiction of the Stannaries Court over the county of Devon, does not oust the jurisdiction of the Court of Chancery over mines in that county; and therefore it is no objection to a petition for winding up a joint-stock mining company in that county that the petitioners are not owners of one-tenth in value of the shares, as required by the 12 & 13 Vict. c. 108. s. 1. in the case of mining companies formed on the cost-book principle within the jurisdiction of the Court of Stannaries.

Leave to present such a petition was held to have been properly granted under the 20 & 21 Vict. c. 78. s. 12, on the ground that the Stannaries Court had no jurisdiction to restrain proceedings at law against individual shareholders.

This was a petition for the dissolution and winding up of the South Lady Bertha Copper Mining Company.

The company was formed, in 1859, at Buckland, in Devonshire, within the jurisdiction of the Court of Stannaries of Devon, upon the cost-book principle, for working a copper-mine.

The company became insolvent, and proceedings at law were instituted by creditors against some of the shareholders, who now presented the present petition, alleging that they could not obtain adequate redress in the Court of the Vice Warden of the Stannaries, by reason that the said Court did not possess jurisdiction to stay proceedings at law commenced by creditors or

alleged creditors of the company against shareholders or contributories thereof; and that any order made by the said Court for the dissolution and winding up of the company would not, pending such winding up, afford any protection to the petitioners or the other shareholders and contributories, but leave them still subject individually to be harassed by actions at law.

The petitioners also alleged that they represented one-tenth of the shares of the company, so as to take the case out of the 1st section of the 12 & 13 Vict. c. 108, which excepts companies formed for working mines on the cost-book principle within the Stannaries and jurisdiction of the Court of Stannaries in Cornwall (and which jurisdiction was subsequently extended to mines in Devonshire by the 18 & 19 Vict. c. 32.) from the operation of the Winding-up Acts, unless the petition be presented by the holders of one-tenth in value of the shares. This allegation, however, was denied by the respondent, the purser of the company, and ultimately decided by the Court in the negative; and the question then arose whether the 18 & 19 Vict. c. 32, extending the jurisdiction of the Stannary Court to mines in Devonshire, and so bringing this company within the jurisdiction of the Stannary Court, ousted the jurisdiction of the Court of Chancery; because, if not, then the fact that the petitioners did not hold the requisite number of shares would be immaterial (1).

(1) By the 12 & 13 Vict. c. 108. s. 1. it is provided, "that nothing herein contained shall affect the jurisdiction of the Court of Stannaries in Cornwall; and that nothing in this act, nor in any act herein referred to contained, shall extend or be construed to extend to any partnership, association or company formed for the working of mines on the principle commonly called the cost-book principle, within the said Stannaries and jurisdiction of the said Court, unless the owner or owners of one-tenth in value of the shares in any such mine, as shall appear on the cost-book, shall present a petition to the Lord Chancellor or to the Master of the Rolls for the dissolution and winding up, or for the winding up of the affairs of such company," &c.

The 18 & 19 Vict. c. 32. s. 32. is as follows: "And whereas it has been represented that the adventurers, miners and others interested in mines in the county of Devon would be benefited by the extension of the Stannary Court jurisdiction into that county, and are willing to be contributory to the expenses of such extension in the manner hereinafter provided. Be it therefore enacted as follows: The jurisdiction of the Court of the Vice

Upon an *ex parte* application leave was given, pursuant to the 20 & 21 Vict. c. 78. s. 12, to present this petition. By that section, after reciting that the dissolution and winding up of unincorporated companies for working mines within and subject to the jurisdiction of the Stannaries can now in most cases be conveniently, cheaply and expeditiously effected in the Court of the Vice Warden of the Stannaries, it is enacted that no petition shall hereafter be filed in the Court of Chancery under the Joint-Stock Companies Winding-up Acts, 1848 and 1849, by any adventurer or shareholder in such a company, except upon special application to the Court, alleging and shewing to the satisfaction of the Court that the company cannot be effectually dissolved or wound up in the Court of the Vice Warden, or unless the Vice Warden shall certify to the Court of Chancery that the jurisdiction and powers of his Court are, under the circumstances, insufficient effectually to dissolve or wind up the same."

Upon the petition coming on to be heard,

Mr. Jessel, for the respondents, objected that no statement of the fact appearing on the petition, and no notice having been given, they were entitled to treat it as if

Warden shall henceforth be extended and exercised over the county of Devon, and over the mines and miners therein; and the process of the said Court, both at common law and in equity, shall run in and be executory throughout the counties of Devon and Cornwall; and the forms and customs of procedure as now lawfully used and exercised in the Stannaries of Cornwall (subject nevertheless to such amendments or provisions as are contained in or may be authorized by this act, and to all other lawful rules and orders of the Court) shall henceforth be adopted, used and enforced in and throughout the Stannaries and county of Devon; and the Stannaries of the said two counties shall be and become, for the purposes of Stannary jurisdiction, one entire district; and the present and all future Vice Wardens of the Stannaries shall be Vice Wardens of the Stannaries of and for both counties, and shall have therein all the like powers, privileges, authority and jurisdiction over and in respect of mines and miners and causes touching the same, in Devon as in Cornwall; and all miners and others interested in mines in Devon shall have the privilege to sue and be sued at law and in equity in the Court of the Vice Warden, and be amenable to the said Court and Vice Warden, as well by reason of the person as of the cause, in like cases and for like causes, in and for which the miners and others interested in mines in Cornwall now have such privilege, or are amenable to the said Court and Vice Warden."

leave had not been given; the petitioners therefore could not be heard.

Wood, V.C. held that the objection could not be sustained; leave had been given, and the only objection it was now open to the respondents to make was that it had been improperly given.

Mr. Roxburgh and Mr. E. B. Lovell, in support of the petition.—It having been held that the petitioners do not represent one-tenth in value of the shares, it becomes necessary to contend that the proviso in the 1st section of the 12 & 13 Vict. c. 108. does not oust the jurisdiction of the Court. That act was passed when mines in Devonshire were not subject to the Stannaries jurisdiction, but to the jurisdiction of the Court of Chancery, and the subsequent act (18 & 19 Vict. c. 32), extending the jurisdiction of the Stannaries Court, cannot be construed as ousting that of the Court of Chancery. The act must be construed with reference to the state of the law at the time it was passed—*Re the British Provident Life and Fire Assurance Society* (2).

Mr. Jessel, for the respondent, the pursuer of the company, contended that leave to present the petition had not been properly granted. It ought to be shewn that the company cannot be effectually dissolved or wound up in the Court of the Vice Warden, and this had not been shewn. The allegation that the Stannaries Court had no jurisdiction to stay proceedings commenced at law by creditors was not true, inasmuch as the Judge to whom the power of staying such proceedings is given by the 20 & 21 Vict. c. 78. is the Judge who is charged with the winding up, and the word includes as well the Vice Warden of the Stannaries as the Judge of the Court of Chancery. He further contended that the petition must be presented by one-tenth in value of the shareholders, and that the 32nd section of the 18 & 19 Vict. c. 32. had entirely removed the mines in Devonshire from the jurisdiction of the Court of Chancery to that of the Stannaries.

Mr. Roxburgh replied.

Wood, V.C. (June 26.)—This case turns entirely upon two statutes which govern the arrangements as to winding up com-

panies within the Stannaries jurisdiction. It appears that the mine is situated in the county of Devon, and that at the passing of the act of 1849 it was not included within the Stannaries jurisdiction, which would have taken it out of the jurisdiction of the Winding-up Acts; and an important question arises in consequence of the Stannaries of Devon having since that act been in a very peculiar manner placed under the jurisdiction of the Vice Warden of the Stannaries, that question being whether these mines are exempted from the Winding-up Acts, except upon a petition presented by the holders of one-tenth part in value of the shares. There is also an objection raised to the jurisdiction altogether, on the ground that a case has not been shewn, as required by the subsequent statute, to satisfy the Court that the company could not be conveniently wound up in the Court of the Vice Warden.

From the year 1849 down to 1855, when an act was passed to amend and extend the jurisdiction of the Stannaries Court, there can be no doubt that companies formed in Devon would have been wound up in the ordinary way, without any limit as to the number of the petitioners or the amount and value of their shares. If, however, the act of 1855 has made it necessary that the petitioners should hold one-tenth in value of the shares, still no hardship would arise in this case on that account, because this company was formed four years after the passing of the act of 1855.

In the first instance, *Mr. Roxburgh* put it so high as to say that he thought the act extending the jurisdiction of the Stannaries Court would itself be an implied repeal of that clause in the act of 1849 which requires the shareholders to be one-tenth in number of the whole. I do not think that can be so. The principle laid down in the case of *Lang v. Spicer* (3), and several other authorities referred to in that case, is that affirmative words in an act of parliament cannot repeal a previous act of parliament unless they are distinctly inconsistent with it, and it is impossible that the two acts should operate together. In the 18 & 19 Vict. c. 32. there is a reference to

(3) 1 Mee. & W. 129; s. c. 1 Tyrw. & G. 358; 5 Law J. Rep. (N.S.) M.C. 60.

(2) 10 W.R. 508.

and preservation of the clause in the act of 1849, because the 22nd section gives power to the Vice Warden to make orders, if he thinks fit, which may remove the conditional difficulty as to winding up under the act of 1849, and enable people to wind up a company although there may not be ten subscribers; and very full directions are given by which the Vice Warden may make orders for that purpose; and it says the company shall no longer be deemed or taken to be for any purpose a partnership association or company within the exemption of mining partnerships contained in the Joint-Stock Companies Act, or within the conditional exemption contained in the Joint-Stock Companies Winding-up Amendment Act of 1849. Then comes the important clause upon which the question turns; it is the 32nd clause, which unites the two jurisdictions.—[His Honour read the section and proceeded.]—Upon that section a question arises whether it repeals in effect the general Winding-up Act of 1848, which act had distinct application to these mines in Devon, and indeed to all mankind, except the mines in Cornwall. It cannot be distinctly repealed unless the two things are inconsistent. That is what the authorities seem to say, and plain common sense must be applied to the subject to see whether they can or cannot stand together. The case of *Lang v. Spicer* would be most favourable for the contest of those who wish to exempt the Devon mines from the jurisdiction of the Winding-up Acts. In that case a question arose with respect to the affiliation of a bastard child. The 4 & 5 Will. 4. c. 76. says, where a man marries a woman having a bastard child, that child shall be deemed part of the family, and the husband must take upon himself the burden of its maintenance. It was held in that case that the clause in the earlier act was repealed upon the ground of the strong improbability that the legislature would provide a double maintenance for the child, leaving the putative father and the husband of the mother both liable. That, certainly, is as strong a case as could be instanced in favour of the objection to the jurisdiction: on the other hand, I have to consider who are interested in the matter. If miners alone were interested in the privilege, there might be strong reasons for

saying that the two jurisdictions were not intended to exist; but the Winding-up Act enables every person liable to the debts of the company to proceed, and that, not merely against existing shareholders, but against anterior shareholders, for the common liabilities they were under for debts incurred.

The cost-book principle exempts the transferor, upon the transfer of shares, from all future liabilities, but not from the past; therefore, he remains liable, as between himself and existing shareholders, to creditors. Here, these unfortunate contributories, who no longer hold shares in the mine, have been subjected to a variety of actions, and they are to be told that they can have no relief because the miners have the privilege of being sued in Devon alone. The contributories say in answer to this, that it cannot have been intended to repeal the statute, and so to take away the valuable remedies there given; they have a right to the assistance which the legislature has granted to all mines in Devon, and which is not to be taken away by a subsequent act, which only says affirmatively that the miners in Devon have the like privilege of suing and being sued as those in Cornwall; unless, indeed, the two things are inconsistent, and ought not to stand together. As it appears to me, that would be a strong interpretation of that clause which seems to have been contemplated for the benefit of persons holding shares for the time being in different mines. If I were to hold that it applied to persons sued, as these gentlemen unfortunately are, in Her Majesty's superior Courts, I should leave these parties entirely remediless, although the Winding-up Act has given them a remedy, upon the ground of an implied repeal contained in the subsequent act of 1855. There is no special hardship upon the company in this case, because the company was formed after 1855, and, therefore, must be taken to have known of the act of 1855. I think these persons have a right to say that they have the same rights and privileges as they held anterior to the passing of the act of 1855.

As regards the other act, I have no difficulty. The 12th section of the act of 1857 says, that no petition shall be presented in this Court without the leave of

the Court, which leave is not to be given unless effective relief cannot be given in the Court of the Vice Warden. Mr. Jessel has said that the principal ground relied upon when the application was made was, that there is no relief in the Stannaries Court with regard to actions against contributories brought in Courts of a jurisdiction paramount to that of the Vice Warden, where there is no power to stay actions; but he says that power is given to the Court of the Vice Warden by this very act, which says that this Court is not to exercise its power unless the Stannaries Court cannot afford complete relief; and it is absurd to suppose that a power was given which the legislature must have known that the Stannaries Court could not exercise. I hold the true meaning to be rather the reverse, the legislature having declared it to be beneficial that there should be this power of winding up, and thus stopping actions, because the Court of the Vice Warden does not possess it. It appears, therefore, to me that there are sufficient grounds for the application, and that a winding-up order ought to be made.

The case tests in the strongest manner the injustice that might be done by withholding the relief sought. Here are these gentlemen perpetually sued and harassed by actions, and it appears there is one person, the pursuer of the mine I believe, conducting himself in a very singular way; he seems never to have had a proper banking account, and in one sense has appropriated to himself all the monies of the company. I do not say that he applied them afterwards to any purpose of his own, but there was no proper account at a banker's of the monies of the company. He was evidently conducting all these matters in a very loose way, and the mine was in such a position that it has been put up for sale for payment of the rent. He will take no step to release these unfortunate gentlemen, thus affording them no means of relief, except by the aid of the Winding-up Act. I can hardly conceive a stronger case for winding up, if the Court has the jurisdiction. I think that the Court has that jurisdiction, and that, therefore, I ought to make the winding-up order.

LORDS JUSTICES. { *Ex parte STEVENSON, in re*
Nov. 14, 18; { THE LIVERPOOL TRADES-
Dec. 9. { MAN'S LOAN COMPANY
(LIMITED).

Winding up — Jurisdiction — Limited and Unlimited Company — Calls.

A company of unlimited liability registered under the statute 7 & 8 Vict. c. 110, after carrying on business was registered as a limited company under the statute 19 & 20 Vict. c. 47, and was afterwards ordered to be wound up. The Court, affirming an order of one of the Commissioners of Bankruptcy, decided that the same must be done under the jurisdiction in Bankruptcy, both as to matters before as well as after registration, under the act of 1856.

A call can be made by the Court of Bankruptcy upon the shareholders at the time of re-registration to discharge debts of the company then due, whenever they accrued.

This was an appeal against an order made by Mr. Hosack, the acting Commissioner of the Liverpool District Court of Bankruptcy. The company was formed before the Joint-Stock Companies Act, 1856 (19 & 20 Vict. c. 47), was passed, and was registered under the act 7 & 8 Vict. c. 110; but in October 1856 it was registered under the act of 1856 as a limited company. The company carried on business after such registration down to 1860, when it became in a state of insolvency. All the funds of the limited company, as well as the outstanding assets since realized, had been applied in the payment of the company's debts; but a sum of 2,218*l.* 7*s.* 8*d.* was still necessary to be raised for payment of debts. The learned Commissioner made a call of 4*l.* per share. The shares were fully paid up. For the shareholders of the company before him, it was contended that the Court had no power to make a call on them as a "limited company" beyond the amount of their shares; while, on the other hand, it was argued that, as it had been decided in the case of *The Plumstead Waterworks Company* (1), that in such a case as the present

(1) 2 De Gex, F. & Jo. 20; s. c. 29 Law J. Rep. (N.S.) Chanc. 741; and see *post*, note 4.

the Court of Bankruptcy had jurisdiction to wind up the company, both limited and unlimited, it followed necessarily that the Court had power to make the necessary call (2).

Mr. Stevenson and other alleged contributories, appealed from this decision.

Mr. G. M. Giffard and *Mr. Roxburgh*, for the appellants, argued that the Court of Bankruptcy had no jurisdiction whatever

to make a call in respect of the unlimited company, which was one quite distinct from the subsequent company with limited liability. The 60th section of the act of 19 & 20 Vict. c. 47. conferred the winding up of unlimited companies on the Court of Chancery; and no call could be made upon this latter, as the amounts of the shares had been paid up in full.

(2) The Commissioner's judgment, dated the 29th of October 1862, was as follows:

"This company was established some years before the Joint-Stock Companies Act, 1856, was passed; but on the 1st of October 1856 it was duly registered as a limited company under that act, by the 116th section of which it is expressly provided that the rights of existing creditors shall in no way be prejudiced by such registration, and it is to satisfy the claims of creditors of that description that the present application is made. The company in 1860 became insolvent, and all the funds of the limited company, as well as the outstanding assets since realized, have been applied in payment of the debts. But there are still outstanding debts of 2,218*l.* 7*s.* 8*d.*, for which the shareholders of the company previous to its registration are liable, and for these a call of 4*l.* a share will be required. It is, however, contended, on the part of those earlier contributories, that the Court has no jurisdiction to make this call; and this is the only question now to be determined. It is contended that not only can no authority be shown which empowers this Court to make a call for any purpose on the shareholders of a limited company beyond the amount of their shares, but that the powers of the Court in this respect are expressly defined and restricted by the act of 1856. It is provided by that act that unlimited companies shall be wound up by the Court of Chancery, and that limited companies shall be wound up by the Court of Bankruptcy having jurisdiction in the place where the registered office of the company is situated. By the 82nd section power is given to the Court to make calls on the contributories to the extent of their liability; but by the 61st section it is provided that, if the company is limited, no contribution shall be required from any shareholder exceeding the amount, if any, unpaid on the shares held by him. It is contended that, as this is a limited company, and as the shareholders have already paid up the full amount of their shares, this Court has no power to make any further call. The difficulty of determining this point arises from the circumstance that the act of 1856, while providing for the winding up of both limited and unlimited companies, makes no provision for the case of a company originally unlimited which afterwards became limited, and which consequently consists partly of shareholders who are liable only to the amount of their shares, and partly of those who are liable beyond that amount; and the amended Joint-Stock Companies Act of 1857 is equally silent on the subject: but there is a recent decision of the Lords Justices which appears to me to get rid of this difficulty. It has been there held,

differing from the decision of Vice Chancellor Kindersley, that the proper Court for winding up a company which was originally unlimited and subsequently limited, is not the Court of Chancery, but the Court of Bankruptcy. I gather from the expressions of Lord Justice Turner, that in a case of a company of this description, this Court has exclusive jurisdiction. The case is *Re the Plumstead, Woolwich and Charlton Waterworks Company* (3). The Lord Justice expresses himself to this effect: 'On reading the act, my mind is satisfied that the intention of the legislature here was to place within the jurisdiction of the Court of Bankruptcy all companies originally unlimited, which were registered under that act as limited companies, and to take away all jurisdiction over such companies under the acts which had been previously passed for the purpose of winding up companies.' And his Honour the Master of the Rolls has intimated his opinion to be the same. If, therefore, this is the proper — and indeed the only — Court for winding up a company like the present, it appears to me to follow, as a necessary consequence, that it is invested with all the powers necessary for that purpose. It would be a manifest inconvenience to the creditor, and eventually, I believe, to the shareholders themselves, to hold that this company can only be partially wound up here, and that the former must make good elsewhere their unsatisfied claims against the latter. I cannot believe that such a state of things could have been contemplated by the act of parliament. It was clearly the object of the provisions contained in the third part of that act to give to one tribunal, namely, the Court of Chancery or the Court of Bankruptcy, as the case might be, ample and complete powers for winding up an insolvent company. It was clearly the object of those provisions to provide a comparatively expeditious and inexpensive mode of settling the respective claims and liabilities of the parties interested, and thus to prevent litigation elsewhere. If the present application is refused, the obvious intention of the legislature will be defeated. I therefore think that the restrictive words in the 61st section must be held to apply only to those shareholders whose liabilities are limited in fact and in law. By this interpretation, those whom the section was intended to protect will be protected, and those whom the act still renders liable will be bound to contribute in proportion to their liabilities. I think, therefore, that a call of 4*l.* per share must be made on the class of contributories in the terms of the report of the official liquidator."

(3) *Ubi supra*.

Mr. Bacon and Mr. Little, on behalf of the official liquidator of the company, supported the order for the call, contending that the company before and after the registration was the same in every respect, except its liability; and the authorities shewed that the Court of Bankruptcy, which had jurisdiction over the limited company, was not confined to dealings only after the second registration.

Mr. Robinson, for a creditor of the company while it was registered as an unlimited company, proposed to address the Court; but it was decided that he had no claim to be heard, as he had not been served with notice of the appeal, and his client had not himself appealed.

Mr. Giffard was heard in reply.

The authorities referred to were—

In re the Plumstead, Woolwich and Charlton Waterworks Company, ubi supra.

Ex parte Lofthouse, in re the Welsh Pottery Mining Company, 2 De Gex & Jo. 69; a.c. 27 Law J. Rep. (N.S.) Chanc. 1.

Wryght's case, 2 De Gex, M. & G. 636; a.c. 21 Law J. Rep. (N.S.) Chanc. 807.

LORD JUSTICE TURNER (Dec. 9).—This company was originally registered with unlimited liability, under the 7 & 8 Vict. c. 110, with a capital of 15,000*l.*; and for some years it carried on business as a company of unlimited liability. On the 21st of October 1856 it was registered with limited liability, under the act of that year (19 & 20 Vict. c. 47); and in compliance with the provisions of that act, the word "limited" was added to its title, and the incorporation of the company under its new name was duly certified. No alteration was made in the shares of the company, and, as thus constituted with limited liability, it continued to carry on business until the close of the month of December 1860, when a petition for its winding up was presented in the Liverpool District Court of Bankruptcy by Mr. George Crosfield, a shareholder. That petition stated the original registration of the company and its subsequent change of constitution; that three-quarters of its capital had been lost; that the company was unable to pay its debts,

and that, in one particular instance, a debt had been duly demanded and not paid; that the petitioner had been a shareholder of the company whilst it was still unlimited, and had continued to be one after its second registration; and that he was also a creditor of the company for a sum exceeding 50*l.* The petition then prayed that the company might be wound up by the Court under the acts of 1856 and 1857. This petition was entitled, "In the matter of the Joint-Stock Companies Acts, 1856 and 1857, and in the matter of the Liverpool Tradesman's Loan Company, Limited"; and by an order, dated the 7th of January 1861, and similarly entitled, it was ordered that the Liverpool Tradesman's Loan Company (Limited) should be wound up. In pursuance of this order, two lists of contributories were made; the first list comprising all those contributories who were shareholders prior to the second registration; being list A, and the second list comprising only those who had become shareholders subsequently to that registration. Debts were then proved against the company, and some of them were wholly or partially incurred before the second registration; and dividends were paid out of the assets as far as they would go, but these assets were insufficient to pay the debts in full. Under these circumstances, an order was made on the 29th of October 1862, by the acting Commissioner, for a call of 4*l.* per share from the contributories upon the list A, in order to discharge the residue of those debts. From this order the appellants have brought the present appeal, on the ground that, as the company was limited and their shares were fully paid up, there was no jurisdiction to make any call whatever. The principal argument on the part of the appellants was, that the company of unlimited liability was wholly distinct from the company of limited liability, and that the creditors of the former company, when registered under the earlier act, could have no general rights against the new company after registration under the 19 & 20 Vict. c. 47. other than those which were reserved to them by the 116th section, which only reserved a right of action against the company and its members, and did not authorize calls to be made. But, for the reasons which were given when we

decided the case of the *Plumstead Waterworks Company*, I think that the limited company cannot be distinguished from the unlimited (4). I think that there was but one company; that it was throughout but one and the same company, though governed by different rules at different times. The arguments adduced in the case of the *Plumstead Company* were sufficient to establish that section 113. of the act of 1856, one of those relied on by the appellants, applied only to the new registration; and the second of them, the 116th section, was intended only to reserve the rights of

creditors against the company and its members. As to the argument founded on the rights of the creditors, I think that it is a mistaken view to look on it as regarding the rights of creditors only—the rights of the contributories also must be regarded. I see no reason to doubt the authority of the Court to make the call in question. Then it was said, that the order in this case was to wind up a limited company, and that it was not competent for the Court of Bankruptcy to deal with the company before it was limited. I think, having regard to the fact that it was the

(4) Lord Justice Turner, in his judgment, speaking of the jurisdiction to wind up a company situated as was the *Plumstead Company*, said that the question depended mainly upon the construction of the act of 1856, and proceeded as follows: "Whether it has taken away the jurisdiction of the Court of Chancery as to a company originally founded with unlimited liability, but registered under the act with limited liability. The construction of this act is open to considerable question, but I am satisfied that the intention of the legislature was to place within the jurisdiction of the Court of Bankruptcy all companies originally unlimited which were registered under the act as limited companies, and to take away all jurisdiction over such companies under the acts which had been previously passed for the purpose of winding up companies. There was a suitable jurisdiction created by the original Winding-up Acts; and I think that the true meaning of this act of parliament was to take away that suitable jurisdiction in the particular cases to which I have referred. It is said that in the true construction of this act there were here two companies,—one a company with limited liability, and the other a company with unlimited liability. But I think it impossible to maintain that argument; for when we look at the 107th section of the act, we find first of all a repeal of the statutes 7 & 8 Vict. c. 110. and 10 & 11 Vict. c. 78, with a proviso that such repeal shall not take place with respect to any company completely registered under the 7 & 8 Vict. c. 110. until such company had obtained registration under the new act; so that a company incorporated under the 7 & 8 Vict. c. 110. (which would be a company up to that time incorporated with unlimited liability) is called 'such company,' though it obtains registration under that act. Again, in the 108th section of the act there is a repeal of the Winding-up Acts so far as relates to these companies. The section says that the following acts (that is to say, the former Winding-up Acts) shall not apply to companies registered under the act, nor to companies registered under the act of the 7 & 8 Vict. c. 110. from and after the date at which they have obtained registration under this act; so that the jurisdiction under the former Winding-up Acts is taken away as to companies created under the 7 & 8 Vict. c. 110. when these companies become registered under the act, whether registered

with limited or with unlimited liability. Other provisions of the act lead to the same conclusion. By the 59th section it is enacted that the provisions of the act relating to the winding up of companies shall apply to all companies registered under the act, and to all companies registered under the act of the 7 & 8 Vict. c. 110. from and after the date at which they have obtained registration under the act of 1856 in manner mentioned in the act, but not to any other companies; and by the jurisdiction clause (a), in the case of a limited company registered in England that is not engaged in working any such mine as is comprised within the exceptions specified in the act, the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situate is the Court which is to have power under this act. Now, can it be said that the company is not a limited company registered in England, when, by the operation of being registered, it has been brought within the provisions of this act by the 59th section? The best argument for the official manager was brought forward last, namely, that which was founded on the 5th section, and which went to shew that that section was intended to define a limited company. The section says, 'that in case of a company formed with limited liability, and hereinafter called a limited company, the word "limited" shall be the last word in the name of the company.' But this goes no further than to shew that companies formed with limited liability were to be included in the description of limited companies. It does not shew that other companies were not to be included in the term, and therefore cannot be taken as a controlling definition that no company should be taken to be a limited company within the meaning of the act unless it was formed with limited liability. I should be very slow in acting upon any such conclusion as is attempted to be deduced from that section, as against the general words of the act, and as against the extended construction which the act appears to bear in its different parts. On the whole policy and purport of the act the conclusion, at which I have arrived (a conclusion fortified by the 23rd section of the act of 1857) is, that the statutable jurisdiction originally created for the purpose of winding up these companies is taken away from the Court of Chancery (to which it had been given), and is now transferred to the Court of Bankruptcy."

same company, bearing the same name, and that the proceedings in this case must be taken as having been intended to reach the company as it existed with unlimited liability, no objection upon that ground can be maintained. The motion must therefore be refused.

LORD JUSTICE KNIGHT BRUCE.—I am not able to free my mind from doubts upon this appeal. The opinion of my learned Brother, however, affirms the order, and I have no objection, if he thinks fit, that the respondents should take the deposit, but no other costs, from the appellants.

The order made was—"The costs of the official liquidator to be taxed; and if they exceed the amount of the deposit (30*l.*), the deposit be paid out to him, and he take the balance of his costs from the estate; but if they fall short of the deposit, the excess beyond the taxed costs to be returned to the appellants."

ROMILLY, M.R. } *Ex parte* TOSLAND.
Nov. 8. } *In re* LETTS.

Solicitor—Bill of Costs—Taxation.

A solicitor delivered his bill of costs to his client, made out in double columns, one being the amount allowed on taxation, which he refused to accept when tendered. The client then paid the larger sum to obtain his papers; and, upon his petition,—Held, notwithstanding the payment, that he was entitled to an order to tax the bill, as he had been constrained to pay the larger sum by the refusal of the solicitor to accept what he himself had stated that he was legally entitled to.

In this case, a solicitor, who had been employed by a trustee, delivered his bill of costs, with the items brought out in double columns: one representing the sums claimed if the bill were not taxed, and the other the sums which would be allowed if it were taxed. The sums amounted in the first case to 32*l.* 2*s.*, and in the second to 23*l.* 11*s.* 10*d.* The petitioner tendered the smaller sum to the solicitor; he refused to accept it, and required the petitioner to obtain the common order and have the bill taxed. The petitioner objected; but being desirous of

obtaining the documents in the solicitor's possession, paid the 32*l.* 2*s.*, took the documents, and then filed the petition asking for the taxation of the bill.

Mr. Bagshawe, for the petitioner, said he had not, by paying the larger sum to obtain his papers, waived any right to tax the bill.

Mr. Baggallay and *Mr. A. E. Miller*, for the respondent.—The petitioner, after payment of the bill of costs, was not entitled to ask for taxation. It was not alleged that there was either fraud or pressure: the form of the bill was unexceptionable; it specified the charges for the work done, and left the client at liberty to pay them. The second column was a mere assumption of a result which might not be correct, and could only be ascertained by taxation—*Ex parte Turner* (1).

The MASTER OF THE ROLLS.—The result of this application might have been different if the exercise of any option had been allowed to the client. Had the solicitor sent in his bill of costs with the items brought out in double columns, and stated that the amount in the one column was what he was legally entitled to charge if the bill was taxed, but that the amount in the other column was the recompense he thought himself entitled to as a remuneration for his services,—if he had done that, and then left the client to elect which amount he would pay, it would have been difficult had the client chosen to pay the larger amount for him to complain; for though informed of the charges legally allowed, still he might have considered that the larger sum was a more adequate sum for the remuneration of the services performed. At any rate, the client would have been left to his option, and if he had exercised it he could be hardly heard to complain. If what the solicitor contended for were to succeed, he might say that the client should not have his papers unless he paid the larger amount, and after he had paid the same, that he should insist upon the numerous authorities in which it had been held that a bill, when paid without pressure, ought not to be opened. Even now it was argued that the client might have obtained the common

(1) 24 Law J. Rep. (N.S.) Chanc. 71.

order to tax the bill before he paid it, that was as much as to say that the client was to incur all the expenses of obtaining and prosecuting the order to tax the bill, because the solicitor who delivered the bill refused to accept what he himself had stated that he was legally entitled to. Under the circumstances, therefore, the order asked for must be granted, and the respondent must pay the costs of the application.

KINDERSLEY, V.C. } *Re* KEELER'S MORT-
Nov. 17. } GAGE TRUST.

Vesting Order—Trustee Act.

A mortgagee, having a power of sale upon non-payment of the money, with a trust to hand over the residue to the mortgagor, entered into possession, and subsequently died, giving his general estate to his executor, but leaving no heir-at-law. The Court made a vesting order under the 15th section of the Trustee Act, the 13 & 14 Vict. c. 60.

This petition stated that by a mortgage, dated the 11th of February 1840, certain lands were mortgaged by Samuel Keeler to John Lee, to secure 350*l.* and interest; and the mortgage contained a power of sale in default of payment, with a trust to stand possessed of the rents until the sale; and the proceeds of such sale, after deducting the expenses, and after payment of the principal and interest, were to be handed over to Samuel Keeler, his executors, administrators or assigns. In consequence of default having been made in payment of the interest, the mortgagee entered into possession of the property, and remained in possession until his death, which took place on the 8th of October 1857. By his will, dated in August 1857, J. Lee, the mortgagee, directed payment of various legacies, and gave the residue of his real and personal estate to Abel Roger Grove and Harry Grove, and appointed them his executors. The will contained no devise of mortgaged or trust estates. It was stated upon affidavit that the testator had no relatives living at the time of his death. Under these circumstances, and the principal and interest upon the mortgage still remaining unpaid, and there being no heir of John Lee, this peti-

tion was presented under the Trustee Act, the 13 & 14 Vict. c. 60, praying that the mortgaged hereditaments might be vested in the petitioners, the executors of John Lee.

Mr. Morris appeared in support of the petition, and submitted that the order might be made under the 9th or 19th section of the Trustee Act. He also cited *Re Skitter's Mortgage Trusts* (1).

KINDERSLEY, V.C.—I do not think that what the petition asks for can be done under the 19th section, or under the 9th; but there is a case of *In re Underwood* (2), in which, under circumstances so similar to the present, that I can find no distinctive principle, Wood, V.C. thought it might be done under the 15th section of the act. In that case, by the terms of the instrument, property was conveyed to trustees upon trust to sell; and after paying the debts and expenses, the surplus was to be handed over to the party, his executors or administrators. Whatever doubt I might have entertained if it had been *res integra*, finding such a decision as that in the case I have quoted, I can do no other than follow it in this. I will, therefore, make the order in the terms of the petition.

KINDERSLEY, V.C. } *COLYER v. COLYER.*
Nov. 18.

Executors, Liability of—Retaining Balances.

*Executors having retained in their hands large balances arising from the estate without investing them, an inquiry was directed as to the propriety of their conduct, and they were charged with interest at 4*l.* per cent. upon a portion of such balances:—Held, that, in pursuance of the general principle, the executors could not be allowed the costs occasioned by the inquiry.*

This was an administration suit, and an inquiry had been directed as to whether the executors were justified in having retained in their hands certain large balances belonging to the estate for the execution of the trusts reposed in them, and without

(1) 4 W. R. 791.

(2) 3 Kay & J. 745.

having invested the same. The chief clerk, by his certificate, found that it was necessary for the executors to retain the sum of 300*l.* from the year 1848 till 1856; but he found that the executors were not justified in retaining any further sum, and that they ought to be charged with interest at 4*l.* per cent. upon whatever amount they had retained in excess of that sum. The whole amount which was found to be due upon this principle was 257*l.* 12*s.* The case now came on for further consideration, and the plaintiff asked that the executors should not be allowed the costs which had been incurred in effecting the inquiry into their conduct.

Mr. Cole and *Mr. Shebbeare* appeared for the plaintiff, and cited—

Tebbs v. Carpenter, 1 Madd. 290; and
The Attorney General v. Alford, 4 De Gex, M. & G. 843.

Mr. Baily and *Mr. Hallett* appeared for the executors, and opposed the application.

They cited—

Heighington v. Grant, 1 Phill. 603;
s. c. 11 Law J. Rep. (N.S.) Chanc. 171.

Buxton v. Buxton, 1 Myl. & Cr. 80.

Royds v. Royds, 14 Beav. 54.

Taylor v. Tabrum, 6 Sim. 281; s. c.
1 Law J. Rep. (N.S.) Chanc. 189.

Mr. Glasse and *Mr. Karslake* appeared for the legatees.

KINDERSLEY, V.C.—The sums involved in this case are not large, but the question may be decided on the same principle as if they were more considerable. Independently of any direction in the instrument creating the trust for the executors to invest, it has been established on obvious principles, that where executors receive assets to any considerable amount and find it impossible, owing to the requirements of the administration or other cause, to divide the monies amongst the parties entitled, it is their duty not to retain them uninvested for more than six or twelve months; if they do so, they are guilty of a breach of that duty which is imposed by the Court on all executors. If it were otherwise, there would be a temptation to executors to retain balances which they ought to pay over to those entitled, and the inquiry in this case was directed in accordance with that rule. In ordinary cases, if the Court should see upon the face of the accounts that considerable balances

have been retained, it will direct inquiries whether the balances were improperly retained, and will charge the executors with interest on the amount. Here it appeared that it was necessary to retain some portion of the funds received by the executors, and the inquiry was directed in accordance with general principles; the question now is as to the costs incurred by that inquiry to ascertain how the matter stood, and whether there had been any default on the part of the executors. If an executor or trustee by omitting his duty causes expense to his *cestui que trust*, *prima facie* he ought to pay such expense, and it ought not to fall on the *cestui que trust*. The tendency of my inclination has always been in favour of executors, who are, I think, sometimes hardly treated; but here the plaintiffs have asked the least they have a right to ask under the circumstances, and the executors cannot be allowed their costs. The cases which have been cited establish the general principle, and I am only acting upon that principle.

LORDS JUSTICES. { *Ex parte* PHILLIPS, *in re*
Nov. 19. { THE LONDON AND SOUTH-
WESTERN RAILWAY COM-
PANY.

Costs—*Lands Clauses Consolidation Act*, 1845, ss. 80, 82. and 112.—*Mortgage*.

The owner in fee simple of an estate (part of which was subject to a mortgage) entered into a contract to sell a portion to a railway company, but no provision was made in the contract as to costs. On the investigation of the title it appeared that only a very small portion of the mortgaged part was included. The mortgaged portion of the estate was vested in trustees of a person whose estate was in course of administration by the Court of Chancery. The railway company required the concurrence of those trustees in the conveyance. The vendor applied to one of the Vice Chancellors for the sanction of the Court to the trustees releasing the mortgaged part of the estate included in the contract of sale, and the same was ordered. On taxing the costs of the vendor, the taxing Master disallowed the costs of the above application to the Court; but the Vice Chancellor ordered the Master to review his taxation. On ap-

peal, the Lords Justices held that the railway company were not liable to pay these costs.

This was an appeal, presented by the South-Western Railway Company, against an order of Vice Chancellor Wood, by which his Honour had directed a review of a taxation, which in effect decided that the company were liable to pay the costs of an application to the Court. In the month of July 1858, Mr. George Phillips and his since deceased brother were seised in fee simple as tenants in common of lands, part of which was subject to a mortgage for 7,000*l.* The present company served a notice upon them to take a portion of the land, almost the whole of which portion was unencumbered, but one small part was subject to the mortgage. For the parts required by the company the Messrs. Phillips demanded 25,000*l.*

In April 1859 the brother died intestate, and George Phillips, as his heir-at-law, became seised of the whole of the estate. The negotiations, which had not been concluded between the Messrs. Phillips and the company, were then carried on, and ultimately an agreement was entered into for the sale of the land for 12,800*l.* No mention was made of the mortgage.

An abstract of title was then furnished to the company, and from the answers to their requisitions it appeared that a small part of the lands bought was subject to the mortgage, and that this mortgage was then vested in the trustees of the will of the original mortgagee, whose estate was being administered by the Court of Chancery in the suit of *Allen v. Embleton*. The company required the concurrence of these trustees, and an application was made in the above suit to the Court for its sanction, which was given, and the costs were taxed by Master Parkes at 157*l.* 4*s.* 10*d.*, and the same was paid by Mr. Phillips. The company did not appear upon the application, and were not parties to the suit. The company entered into possession of the land, and Mr. Phillips's solicitors delivered the vendor's bill of costs (including the above sum of 157*l.* 4*s.* 10*d.*) of deducting the title and for the conveyance. On the 3rd of May 1861 an order for taxation was made at the Rolls, and the bill was referred to Master Wainewright, and he disallowed

the whole of the 157*l.* 4*s.* 10*d.*, relying on the authority of the case of *In re the South Wales Railway Company* (1), as to the costs not being payable by the company under the 82nd section of the Lands Clauses Consolidation Act, 1845. Mr. Phillips then presented a petition for the review of the taxation, and the Vice Chancellor ordered the same, expressing an opinion "that when the company ascertained by the answers of the vendor to the requisitions on the title that the land was under mortgage, they might have either given notice to the vendor to clear the title of the mortgage, or have proceeded under the mortgage clauses of the act. Besides, as a very small part of the land included in the purchase was subject to mortgage, the case came within the principle of the case of *Picard v. Mitchell* (2); and the vendor ought not only to be indemnified, but ought not to be put to any inconvenience." The company now appealed.

Mr. Amphlett and *Mr. Bagot*, for the company.

Mr. G. M. Giffard and *Mr. Bury*, for Mr. Phillips.

During the argument the following cases were cited:

Re the South Wales Railway Company, ubi *suprà*.

Dinning v. Henderson, 2 De Gex & Sm. 485.

In re Horé's Estate, 5 Rail. Cas. 592.

Wilson v. Foster, 26 Beav. 398; s. c. 28 Law J. Rep. (N.S.) Chanc. 410.

Haynes v. Barton, 1 Dr. & Sm. 483; s. c. 30 Law J. Rep. (N.S.) Chanc. 804.

Ex parte Ommaney, 10 Sim. 298; s. c. 10 Law J. Rep. (N.S.) Chanc. 315.

The Midland Counties Railway Company v. Westcomb, 11 Sim. 57; s. c. 9 Law J. Rep. (N.S.) Chanc. 324.

Henniker v. Chafy, 28 Beav. 621.

Picard v. Mitchell, ubi *suprà*.

Re Taylor, 1 M. & G. 211; s. c. 1 Hall & Tw. 432.

LORD JUSTICE TURNER.—I should hesitate to give an opinion on this case if I thought I should be thereby establishing a general rule; but it depends upon very

(1) 14 Beav. 418; s. c. 20 Law J. Rep. (N.S.) Chanc. 534.

(2) 12 Beav. 486.

peculiar circumstances. The Court has to deal with a case of contract between a company on the one side, and the owner of land on the other. According to that contract, it was not competent for the company, after it was made, to deal with a mortgagee. The question is, what is the effect of that contract? and to me it appears that its effect is, that as Mr. Phillips has agreed to sell land to the company, it has become his duty to make a conveyance of it, and it is incumbent upon him to procure all necessary parties to join in such conveyance. What the act relied upon says is, that the company is to pay the costs of the conveyance of and the title to the land. This, however, is not a question of conveyance or title. It seems to me that this case is not covered by any of the authorities, and I think the view of the Taxing Master is proper.

LORD JUSTICE KNIGHT BRUCE.—I agree with my learned Brother. There never has been any contract between the company and the mortgagee, nor has any notice ever been given to the mortgagee as between the mortgagee and the company. There is nothing but a contract between the owner of the equity of redemption and the company, which is wholly silent on the question of costs. After that contract the company could not have proceeded under the 112th section to pay the mortgage off. This is a special case, under very peculiar circumstances, and it ought not to be drawn into a precedent. Under these circumstances, I think that the costs cannot properly be paid by the company.

KINDERSLEY, V.C. }
Dec. 13. } DUNN v. SNOWDEN.

Presumption of Death.

A legatee under a will who had not been heard of since the year 1848 was presumed to be dead at the expiration of seven years, but there being no evidence to fix the death at any particular period, it was held that he had died subsequently to the death of the testator in 1851, and that his representatives were entitled to the legacy.

A question in this case arose upon an adjourned summons, whether William Snowden should be presumed to be dead,

and if so whether he died before or after the testator in the cause.

William Snowden was a legatee under the will of the testator, who died on the 12th of May 1851. The evidence proved that William Snowden was a carpenter; that he was last seen at Newcastle-on-Tyne on the 1st of January 1848, at which time he was unmarried, and that nothing had been heard of him since that period. The executors of the testator had made all the inquiries in their power respecting William Snowden, and had advertised for him in the London and local newspapers, and also in the *New York Herald*, but without effect.

The Chief Clerk upon this evidence had reported that William Snowden must be presumed to have died unmarried, and that the presumption must have reference to the end of seven years from the last period at which he was seen alive, and consequently that he survived the testator.

Mr. Glasse and *Mr. Hislop Clarke* appeared for the executors.

Mr. Lawson, for the next-of-kin of William Snowden, contended that the presumption of death did not take place till the expiration of the seven years; which period having occurred after the death of the testator, the representatives of William Snowden were entitled to his legacy.

Mr. F. Bacon appeared for the next-of-kin of the testator.

They cited—

Lambe v. Orton, 29 Law J. Rep. (N.S.)
Chanc. 286.

Dowley v. Winfield, 14 Sim. 277.

Sillick v. Booth, 1 You. & C. C. 117.

Nepean v. Knight, 2 Mee. & W. 894;
s. c. 7 Law J. Rep. (N.S.) Exch. 335.

KINDERSLEY, V.C.—I think that as no further evidence can be obtained, the chief clerk has arrived at a just conclusion, that William Snowden died unmarried after the death of the testator. The rule is well established, that if it can be proved that a person has not been heard of since a given day, and that seven years at least have elapsed since that time, you must presume that he is dead. Of course, he may reappear, and such cases have happened; but seven years is the period fixed for the presumption of death to arise. The next question is, whether there is evidence upon

which it can be presumed that he died at any particular time during the seven years. It appears that some months after the testator's death his executors advertised in the papers for information about Snowden, but without effect; and there is nothing further known of him than that he was last seen at Newcastle-on-Tyne in January 1848. There is no sufficient evidence, therefore, to prove that he died at any particular time during the seven years, but he must be taken to have died unmarried and to have outlived the testator.

ROMILLY, M.R. }
Nov. 11. } **CASSON v. ROBERTS.**

Vendor and Purchaser—Parol Agreement—Abandonment—Returning Deposit—Interest.

Where a deposit has been paid upon a parol agreement for the purchase of land, which is either abandoned or is incapable of being carried out, the purchaser is entitled to a return of the deposit.

The forfeiture of a deposit must depend upon an agreement, either expressed or implied.

George Casson, in the year 1856, contracted by parol with John Lloyd, since deceased, for the purchase of certain freehold estates in the parish of Maentwrog, in the county of Merioneth, with the minerals under the same, for 14,680*l.* 11*s.* 5*d.*

The estate was mortgaged to Ann and Thomas Whitfield, to secure the repayment of 7,000*l.* and interest.

George Casson advanced to John Lloyd a sum of 430*l.*, in two payments, the one on the 3rd of May and the other on the 15th of July 1856, and he acknowledged the receipt of them as being in part payment of 680*l.* 11*s.* 5*d.*, the deposit which was to have been received in part payment of the purchase-money of the estates.

John Lloyd died on the 4th of October 1856, having, by his will, appointed Phoebe Roberts his executrix.

On the 8th of February 1860 the plaintiff George Casson, when applied to, said he did not consider himself called upon to

complete the purchase, and he had now no wish to do so.

The estates were afterwards sold by the mortgagees in a suit of *Whitfield v. Roberts*.

The plaintiffs now filed this bill, on behalf of themselves and others, against Phoebe Roberts, claiming, as creditors of John Lloyd, the repayment of the sum of 430*l.* with interest.

Phoebe Roberts, by her answer, said that the testator was able and willing to complete the purchase, and that she had been willing so to do, but that it had been repudiated by G. Casson, and she insisted that the 430*l.* had been paid as a deposit, and that it had been forfeited to the vendor in consequence of the plaintiff's non-performance of the contract, and that as the estate had been sold in consequence of his non-performance of the contract, she, as executrix, could not be called on to refund a deposit which by his omission he had forfeited.

Mr. Selwyn and Mr. Faber, for the plaintiffs Messrs. G. & J. Casson, bankers at Portmadoc, in the county of Caernarvon, said that the deposit ought to be returned, as no contract had ever been concluded—*Sugden's Vendors and Purchasers*, 32, 13th ed.

Mr. Hobhouse and Mr. G. O. Morgan, for P. Roberts, the executrix.—If a party contracts for the purchase of land and pays a deposit as an earnest for the due completion of the contract, he forfeits it, if by his own act he omits to perform what he, by paying the deposit, contracted to do. The estate had certainly been sold by the mortgagees, and the contract could not now be specifically performed. This had put the estate to expense and damage; it had been caused by the omission and default of the plaintiff: he therefore could not complain, or claim a return of the deposit.

Spratt v. Jeffery, 10 B. & C. 249; s. c. 5 Man. & Ry. 188; 8 Law J. Rep. K.B. 114.

Palmer v. Temple, 9 Ad. & E. 508; s. c. 1 P. & D. 379; 8 Law J. Rep. (N.S.) Q.B. 179.

Gosbell v. Archer, 2 Ad. & E. 500; s. c. 4 Nev. & M. 485; 4 Law J. Rep. (N.S.) K.B. 78.

Lethbridge v. Kirkman, 25 Law J. Rep. (N.S.) Q.B. 89.

Clark v. Upton, 3 Man. & Ry. 89.
Dart's Vendors and Purchasers, 620,
 3rd edit.

The MASTER OF THE ROLLS.—Where it is necessary to ascertain who is to blame for the non-performance of an agreement when the Court is asked to determine whether a deposit paid ought to be returned, it must necessarily do so in a manner most unsatisfactory. When a deposit is paid by a purchaser to a vendor the presumption is, that it is paid on behalf of the purchaser, and that he was to obtain the benefit of it on the completion of his purchase: in fact, that it was made in part discharge of the purchase-money. An agreement certainly might be made that the deposit should be forfeited in case the purchase should not be completed, but this must either be expressed or clearly implied from the contract itself. It had in many cases, from the terms of the contract, and even from its silence, been held that such a forfeiture must be inferred. There is, however, no authority which holds that the deposit must be considered as forfeited in the absence of any agreement whatever, or one which could neither be enforced at law nor in equity. In *Gosbell v. Archer*, where the contract went off because the vendor was unable to make a title, the Judges considered that the purchaser was entitled to a return of the deposit, though without either interest or the expenses which he had incurred in consequence of the contract. If in that case the contract had been valid, and if it had then gone off in consequence of the defaults of the defendant, the purchaser would, undoubtedly, have been entitled to interest on his deposit and also to his expenses: in that case damages would then have been sustained in consequence of the breach of the contract, which of itself would give a right of action; but in the absence of any contract whatever, the purchaser could not bring any action for the breach of it, neither could he recover the interest or expenses. He was merely entitled to the return of his deposit: it was his money; it had not been applied, and it could not be applied for the purpose for which it was deposited. *Palmer v. Temple*, and the comments of text writers, tended rather to the conclusion that the question depended upon the fact of the

existence of a contract; but this rested upon a slender basis. If there were no contract, or if there were a contract that could not be enforced, still the purchaser was in equity entitled to a return of the deposit from the vendor, but whether he was entitled to interest upon the deposit was another question. In the present case, however, there must be the usual creditor's decree for the administration of the real and personal estate, and in chambers the plaintiffs will be entitled to prove for the sums paid on account of the deposit. The question of interest will then be left open.

STUART, V.C. } *Re HOOPER.*
 Nov. 13. } *BAYLISS v. WATKINS.*

Practice—Motion to vary Chief Clerk's Certificate—Affidavit filed after filing of Certificate.

Upon a motion to vary the chief clerk's certificate, an affidavit filed after such certificate is filed cannot be read.

Mr. Greene and Mr. Osborne Morgan appeared in support of a motion to vary the chief clerk's certificate, and they proposed to read an affidavit which had been filed since the certificate was filed.

They referred to—

Whitworth v. Whyddon, 2 Mac. & G. 52; and

Fairburn v. Pearson, cited 2 Ibid. 56 (note).

Mr. Malins and Mr. Cracknall opposed the motion.

STUART, V.C. refused to allow the affidavit to be read. Sometimes fresh affidavits might be read on the hearing before the Court of Appeal of a motion to vary or discharge an order of the Master of the Rolls, or of one of the Vice Chancellors; but in that case the motion was treated as a new motion, and not as an appeal motion. Upon a motion to vary the chief clerk's certificate, the case came before the Court upon the same evidence as was before the chief clerk in chambers.

ROMILLY, M.R. }
Nov. 12, 13. } FARRANT v. BLANCHFORD.

Trustee — Breach of Trust — Invalid Release — Lapse of Time.

A valuable consideration and a knowledge of the facts connected with a trust are essential to the validity of a release which will discharge trustees from liability.

Where, therefore, a cestui que trust executed a release at the instance of a trustee, his father, who by a breach of trust had obtained possession of a trust fund, such release did not discharge from liability a co-trustee, whom it purported to release, and to whom the father sent it, when such co-trustee had assisted the father in the commission of the breach of trust.

A lapse of ten years from the time when the cestui que trust attained twenty-one, held, under the circumstances, not to bar the cestui que trust from obtaining relief in equity against the breach of trust.

This bill was filed by Henry Arundel Martyn Farrant, against Anne Blanchford, Joseph Green Bidwell, William Jenney Pengelley, and Myra Mary, his wife, to obtain an account of what was due to the plaintiff for principal and interest in respect of a moiety of a trust fund originally amounting to 970*l.*, and asking that it might be raised by the sale of six houses (the title-deeds of which had been deposited as a security for payment), or such part of them as might be necessary, and that any deficiency which should remain might be made good by J. G. Bidwell, personally, and the estate of Frederick Granby Farrant, in such order between them as might be considered just. It also asked for a declaration that a release alleged to have been given by the plaintiff to J. G. Bidwell would not, even if it had been given, release him from the claim. It further asked for the administration of the real and personal estate of F. G. Farrant, if it should be necessary for the purposes of the suit.

William Tucker died on the 25th of August 1819, having by his will, dated the 7th of June previous, bequeathed to Messrs. Arundel and John Radford a sum of 1,000*l.*, upon trust to pay the interest

to Harriet Radford for life, and after her death upon trust to divide the principal between all and every the children of Harriet Radford, equally between them, and power was given to appoint new trustees.

On the 15th of November 1838, under the power contained in the will, Messrs. J. G. Bidwell and F. G. Farrant were substituted as trustees in the place of the Messrs. Radford; and received the sum of 970*l.* (being the amount of the legacy after deducting the duty), and it was afterwards invested in consols.

In 1826 F. G. Farrant, who was a surgeon in the army, intermarried with Harriet Radford. She died on the 16th of August 1832, leaving the plaintiff and his sister, now Mrs. Pengelley, infants; but on the 5th of September 1848 her share of the trust fund was paid to her.

F. G. Farrant, by his will, dated in 1835, after disposing of several personal chattels, gave all the rest of his estate and effects to John Daw and J. G. Bidwell, their executors and administrators, upon trust to sell the same, and pay 300*l.* to Anne Blanchford, his housekeeper, for arrears of salary, and his other just debts, and "to divide the residue between his children, Myra Mary Pengelley and the plaintiff, in equal proportions, share and share alike"; and he appointed Messrs. Daw and Bidwell his executors, but they renounced probate and disclaimed the trusts.

F. G. Farrant was the acting trustee under the will of W. Tucker. In 1847 he asked Mr. Bidwell to enable him to obtain the trust funds; and he stated that by so doing it would be of the greatest advantage to his family. Mr. Bidwell told him he was satisfied that he intended to lay out the money in railway shares, and that he would lose it. As, however, Mr. Bidwell did not like to rest under the taunt that he was obstructing him in benefiting his family, and as security was offered upon certain houses in St. Sidwell's, Exeter, Mr. Bidwell joined in such acts as were necessary to enable him to obtain the fund, and he received from F. G. Farrant, in return, a sealed packet, which he never examined.

The plaintiff attained the age of twenty-one on the 15th of March 1851, and on the 31st of May following he called on Mr.

Bidwell and requested payment of his share of the trust fund. Mr. Bidwell then informed him that the trust affairs had been managed by the plaintiff's father, and that he, Mr. Bidwell, only held security for payment of the money, and that he believed it was upon freehold houses of ample value. He then requested the plaintiff to speak to his father, but this he declined to do. Mr. Bidwell then promised to communicate with his father, and inform the plaintiff of the result.

The matter was left in abeyance until 1855, on the ground that the plaintiff's father was angry with him in consequence of the application he had made to Mr. Bidwell; so much so, that they did not speak, though residing in the same house. The result of this was, that the plaintiff did not assiduously prosecute his claim.

In February 1855 the plaintiff said his father, when dangerously ill, requested him to call on Mr. Bidwell, as "he had something for me"; that he did call in consequence, and received a packet from his clerk, which he took to his father, who requested him to keep it. The plaintiff, though he suspected that the packet contained the deeds which had been previously referred to by Mr. Bidwell, abstained from asking any questions of his father, and contented himself with putting his seal upon it, and depositing it with his bankers at Exeter. He then went to Newport, Monmouthshire, and while there he received a letter from his father, asking him, in the event of his death, not to hold Mr. Bidwell responsible for not paying the 485*l*. This letter also contained a request that the plaintiff would copy, sign and send to Mr. Bidwell, the following memorandum, a copy of which he inclosed in the letter:

"In consideration of certain deeds of conveyance delivered to me, I hereby release, quit and discharge J. G. Bidwell, Esq. from all claims and liabilities I may have on him as one of my trustees under the will of the late W. Tucker, deceased. Dated, 25th February, 1855.

"H. A. M. Farrant."

This request the plaintiff complied with, except that he sent the document to his father, who forwarded it to Mr. Bidwell.

The affairs relating to the trust remained

in this state until after the death of the plaintiff's father, on the 14th of February 1859, when the plaintiff obtained the packet from his bankers and gave it to his solicitor, who opened it, and found it to contain several deeds relating to six cottages in Exeter, with a memorandum in his father's handwriting as follows:

"Deeds deposited with J. G. Bidwell as security for 970*l*. as co-trustee with F. G. Farrant."

It was then ascertained that the property was insufficient to secure to the plaintiff what was due to him under the will of W. Tucker.

This led to a correspondence with Mr. Bidwell, which finally resulted in the filing of this bill on the 25th of April 1861.

The defendant, Mr. Bidwell, generally admitted the facts stated in the bill, but said that the trust had long since been arranged and concluded between the plaintiff and his father, and he claimed the benefit of the time which had elapsed since the plaintiff attained twenty-one, and since the delivery of the packet to him, and also of the release which had been signed by the plaintiff and sent to him.

The plaintiff, however, said that no release was sent by him to Mr. Bidwell, but that the document relied upon by Mr. Bidwell was copied by the plaintiff at the suggestion of his father when he was dangerously ill, and signed, without advice or consideration, to relieve his mind; and he insisted that it was not a release which equity would enforce in favour of a trustee who had parted with the trust fund without ever looking into the security which had been given for its repayment.

Mr. Selwyn and *Mr. Wickens*, for the plaintiff.

Mr. Southgate and *Mr. H. Clarke*, for J. G. Bidwell, cited *Brice v. Stokes* (1).

Mr. Bevir, for Anne Blanchford, the administratrix of F. G. Farrant.

Mr. E. Charles, for Mr. and Mrs. Pengetley, who disclaimed any interest in the trust fund.

THE MASTER OF THE ROLLS (Nov. 13).—In this case a clear breach of trust was

committed by Mr. Bidwell, and he is liable to make good the trust-money, unless by some act the plaintiff has intercepted his right to that equity. How, then, could he intercept that right? It must be either by lapse of time, something that he has not done, or by something that he has done, or by the combined effect of the two. Lapse of time alone in this case would not be a bar. The plaintiff attained twenty-one on the 15th of March 1851; the bill was filed on the 15th of April 1861, a little more than ten years after; and if that were unexplained, and it were a mere breach of trust, though he knew of it at the time, that would not bar his claim to have the breach of trust set right. The only thing that he has done, upon which reliance is placed is, that he wrote and signed a paper at the request of his father. This is clearly not a release at law; it is not under seal, but it might be equivalent to a release in equity if it had been given for a valuable consideration and under proper advice. In what manner, then, was it given? The burthen of proving this is upon the defendant; and he must shew that it was given under such circumstances as enabled the plaintiff fully to understand the effect and purport of it, and to know and appreciate his position before he gave it. If it was given by the plaintiff to Mr. Bidwell, in consideration of his delivering up to him certain securities therein mentioned, then it would have been so far good, and it might, when stamped, have been used so far as it extends as an agreement. But how do the facts stand? The statements of the plaintiff and Mr. Bidwell are, that the security was sent to the father by Mr. Bidwell; that the father then sent to the plaintiff a copy of the paper now relied on as a release; that the plaintiff copied and signed it and then sent it to his father, and that his father sent it to Mr. Bidwell. If that be so, it is obvious that there is no consideration moving between Mr. Bidwell and the plaintiff. It is a mere transaction by which the father induces the son to sign a paper for the benefit, as he believes, of his friend Mr. Bidwell. That is purely voluntary. There was literally nothing done by Mr. Bidwell. What, then, was done, was done solely by the father. In

addition, this is a transaction between the father and the son to screen a breach of trust committed by the father. If it were an instrument under seal, and Mr. Bidwell relied upon it, it would under those circumstances be necessary for him to shew that the father, or somebody on his behalf, duly explained to the son the facts and the results of the case, and it should be proved that he had full knowledge of the subject, and of what was the value of the proposed securities. Upon this subject there is not the slightest information. The relation of the plaintiff with respect to the circumstances under which he signed the memorandum is simply unconfirmed, because no one else except himself knew anything about it. But there is no reason to doubt the accuracy of his statement. It remains, then, to consider whether the effect of time, combined with this transaction, will bar the plaintiff's right. The plaintiff, as soon as he attained twenty-one, requested payment of the money. The answer of Mr. Bidwell apparently was, that it was an affair between the plaintiff and his father, and that he had nothing to do with it. If the plaintiff is correct, his father was so angry with him for asking payment, that though they lived in the same house he would have no intercourse with him. The father wrote a letter to the son, and the son wrote a letter in answer, and this though living under the same roof; but nothing took place upon the subject until what the plaintiff calls the illness of his father in February 1855. This illness is denied both by the administratrix and by Mr. Bidwell; but it is clear upon the evidence that it is merely a question of degree, because it is proved that in March 1855 he gave up the lucrative appointment of surgeon to the 1st Devon Militia, which required active employment, on account of his health at that very time. It must be considered, therefore, as proved, that he was ill to some extent. Is it, then, possible to say, when a trustee has done nothing, but when he has simply been persuaded to commit a breach of trust on the promise by the father that it would by no means be injurious to the *cestui que trust*, that by merely getting, through the instrumentality of the father, this paper without consideration, as far as

it can be understood, and without proving that an explanation of the facts was given to the son, he can defend himself from making good the breach of trust which he has committed. The rules of this Court make it impossible to arrive at that conclusion. The consequence, therefore, is, that I must make a decree either for Mr. Bidwell to pay the whole amount and allow him to recoup himself out of the testator's estate, or I must direct the property comprised in the security to be sold, the personal estate to be applied, and the deficiency made good by Mr. Bidwell. I am indifferent which course is pursued. The usual course is to make the trustee pay the whole and to allow him to recoup himself out of the security and the estate of the deceased. Mr. Bidwell must also pay the plaintiff the costs of the suit without prejudice to his right to recover the same sum against the estate of the testator. Further consideration and the costs of all other parties must be reserved.

WOOD, V.C. } MASON v. THE STOKES BAY
Nov. 21. } PIER AND RAILWAY COMPANY.

Lands Clauses Consolidation Act—Compulsory Purchase—Contract—Specific Performance.

Notice by a railway company to take land under their compulsory powers, and the subsequent fixing of the purchase and compensation money by arbitration, together constitute a contract for sale and purchase, which the Court will enforce at the instance of the vendor.

This suit was instituted for the purpose of compelling the completion, by the defendants, the Stokes Bay Railway and Pier Company, of the purchase of certain land belonging to the plaintiff, which the defendants had given notice of taking under their compulsory powers, and the amount of compensation for which had been settled by arbitration.

The short facts were as follows: On the 25th of September 1855, the defendants caused the plaintiff to be served with a notice, dated the previous day, that they required to purchase and take the lands

described in the schedule, and requiring the plaintiff to deliver particulars of her estate and interest in the premises, and of her claim in respect thereof, and offering to treat for the purchase of the lands and compensation to the plaintiff. No agreement, however, was come to, and the company proceeded, under the Lands Clauses Consolidation Act, to have the amount determined by a surveyor, who fixed it at 250*l*. This sum they paid into court, and having entered into the usual bond in the like sum, they, on the 12th of October 1859, entered into possession.

The plaintiff having elected to have the amount of purchase-money and compensation determined by arbitration, arbitrators and an umpire were appointed in the usual way, and on the 29th of June 1860 the umpire made his award, fixing the amount at 727*l*. 10*s*. The defendants, however, did not take up the award until compelled by mandamus in November 1860.

The abstract of title was delivered on the 14th of December 1860, and the requisitions made on the title were answered on the 2nd of March 1861. Since this time the plaintiff had made frequent applications to the defendants to complete the purchase, but they were all unsuccessful; and she accordingly filed her bill on the 3rd of July 1861, charging that the title had been accepted, and praying that the purchase might be specifically performed.

Mr. J. B. Hoskins, for the plaintiff.—Sufficient has been done in this case to constitute a complete contract for the purchase of the land—*The Regent's Canal Company v. Ware* (1); and the Court has jurisdiction to compel specific performance—*Inge v. the Birmingham, Wolverhampton and Stour Valley Railway Company* (2).

Mr. C. T. Simpson, for the company, denied that there was any contract which the Court had jurisdiction to enforce—*Adams v. the London and Blackwall Railway Company* (3), *Gould v. the Staffordshire Pot-*

(1) 23 Beav. 575; s.c. 26 Law J. Rep. (N.S.) Chanc. 566.

(2) 3 De Gex, M. & G. 658; s.c. 1 Sm. & G. 347.

(3) 2 Mac. & G. 118; s.c. 2 Hall & Tw. 285; 19 Law J. Rep. (N.S.) Chanc. 557.

teries Waterworks Company (4), *Haynes v. Haynes* (5), and *The Sutton Harbour Improvement Company v. Hitchens* (6). The plaintiff's proper course was pointed out by the Lands Clauses Act, 8 & 9 Vict. c. 18. s. 68.

WOOD, V.C. said he was clearly of opinion that the Court had jurisdiction. The case of *Adams v. the London and Blackwall Railway Company* was not applicable, inasmuch as the amount of purchase-money and compensation had not been ascertained. In this case the amount to be paid had been settled by the award, and a parliamentary contract had been made which could be enforced in this Court at the instance of either vendor or purchaser. A Court of law would be unable to do complete justice between the parties, having no machinery either for investigating the title or settling the conveyance. The Master of the Rolls had put the matter on the right grounds in *The Regent's Canal Company v. Ware*; after notice given and the price fixed, the relation of the parties, as vendor and purchaser, was as fully constituted as in the case of a formal and regular agreement. There had been considerable delay in this case; the plaintiff had been kept out of her money for nearly two years, and there must be a decree for payment of the purchase-money with interest and costs.

WOOD, V.C. }
Dec. 9. } DURHAM v. CRACKLES.

Baron and Feme—Equity to a Settlement—Fee Simple Estates of Wife—Particular Assignees for Value—Practice—Disclaimer—Costs.

A married woman has no equity to a settlement out of her fee-simple estates, as against the mortgagee of her husband's life interest therein.

Distinction between property of the wife which the husband takes absolutely and that in which he only takes a life interest.

(4) 5 Exch. Rep. 214; s.c. 19 Law J. Rep. (N.S.) Exch. 281.

(5) 1 Dr. & Sm. 426; s.c. 30 Law J. Rep. (N.S.) Chanc. 578.

(6) 13 Beav. 408; s.c. 1 De Gex, M. & G. 161; 20 Law J. Rep. (N.S.) Chanc. 489; 21 Ibid. 73.

A defendant disclaiming, but not stating that he never did claim any interest, is not entitled to his costs on having the bill dismissed.

In December 1859 Mr. and Mrs. Crackles deposited with the plaintiffs the title-deeds of a small estate of which Mrs. Crackles was seised in fee, as security for 100*l.* and interest, and the bill was filed for the purpose of realizing the security. At the date of the equitable mortgage Mr. Crackles was maintaining his wife, but shortly after the institution of this suit he became insolvent, and the defendant Crampton was appointed his assignee, and put in a voluntary answer to the following effect: "As such assignee or otherwise, I do not claim any interest in the premises the subject of this suit, and I hereby renounce and disclaim all interest therein; and I would, as now advised, have made such renouncement and disclaimer and released the said premises from all claims by me as such assignee as aforesaid, or otherwise, had I been applied to so to do prior to my being made a party defendant."

It was contended, on behalf of Mrs. Crackles, that she was entitled to a settlement, and that her equity would override the interest of the mortgagees.

Mr. W. Forster, for the plaintiffs.—There is no equity to a settlement. The mortgage is good to the extent of the husband's interest, and the fee of the wife is not interfered with—*Tidd v. Lister* (1).

Mr. Osborne, for Mrs. Crackles, contended, that the husband having become incapable of supporting his wife, she was entitled to have the property settled on herself and her children—

Sturgis v. Champneys, 5 Myl. & Cr. 97; s.c. 9 Law J. Rep. (N.S.) Chanc. 10.

Hanson v. Keating, 4 Hare, 1; s.c. 14 Law J. Rep. (N.S.) Chanc. 13.

Mr. Lovell, for the assignee in insolvency, asked to be dismissed, with costs. He referred to *Talbot v. Kemshead* (2).

WOOD, V.C.—It is impossible, without overruling *Tidd v. Lister*, to hold that the plaintiffs are not entitled to the full benefit

(1) 3 De Gex, M. & G. 857; s.c. 23 Law J. Rep. (N.S.) Chanc. 249.

(2) 4 Kay & J. 93.

of the security, so far as it affects the husband's life interest, which is all it can do. It is the rule of this Court that a person entering into an agreement for value, is bound to perform it as far as he is able. In this case, the defendant William Crackles cannot give effect to the agreement to the extent of his wife's inheritance, but the Court will bind him to it to the extent of his own interest in his wife's property. It has been argued, that the authorities having reference to the wife's equity to a settlement, will not permit this, and that *Tidd v. Lister*, which might be considered favourable to the plaintiff, is distinguishable, because that confessedly was the assignment of a life interest. But the observations upon which this argument is based are there made by the Lord Chancellor in dealing with a question relating to personal estate. The Lord Chancellor in effect says, that an assignee of the whole fund takes the fund subject to the wife's equity to a settlement, and he explains the grounds on which that well-known rule of this Court stands, and he states that the assignee, putting himself by contract in the place of the husband, cannot complain when he finds himself in no better condition than the person to whose rights he succeeds. But when he comes to deal with the case of the assignee of a life interest only, in other words the assignee of income, as distinguished from *corpus*, he points out that the matter has to be decided upon different considerations, and that as against an assignee for value, who has become such at a time when the husband was able and willing to support his wife, no equity to a settlement exists. In this I think is to be found the ground for decision of the case before me. That the husband here has affected to bind the inheritance has no bearing in connexion with the observations of Lord Cranworth in *Tidd v. Lister*. This is the case of the wife's real estate; she wants no provision out of the *corpus* of that estate, for she cannot be deprived of it without her own concurrence, which must be given in such a manner as will protect her from her husband. It has been pressed upon me that *Sturgis v. Champneys* is an authority in favour of the wife; that case is, no doubt, an authority that if the assignee in insolvency of the husband is obliged to come

into this Court, the maxim, that coming for equity he must do equity, applies; the Court holds that such an assignee stands precisely in the place of the husband, and must, the husband being unable by his insolvency to maintain his wife, perform that duty for him, so far as it can be done through the medium of the wife's equity to a settlement. Except upon this distinction between assignee in insolvency and assignee for value, I do not see how to reconcile *Tidd v. Lister* with *Sturgis v. Champneys*; and the distinction is indeed pointed out by the Lord Chancellor, who adverts to the difficulties which would arise if an assignment for value were to be defeated by matter arising *ex post facto*, such as the wife being deserted or inadequately maintained by the husband. Of the case of *Hanson v. Keating*, before Sir J. Wigram, V.C., I need only remark that the judgment shews the learned Vice Chancellor to have considered the facts there as completely within the authority of *Sturgis v. Champneys*, and to have so decided the case, although he did not wholly approve of the decision which he followed. Besides, in *Hanson v. Keating*, the property consisted of a term, not, as here, of the inheritance; I, therefore, come to this conclusion, that the husband must be taken to have pledged this property to the extent of his interest in it, which is perfectly reconcilable with his duty to his wife (for he may have raised the money to maintain her), and that the pledge is not avoidable by his after-ensuing bankruptcy. With reference to the costs of the official assignee, he has put in his answer, stating that he does not claim any interest in the premises, and says that he would have disclaimed had he been applied to before bill filed. This has already been held to be not a sufficient disclaimer to entitle the assignee to his costs, as it does not state that he never has claimed any interest, which is the proper form of disclaimer. There will be a decree to take the usual accounts against the defendant W. Crackles, with an order for sale of his life interest in default of payment within six months, and the bill will be dismissed, without costs as against the assignee.

KINDERSLEY, V.C. }
Dec. 9, 20. } ERNEST v. WEISS.

*Public Company — Official Manager —
Suits by and against — Unincorporated
Society—11 & 12 Vict. c. 45.*

Upon a bill filed by the official manager of an unincorporated society representing a particular class of shareholders, against another class of shareholders, praying that the defendants might be declared liable to make good certain funds alleged to have been misapplied, the Court held that such a suit could not be maintained.

The Court also expressed an opinion that an official manager of an unincorporated company, that is, a company which has only been provisionally registered, can under no circumstances bring an action, or institute a suit against any person, nor can any action or suit be instituted against such official manager.

This was a bill, filed by the official manager of the Warwick and Worcester Railway Company, now in the course of being wound up, against five persons constituting the committee of management; and it stated that in 1845 the above undertaking was projected and provisionally registered under the 7 & 8 Vict. c. 110, and the parliamentary contract and subscribers' agreement executed. By the first of these instruments the defendants and other persons, some since deceased, were appointed the committee of management, with the usual powers, and, *inter alia*, to permit any other company to hold shares in the undertaking, and to enter into arrangements or agreements with any other company for amalgamating or uniting wholly or partially the said intended undertaking with any other railway or undertaking; and out of the monies coming to their hands for deposits or calls, to make the necessary parliamentary deposit, pay registration fees and all costs of surveys, and other things requisite for obtaining the act and carrying the undertaking into effect. The subscribers' agreement stated the proposed capital as 700,000*l.* in shares of 20*l.* each. Large sums were paid for deposits, and in October 1847 a finance committee was appointed. In the same year three other undertakings were projected, namely,

the London and Birmingham Extension, the Rugby, Warwick and Worcester, and the Worcester, Warwick and Rugby Railway Companies; and all three were provisionally registered.

In October 1845 a resolution was passed by the general committee of management of the Warwick and Worcester Railway Company, for its amalgamation with the Birmingham Extension; and in the same month an agreement was entered into by the committee of the Birmingham Extension with the Warwick and Birmingham Canal Navigation Company, and the Warwick and Napton Canal Company, for the purchase of these canals. On the 1st of January 1846 an agreement for amalgamation with the Warwick and Worcester Railway Company, the Rugby, Warwick and Worcester, and the London and Birmingham Extension Company, was entered into; and that agreement was carried out by a formal deed dated the 28th of January 1846. Under this deed steps were taken to obtain parliamentary powers to carry it out, but unsuccessfully; and on the 26th of May 1849, an order was made by this Court to wind up the Warwick and Worcester Railway Company, under the act of 1848, and the plaintiff was appointed official manager. The bill charged that the finance and general committee were responsible to the subscribers of the Warwick and Worcester Railway Company for the proper application of the sum paid for deposits, and were bound to account for it to the plaintiff, with interest; that by the deed of amalgamation they had admitted the liability, and adopted the expenditure of the amount, and such of them as were living, or the representatives of those that were dead, were bound to make good so much as had been improperly applied in a manner not authorized by the parliamentary contract and subscribers' agreement. The plaintiff then charged that a large proportion of the money was improperly applied, and particularly that on the 20th of October 1845, 14,209*l.* 15*s.* and 1,986*l.* 5*s.*, part of the deposits, were drawn out of the company's bankers by two cheques dated on that day, and applied to what was known in railway parlance as "rigging the market," or giving a fictitious value to shares, and wholly lost; such cheques being made payable to "contingencies, or bearer," and

drawn on printed forms containing the name of the London and Birmingham Extension Railway Company, which was struck through with a pen, and the words "Warwick and Worcester Railway Company" substituted; and these cheques were signed by three members of the finance committee, the others being cognizant of it. The plaintiff also charged that the Warwick and Worcester Company had no power to amalgamate with the other companies, as they had done, and that the defendants were liable for a sum of 15,000*l.* handed over to the amalgamated companies, with interest. The bill then referred to three suits, and other circumstances connected with this matter, which, owing to the view taken by the Vice Chancellor in his judgment, it is unnecessary to set forth : and it prayed a declaration that the defendants might be ordered to account for the application of the amount received as deposits from the subscribers to the Warwick and Worcester Railway Company upon the shares subscribed for by them, and that they might be ordered to pay to the plaintiff as much of such sum as should appear, upon taking the accounts, to have been improperly applied; and that it might be declared that the sums paid as alleged for the purpose of rigging the market were improper applications of the funds, and ought not to be allowed in taking the accounts, and that the defendants might be ordered to pay the said sums to the plaintiff, as such official manager.

Mr. Roll, Mr. Glasse and Mr. Fry appeared for the plaintiff.

The Solicitor General, Mr. Baily, Mr. Roxburgh, Mr. Hetherington, Mr. Kenyon, Mr. Martindale and Mr. Yool, for the defendants.

The following authorities were cited :

Ernest v. Croysdill, 2 De Gex, F. & J. 175; s.c. 29 Law J. Rep. (N.S.) Chanc. 580.

Ernest v. Nicholls, 6 H.L. Cas. 401.

In re Oxford and Worcester Extension Railway Company, ex parte Potter, 1 De Gex & Sm. 728; s.c. 18 Law J. Rep. (N.S.) Chanc. 247.

In re Warwick and Worcester Railway Company, ex parte Pell, 3 De Gex & Sm. 170; s.c. 19 Law J. Rep. (N.S.) Chanc. 164.

The Grand Trunk Railway Company v. Brodie, 9 Hare, 523; s.c. 3 De Gex, M. & G. 146; s.c. 22 Law J. Rep. (N.S.) Chanc. 514.

Prichard v. the Official Manager of the London and Birmingham Extension Railway Company, in re Weiss, 15 Com. B. Rep. 331; s.c. 24 Law J. Rep. (N.S.) C.P. 30.

Russell v. Croysdill, 11 Exch. 123; s.c. 24 Law J. Rep. (N.S.) Exch. 287.

Bryson v. the Warwick and Birmingham Canal Navigation Company, 1 Sm. & Gif. 447; s.c. 4 De Gex, M. & G. 711; 23 Law J. Rep. (N.S.) Chanc. 133.

Harford v. Rees, 9 Hare, App. 68, 70.
The Attorney General v. Dew, 3 De Gex & Sm. 488.

Rowland v. Witherden, 3 M. & G. 568; s.c. 21 Law J. Rep. (N.S.) Chanc. 480.

KINDERSLEY, V.C.—I am of opinion that this bill cannot be supported. The ground upon which I arrive at that conclusion is entirely irrespective of the merits of the questions raised between the official manager and the defendants, or between the different classes of shareholders *inter se*. I think that the official manager cannot institute and maintain such a suit as the present.

The bill is filed, by Mr. Ernest, in his character of official manager of the Warwick and Worcester Railway Company, against five persons who are alleged by the bill to be liable to make good certain funds belonging to the company, which it is alleged they have misapplied. The bill states the parliamentary contract and the subscribers' agreement of this company, which company was commonly called an inchoate railway company, that is to say, it was an association of persons agreeing to promote and endeavouring to promote an act of parliament to enable them to constitute a joint-stock company for the purpose of making a certain railway. It states the fact that there was a committee of management, that the company was provisionally registered, but was never completely registered. It then states the various circumstances, which it is not necessary for me to go through in detail, with regard to those other companies with which there was an amalgamation or an

attempted amalgamation. After stating those circumstances, and also two deeds, one of the 1st of January 1845, and the other of the 28th of January 1846, purporting to carry into effect the amalgamation agreed upon, it proceeds to state, that in pursuance of the arrangement or agreement for amalgamation, 15,000*l.*, being monies which belonged to the company, and which had arisen from deposits paid by the subscribers, was, by a cheque, paid over in fact to parties representing the amalgamated or supposed amalgamated company. It further states that there were contributed, by means of these deposits of the subscribers, sums amounting to 39,049*l.* 10*s.* in the whole. The 15,000*l.* being deducted from that amount, would leave a residue of 24,049*l.* 10*s.*; and it states that a large proportion of that 24,049*l.* 10*s.* was improperly applied or disposed of; and then it states as evidence of that general allegation, that two several sums of 14,209*l.* 15*s.* and 1,986*l.* 5*s.*, being respectively part of the deposits, were drawn out of the hands of the bankers of the company by two cheques, both dated the 29th of October 1845, and were applied in certain operations or proceedings upon the Stock Exchange for the purpose of giving a fictitious value to the shares in the company, and which operations or proceedings are commonly called or known as "rigging the market." The bill then states, that the subscribers to the said undertaking did not derive any benefit whatever from such expenditure of the funds of the company, and the said sums were in fact wholly lost. The better to conceal the purposes for which such cheques were drawn, there was not any payee named in such cheques or either of them; but in lieu of the name of a payee, such cheques were respectively made payable to "contingencies or bearer." It then states who were the persons who signed the two cheques; and it states the proceedings which took place in 1858, when that order was made, which I need not here mention in detail. And then the prayer of the bill is this: It prays a declaration that the defendants,—including George Carpenter, who was not an original party, but who is the representative of Mr. Richard Carpenter, who was one of the board—ought to account, and that they may be decreed to account, for the application of the sum of 39,049*l.* 10*s.* received as afore-

said from the subscribers to the said Warwick and Worcester Railway Company, by way of deposits upon the shares subscribed for by them in such undertaking; secondly, that it may be declared that the defendants ought to pay, and that they may be ordered to pay, to the plaintiff, as such official manager as aforesaid of the Warwick and Worcester Railway Company, so much of the said sum of 39,049*l.* 10*s.* as upon the taking of the account hereby prayed shall not appear to have been properly applied, together with interest thereon from the 28th of January 1846; and then it prays that at any rate, even if that general relief be not given, it may be declared that the payments of the aforesaid sums of 14,209*l.* 15*s.*, and 1,986*l.* 5*s.*, the sums drawn, as is alleged, for the purpose of "rigging the market," and 15,000*l.* (the sum which was paid to the amalgamated company out of the funds of the said company, which had arisen from the deposits aforesaid) were improper applications of the said funds, and ought not to be allowed in taking the accounts hereby prayed, and that the defendants may be decreed to pay the said sums to the plaintiff, as such official manager as aforesaid, together with interest thereon from the aforesaid dates of the payment of the same, the plaintiff being willing to give such credit as hereinbefore mentioned in respect of the said sum of 15,000*l.*, that is, for a certain portion of the 15,000*l.* which he got back under the arrangement of 1858. Then it prays in the usual way that Mr. G. Carpenter may either admit assets of his testator come to his hands sufficient to answer what shall be found due from or shall be ordered to be paid by his personal estate in this suit, or otherwise that his personal estate may be administered in this Court.

This is a bill, in fact, to this effect: The defendants have improperly applied, for purposes not beneficial to the company, and not authorized, monies belonging to the company; therefore make them account for those monies. Let the accounts be taken, to see how they were applied; and so far as they were misapplied, make them repay them, and particularly those sums which are specially mentioned.

Now, that is the frame of the bill. I may observe that this company—the Warwick and Worcester Railway Company—is

an unincorporated company. It is a company in no other sense than this (or rather was, for it has ceased to exist)—an association combining in partnership together, for the purpose of carrying into effect a certain proposed undertaking, which they could not carry into effect without an act of parliament. It is not until complete registration that a company or association becomes an incorporation : it is merely a partnership or association of a certain number of individuals. When the complete registration is effected, then indeed, by the terms of the act, it becomes an incorporation ; that is, for all the purposes of the corporation it may sue and be sued in its corporate name and have a common seal, and so on. Now, the first question that arises is this : Can an official manager of an unincorporated company—that is, of a company which has only got provisional registration—can he, at all, under any circumstances, bring an action or institute a suit against any body, or can an action or suit be instituted or brought against such an official manager ? Of course, that, as well as other questions which I shall have to consider, must be construed by the act of 1848, the 11 & 12 Vict. c. 45. It all turns upon that, and particularly it turns upon the construction to be put upon the 50th section of that act, which enacts, "That after the appointment of any official manager under this act, all actions, suits and other proceedings at law or in equity which might have been commenced, instituted or prosecuted by or on behalf of the company, with respect to which such appointment shall be made against any persons, whether contributories or not, shall be commenced or instituted and prosecuted by the official manager, by the style and designation of 'The Official Manager,' for and on behalf of such company." Then it enacts, "That all debts which might have been proved by or on behalf of the company against the estate of any bankrupt or insolvent debtor, shall and may be proved against such estate by the official manager of such company"; and it then proceeds to the converse of the first part of the clause, and the language is this : "That all actions, suits and proceedings at law or in equity, to be commenced or instituted by any persons, whether contributories of such company or otherwise, against such company, or any

person duly authorized to be sued as the nominal defendant on behalf of the same, shall and lawfully may be commenced, instituted and prosecuted against the official manager of such company (by such style and designation as aforesaid), as the nominal defendant, for and on behalf of such company." Now, for the purpose of construing that clause, it is necessary to bear in mind what description of suits might have been brought supposing this act had not passed. What is referred to in this section is what might have been done independently of this act ; and then it says that what might have been done independently of this act, may be done by the official manager or against the official manager : that is the plain scope of the act of parliament. Now, what was the position of companies at the very time this act of parliament was passed ? Of course, a company might be one or other of three descriptions ; and I am using the word "company" in its large sense, as embracing any partnership, association or company, corporate or unincorporate. Now, what were the three different classes of companies with reference to the manner in which they might sue or be sued ? First of all, there was the incorporated company, which would have been constituted when you had got the act of complete registration. Without waiting for the act of parliament, the act of complete registration for the purpose of suing or being sued would so constitute it. There was then that corporate company which, like any other incorporation, may sue in its own name as if it were a single individual, and you have no reference to the individuals who comprise that corporation ; the only party concerned there is the corporate body in its corporate name. The second class is this : I will take the other extreme, which is a company clearly incorporated like any common partnership, because the number of the partners does not affect the principle upon which they may sue or be sued. If you can get all the partners or persons associated to be co-plaintiffs, you may have a suit by them, and you may call that a suit by that company ; because if there is no impropriety in calling that body a company, there is no impropriety in calling a suit by them all, a suit by the company. And so you could have them all defendants in a suit against them ; and that would be a suit, as I con-

ceive, against the company. I ought to observe, however, with regard to that class to which I have just alluded, that a suit by half-a-dozen of the company, or a suit by all but one, is not a suit by all the company; nor is a suit against a section of them, a suit against the company. To be a suit against or by the company, it must be a suit against or by all the company; but with this exception: in this Court, where the parties are so numerous that they cannot sue by making them all plaintiffs, or cannot do it without such constant interruptions by deaths causing abatements, there the Court allows a suit to be instituted by one, two or three or more, by themselves on behalf of all; and that, no doubt, would be a suit by the company. Now, the third class is a sort of medium case: it is a case where the company is unincorporated, and therefore cannot be sued or sue in its corporate name, but by an act of parliament or by some authority it has been authorized to sue or be sued by or through its public officer, that is, some one named to represent the company.

Those are the three classes of companies with reference to the mode in which, independently of this act, they could sue or be sued; and, no doubt, those were in the calculation of the legislature when they were penning this 50th and the other clauses, to deal with companies or associations coming under any one of them by this 50th section. Then the question which is first raised is, can the official manager sue at all on behalf of an unincorporated company? Now, the converse of that question was raised in the two cases at law which have been cited—*Prichard v. the Official Manager of the London and Birmingham Extension Company*, and *Russell v. Croysdill*.

Now, *Prichard v. the Official Manager* (I need not repeat the name of the company) was the case of a person claiming to be a creditor of an unincorporated company; which means, claiming to be a creditor of all the individuals composing that unincorporated company; and he had brought his action against the official manager, and had obtained a judgment. The question seems not to have been raised upon the trial, if it ever was tried; but having got the judgment, he sought to make it available against the individual members or some of them. The

question was, whether he could do so, and that depended upon the validity of the judgment, and that again depended upon whether the action lay; because if it would not lie, the judgment could not be good for anything, so as to be enforced against an individual member. The Court of Common Pleas, rightly or wrongly, came to the conclusion that upon the language used in that 50th section, inasmuch as an unincorporated company, *quâ* company, could not sue; but as there could only be a suit by all the individual members composing it, if there were a suit at all, that was a case in which the official manager could not be sued by a stranger, a person claiming to be a creditor. And that decision was followed in *Russell v. Croysdill* by the Court of Exchequer. Now, in both those cases the action was by an alleged creditor against the official manager. I cannot for one moment entertain a doubt that the decision would have been the same in a converse case; that is, if it had been an action by the official manager against an alleged debtor. I cannot entertain a doubt that upon precisely the same data on which the Court of Common Pleas and Court of Exchequer came to the conclusion that an action could not have been brought against the official manager, they would have come to the conclusion that it would not lie by the official manager against the alleged debtor. I entertain no doubt upon that question; and if the matter had stood so, I must have come to the conclusion on the first ground which I have taken, that is, whether against any body the official manager can institute a suit on behalf of an unincorporated company—that I should feel very great difficulty in holding that this suit would lie.

The case of *Prichard v. the Official Manager* was certainly cited in the case of *Ernest v. Croysdill*. That was a suit by the official manager of an unincorporated company against the official manager of another unincorporated company; and one would say this, that if the official manager could not sue, could not bring an action, of course he could not file a bill, because the section speaks of actions and suits together. Therefore, first of all, so far as related to the plaintiff the suit was open to that objection, namely, that he was the official manager of an unincorporated company; but independently of that,

Mr. Croysdill, against whom the suit was instituted, was the official manager of another unincorporated company, so that the question seems to me to have plainly arisen both as respects the plaintiff and the defendant. In that case the question was distinctly mixed in argument, and, as far as I can make out, was raised by the counsel for the official manager, Mr. Croysdill. We have not got the arguments of counsel for any one else, and I have no means of judging whether the objection was raised otherwise than by the counsel for Mr. Croysdill. I will assume it was. Being so raised, *Prichard v. the Official Manager* was cited in support of the objection. It was said Mr. Ernest cannot sue, and Mr. Croysdill cannot be sued, as representing their respective companies. I have carefully read the case before the Lords Justices, and the judgment; and, as I understand it, the Lords Justices put it on this footing, that the identical monies cannot be traced into the hands of Mr. Croysdill; and the only way in which this objection, which is simply an objection on the ground that the act does not authorize an official manager to sue on behalf of an unincorporated company—the only way in which that objection is referred to by either of the learned Judges is this: The Lord Justice Knight Bruce does not take any notice of that question, and does not refer to it; but Lord Justice Turner says, “it was further urged for the defendants that the plaintiff cannot be considered as representing the company in right of which he sues; and it was attempted to support that argument by the case of *Prichard v. the London and Birmingham Company*: but that case does not seem to me to apply. It proceeded on the ground that it was not a case in which an action could be maintained against the company; but here the company having got the trust monies, there is no doubt they may be sued (that is, Mr. Croysdill’s company); and it is clear that under the Winding-up Acts the plaintiff is the proper person to institute the suit.” Now, that is the only notice taken of this point, whether against any body an official manager may sue in right of or on behalf of an unincorporated company, or, *vice versa*, whether he may be sued in right of such a company. Having got that decision of the Lords Justices (and they gave relief upon it, having made a decree

in favour of the plaintiff as against the defendant, Mr. Croysdill), I confess I feel very great difficulty to know how to deal with that question; and my difficulty arises very much from this, that the Lord Justice Turner does not say, “We differ from the case of *Prichard v. the Official Manager*.” He does not say “We hold that that was misapprehended, or a mistake; we cannot concur in that decision;” but he says, “That case does not apply”: and, therefore, there must have been some ground upon which the Lords Justices thought, notwithstanding the decision, which they did not contradict, as I understand, in *Prichard v. the Official Manager*, that in the case before the Court, there was the right to institute such a suit by the official manager. Now, I should have to consider very much which of those two classes of authorities—that is, the cases at common law and the case before the Lords Justices—it is to which this particular case ought to be referred. I should feel, I confess, great difficulty to know how to deal with this case upon that abstract question, whether, upon the construction of the 50th section of the act of parliament, the official manager of an unincorporated company can sue in right of that company. But it is not necessary for me to determine that question, because it appears to me that there is another ground upon which the official manager cannot sustain such a suit as this.

Now, let me assume that the official manager could, in the abstract, institute a suit for the purpose of recovering funds or monies belonging to the company, in right of which he professes to do so: can he sue, in fact, as representing some of the members of an unincorporated company, others of those members, in order as against the defendants, and for the benefit of those on whose behalf or for whose benefit he is suing, to make the defendants answer the claims of the rest of the company? That is really the question which I have to determine in this suit. I am of opinion that he cannot. I confess that, having had the opportunity, while this case has been under argument, which it necessarily has for a number of days, of considering every part of this act of parliament, it seems to me impossible to arrive at any other conclusion than this—that, even assuming the other question to be entirely

in favour of the plaintiff, I cannot see how the official manager can sustain such a suit as this. Now, let me consider the sections of the act with this view. The 29th section vests all the estate, effects, remedies and rights of action of the company, and all powers in and about the same, which, by the act or otherwise, might be exercised by an official manager, except so far as the Master shall by writing under hand direct to the contrary, by virtue of the appointment absolutely in the official manager. And now I proceed to consider what appears to me to be the construction of the 50th section. I am satisfied of this conclusion that I arrive at, at all events—that with regard to that portion of the section which relates to suits by the company, and that portion of the section which relates to suits against the company, the same rule was meant to prevail; that if the official manager can institute a suit, as representing the company on behalf of the company or in right of the company, then a suit would lie against him, as representing the company by any one else. Now, let us take the words of the first part of the section—“That after the appointment of any official manager under this act, all actions, suits and other proceedings at law or in equity which might have been commenced, instituted or prosecuted by or on behalf of the company,”—and those are important words,—“with respect to which such appointment shall be made, against any persons, whether contributories of the company or not, shall be commenced or instituted and prosecuted by the official manager by or on behalf of the company.” In the sense in which these words, I think, are to be taken, this section was meant to apply to all the three classes of companies incorporated. Now, what is this suit? Is this a suit which might have been instituted by the company, or on behalf of the company? What is the purpose of this suit? and by whom and for whose benefit is it? It is a suit, in fact, to compel some of the members of this company or association to make good monies for the benefit of others. Can this suit then be said to be a suit which, before this act passed, could have been instituted by the company? Could this be a suit by or on behalf of the company? Clearly not. The only way in which such a company could institute such a suit

would be either by all the members being co-plaintiffs, or one suing on behalf of himself and all. But if he sues on behalf of himself and some only, it is not a suit by the company: it is a suit on behalf of some of the company to make the others who are the defendants pay, in order that those who are *quasi* plaintiffs may have their rights; it is to administer equities between the different classes or sections of the members of the company—of the contributories under the winding-up. That is the nature of this suit. Now, the converse of the case is this, that is, where the suit might have been against the company: “That all actions, suits and proceedings at law or in equity to be commenced or instituted by any persons, whether contributories of such company or otherwise, against such company, or any person duly authorized to be sued as the nominal defendant on behalf of the same, shall and lawfully may be commenced, instituted and prosecuted against the official manager.” The words of this clause might have reference to actions, &c. against a corporate company, or it might be against all the members of an unincorporate company; and I do not know that the language would be very inaccurate if we were to say, wherever it is not contrary to the course which this Court authorizes. At all events, you may have the case of a company which is authorized to sue and be sued by its public officer. This would be a suit exactly answering these words: “against any persons duly authorized to be sued as the nominal defendant on behalf of the same.” Here we have the case provided for as to what suits the official manager may bring, and in what cases he may be made defendant in a suit. Whatever is the rule applicable to the one is the rule applicable to the other. It appears to me that, upon the plain language of the clause, no suit will lie by the official manager except where it will lie by the company, or on behalf of the company, or against the company, or against some one authorized to be sued on behalf of the company; that it does not apply unless it comes within that description, and that this suit does not come within that description. The view which I take of this section is confirmed, I think, by the 52nd and 53rd sections. The 50th section refers, so far as it relates to suits

by the official manager—to original suits instituted, not to suits taken up by the official manager, but to suits commenced by him. But it was considered that many cases might arise where the winding-up order was made in which there was already existing a suit by some of the members of the company, or by all, or by some on behalf of all, against a stranger; or there might be a suit by some against others. Now, what was provided by the legislature in such cases? There is the 53rd section, which clearly refers to a case of a suit instituted by some of the members on behalf of all against some third person; and when the suit is instituted “against any person,” not, as in the 50th section, “whether contributories or not,” but “against any person,” it shall be lawful for such plaintiffs to substitute the official manager of the company; and then the official manager is thenceforward to prosecute such action, suit, &c. as if it had been commenced by him as plaintiff under the provisions of the act. The 52nd section relates to the converse case, where it is against the company, and it seems to me the same observations apply to that section.

Now, is it possible to conceive that the official manager was to have authority, supposing he got the Master's sanction, to institute a new suit in a case in which he could not take up an old suit? To put such a construction upon it would be to annihilate the act of parliament. We know well that the act has given rise to a great deal of doubt and dispute as to its construction, but this, I think, was generally its intention—that as, according to the law as it formerly stood, there could not be an efficacious winding up of a company consisting of a number of persons, there was consequently a new judicature to be established; and where the question should arise between the company and outsiders, then there must be an official manager to represent the company and bring suits or actions, and that official manager was to be the person who was to bring before the Master all the details for the purpose of the liquidation of the company, and as to the propriety of making calls and so forth. It never was intended that the official manager should represent a section, however numerous or respectable, of that company. He was to represent all the contributories, and

not some of them. Then if a question arises amongst the persons who are to contribute towards the debts and the expenses of liquidation, and if questions arise as to whether one was not liable to contribute more than others for the benefit of others in respect of monies which have been misapplied or abstracted, all those questions are to be determined by the Master. That was clearly the general scope and intention of the act, and these sections carry out that intention. To put any other construction upon them seems to me to be contrary to the terms which are actually used, as well as to the fair construction of the sections.

Now, whatever view I may take of this question, of course if I found a decision of the Appellate Court or a clear decision of a Court of co-ordinate jurisdiction upon the subject, in the first case, I should follow it implicitly; and in the second case I should follow it, unless my conscience would not allow me to do so. Now, it appears to me that I have had no decision before me that such a suit as this would lie by an official manager; and it is remarkable that in the enormous mass of litigation on this subject we can find no case in which, upon argument, the Court has decided that an official manager has a right to bring such a suit as this. The first authority was that of *Ernest v. Croysdill*. In that case, besides Mr. Croysdill, the official manager of the London and Birmingham Extension Company, being a defendant, there were two or three parties made defendants in the character of members of the finance committee of the plaintiff's company—that is, of the Warwick and Worcester Company; and part of the object of the suit was to make them liable, as well as Mr. Croysdill in his character of official manager. Now, if it were determined, upon the point being raised, that there should be a decree in favour of the official manager against those members, it would be a case clearly in point; but was this question raised before the Court at all? The other point, no doubt, was, whether, under any circumstances, an official manager of an unincorporated company could sue on behalf of the company; but it appears to me that the first point was not raised. I do not see the slightest evidence of its having been argued before the Lords Justices; but what have

we! We have the dictum of Lord Justice Knight Bruce, which does not amount to a judgment, and his observation is this: he says, dealing with the question as between the two official managers, the plaintiff and Mr. Croysdill, "It was not necessary, I conceive, to make the defendants, Mr. Edkin and Mr. Weiss, parties to this cause; but they were, as directors or committeemen, connected with the transaction as to the 17,000*l.*, and although dismissed, may, I think, properly be so without costs." Now, that is the only observation in the judgment which can be thought to have the slightest bearing upon this point; and he does not say that they were necessary parties, nor does he say that the suit could not be instituted against them: but I cannot take this as a decision by Lord Justice Knight Bruce that, in his opinion, such a suit would lie against some of the members of the company. The observation of Lord Justice Turner is somewhat more distinct. He says: "Upon the whole, therefore, I think that there must be a decree against the company, that is, against Mr. Croysdill, for the 2,800*l.*, with interest at 4*l.* per cent. from the time when they received the 7,300*l.*, and with costs; but in the present state of the record I cannot see my way to make any decree against the other defendants without further inquiry, which would only involve the parties in unnecessary expense. I think, therefore, that unless the plaintiff insists upon further inquiry, the bill should be dismissed against the defendants." So that this was simply a decision in favour of an official manager of an unincorporated company against an official manager of an unincorporated company. It amounts to this, that he does not express any opinion adverse to a suit instituted by an official manager against some of the members of the company. But I cannot take this as a decision of the question, when I have not the slightest ground for supposing that the point was argued before their Lordships. I think the Lords Justices would complain, if this were acted upon as an authority by them, that such a suit as this could be instituted by an official manager. Then we have also an unreported case in the matter of the winding up of this Warwick and Worcester Railway Company which was cited in reply, in which an order

was made, and as to which a question is raised upon the short-hand note of the judgment of the late Lord Chancellor. It was before the full Court of Appeal. The question was, whether there should be a call made by the Master; from whose decision it was argued by way of appeal before the Vice Chancellor, and he decided one way; and then it came before the Court of Appeal, and they, I think, upheld the decision: but inasmuch as some suggestions were made as to questions arising as to liabilities of some one or more of the members of the company in their character of directors, this was suggested—"May it not be necessary to institute a suit?" and the official manager says, "You may use my name if you like"; and accordingly upon that offer the Lord Chancellor says, "The official manager having authorized the use of his name, if he does not institute a suit himself, the parties may take any proceedings they may be advised in the name of the official manager for such purposes as are suggested, namely, for making some of their body liable." I have not the slightest ground for saying that this point was suggested to the Lord Chancellor, and there is no reason for saying that in the Appellate Court there has been such a dictum as might be called an authority.

But we are not without authority, I should say as strong as that, the other way. We have the case of *The Grand Trunk Railway Company v. Brodie*, where the point was brought before the Court by some members of the company against others; the learned Judge in that case, is himself one whose dictum is cited in favour of the plaintiff, and also one of the Court in which that dictum of the Lord Chancellor is said to have been given. What was the case there? A suit had been instituted by Warren on behalf of himself and all other the shareholders or scripholders of the company, except the defendants, who were the provisional directors. A bill was filed in December 1846, and it sought to make the defendants liable on the ground that the rest of the shareholders were entitled to have relief against them. An official manager was appointed, and he procured the usual order of course that the suit should be prosecuted by him as the nominal plaintiff for and on behalf of the company.

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When the suit came on to be heard, it was argued on the merits, and on this point on which I am now dwelling. But there is an expression of opinion that, under the 53rd section, it would be difficult to answer the arguments arising with reference to the right of the official manager to take up such a suit; and if he could not take up such a suit, how can he institute it *de novo* under the 50th section? It appears to me that such an interpretation would lead to great mischief.

I am, therefore, of opinion that there is no indication of that point ever having been brought before the Court except in the last case, and I have no indications of any opinion upon the subject except those which I have referred to in *Ernest v. Croysdill*, and that unreported case and *The Grand Trunk Railway Company v. Brodie*. I think I am, therefore, bound to consider the matter open for determination, not concluded by authority, and upon which there are not sufficient guides even to lead me in the decision of the case. I am consequently left to decide it upon the best construction I can put upon the case; and it appears to me that the construction is entirely unfavourable to the official manager. I think, therefore, that this suit ought to be dismissed; but inasmuch as this is a point quite irrespective of merit, and as it was not taken by demurrer, I shall dismiss it without costs.

ROMILLY, M.R. }
Nov. 18, 19. } MILLETT v. DAVEY.

Mortgage—Deficient Security—Right to work Mines—Acquiescence.

Where a mortgagee of freehold estates enters into possession, he may work mines under the estate, if the security is insufficient for the payment of his principal, interest, and costs.

A mortgagor not allowed to surcharge a mortgagee with the value of minerals which he or his lessees had raised after entering into possession, when he knew that the mines were being worked for four years, and allowed the work to proceed without remonstrance or complaint.

This was a foreclosure suit, instituted by Richard Millett and Richard Vinicombe

Davey, the trustees of the will of John Richards the younger, deceased, son of the original mortgagee, against John Davey, the heir-at-law of the mortgagor.

The principal money due was 3,000*l.* It was made up of 2,000*l.* under a mortgage, dated the 22nd of December 1820, and of 400*l.* and 600*l.* under two several further charges, dated respectively the 9th of April 1822 and the 31st of December 1832.

The property mortgaged consisted of one moiety of a freehold estate called "Besurral," in the parish of Gwinear, in the county of Cornwall. There were minerals beneath it, and several mines.

In the year 1842 the interest upon the mortgage had fallen into arrear about 200*l.*; the mortgagee, therefore, took possession of the estate. The mines upon the estate had been worked before the possession of the estate was taken, but having been found unproductive they had been abandoned. In 1855 the plaintiffs granted a sett of their moiety of the Rosewarne and Herland mines, part of the premises, to a company, and they reserved to themselves a royalty of one-eighteenth of the gross produce raised, and at the same time the company obtained from the owner another sett of the other moiety of the mines. The company worked the mines under these setts, but they afterwards abandoned them as unproductive. By these setts the company were not compelled to make good the damage done to the surface by the working under the setts. The plaintiffs received 136*l.* as their moiety of the royalties, and they gave credit for it in the accounts. There was great conflict in the evidence on the surface value of the estate when possession was taken of it by the mortgagee. On behalf of the defendant, it was represented as being worth 4,500*l.*; while, on behalf of the plaintiffs, it was represented as being worth only 2,500*l.* It appeared, however, that the gross rental received for the surface was at that time 112*l.* 7*s.* per annum, and that 12*l.* 7*s.* arose from the rent of cottages. There was nothing to shew what the estate would have produced if it had been then sold with the minerals.

The chief clerk, by his report, dated the 6th of August 1862, certified that the interest, calculated to February, and the costs, as taxed, after giving credit for

the royalty on the mines, and the rents of the farms, &c., received by the plaintiffs, amounted to 3,162*l.* 8*s.* 4*d.*, and made, with the principal money, a total of 6,162*l.* 8*s.* 4*d.*

A decree was made on the 28th of January 1860, directing the accounts to be taken, and when in chambers the defendant objected that the mortgagees ought not by right to have worked the mines, and he claimed a right to surcharge them in account with 4,920*l.* 8*s.* 8½*d.*, the value of one moiety of the ores raised, and also with a sum of 237*l.* 6*s.* 4*d.*, the estimated value of three acres and a half of land damaged by the working of the mines. From the evidence of the defendant, it appeared that he had been a mine-agent for thirty years; that his father also had been a mine-agent, and that he had purchased the estate in question for the purpose of working the mines, and that he had worked several, and that the plaintiff himself was underground agent in the mines worked for about twelve years; that he resided near the mines worked by the lessees of the mortgagee under the sett of 1855, and was aware of their being worked, and never made any complaint either to the plaintiffs or their lessees.

The plaintiffs further proved that the surface of the land had not sustained any damage, except what arose from unavoidable necessity in working the mines.

The chief clerk disallowed both the surcharges; and, at the defendant's request, the summons on each claim was adjourned into court.

Mr. Lloyd and *Mr. Eddis*, for the defendant, contended that the value of the estate must be calculated as including the minerals. The mortgagees had no right to open mines or to authorize others to do so; they could only work mines which had been previously opened. The defendant certainly knew the mines were being worked, but he was not aware of the circumstances. A mortgagee had no right to speculate with the estate of the mortgagor; the best part of the ore was won near the surface. The loss sustained had arisen from sinking lower.

Viner v. Vaughan, 2 Beav. 466.

Thornycroft v. Crockett, 16 Sim. 445;
a. c. 2 H.L. Cas. 239.

Clavering v. Clavering, 2 P. Wms. 388.

Hood v. Easton, 2 Giff. 692.

Dean v. Thwaite, 21 Beav. 621.

Hughes v. Williams, 12 Ves. 493.

Whitfield v. Bewit, 2 P. Wms. 240.

Mr. Southgate and *Mr. Bevir*, for the plaintiffs.—The security was altogether insufficient for the repayment of the money lent upon the estate; the plaintiffs were, therefore, justified in working the mines, and they had accounted for their receipts. The co-owners of the mine might also have worked it, accounting for half the profits.

Powell v. Aiken, 4 Kay & J. 343.

Smallman v. Onions, 3 Bro. C.C. 620.

Hole v. Thomas, 7 Ves. 589.

Twort v. Twort, 16 Ibid. 128.

Denys v. Shuckburg, 4 You. & C. (Ex. Eq.) 42.

Spencer v. Scurr, 31 Law J. Rep. (N.S.)
Chanc. 808.

Lord St. Leonards' Handy Book, 92,
4th edit.

Mr. Lloyd, in reply.

THE MASTER OF THE ROLLS (Nov. 19).

—The defendant in this case seeks to surcharge the mortgagee with various sums, consisting of the value of minerals obtained from lessees of the mortgagee; and also for the value of certain land which has been destroyed in obtaining these minerals.

This was clearly an insufficient security. The amount of the mortgage-money was 3,000*l.*, and there was an arrear of interest exceeding 200*l.* when, in 1842, the mortgagee entered into possession. The accounts have been taken against him as mortgagee in possession and after making every allowance, taking out of consideration the question of the mines, the mortgage-debt has been gradually increasing down to the present time, and it now exceeds 6,000*l.*, with principal and interest. Against that it will require strong evidence to prove, after the accounts have been taken, that this was a sufficient security to cover the amount of principal, interest and costs, that were due upon this mortgage. It is true there is a witness for the defendant, who says that the surface of the property was worth 4,500*l.*; but, on the other hand, there is a witness for the plaintiff, who says that it is worth 2,500*l.*; but there is too much occasion to observe the impossi-

bility of placing any reliance in these questions upon the evidence given respecting the value of the property. It is a mere matter of opinion, upon which it is impossible, however preposterous it may appear, to assign a value upon which a decision may be arrived at. It may be a *bond fide* opinion of the person who expresses it, and the most monstrous opposite results may be produced by witnesses on opposite sides. The only way in which it is possible to determine questions of value where it has been necessary, and where there are no other data to go upon, is to employ some respectable surveyor or land-valuer totally disconnected with the parties. In this case, however, there is a test to proceed upon, and that is the annual rental of the property: the gross rental was only 112*l.* 7*s.* a year, of which 12*l.* 7*s.* arose from cottages, which are of a very inferior description—at least, of so inferior a description that in times of distress the landlord can never get his rent. If the mere gross rental were put at thirty years' purchase, it would very little exceed 3,300*l.*, and the total amount would not exceed about what was due for principal and interest at the time when the mortgagee took possession, and there is evidence that more could not have been got for it. It is in vain to say that this could have been put up for auction and sold if the minerals had been added to it. The value of the minerals in the market is very doubtful. What is known respecting the minerals in the mine is, that at the time when the mortgagee took possession they had been attempted to be worked before and had failed, the working had been given up, and subsequently a sett made by the mortgagee; it had been worked at a serious and continued loss. Under those circumstances, the burden thrown upon the mortgagee of proving that the security is insufficient has been fulfilled by him on the present occasion; and he has established that when he took possession the security was insufficient to pay the principal and interest due to him, and the costs which, as mortgagee, he was entitled to; and that accordingly he was entitled to such rights as a mortgagee is entitled to who enters into possession of a security which is insufficient for the payment of his mortgage—principal, interest, and costs.

What those rights are is really not a matter in dispute, and may be stated as follows. A mortgagee with a sufficient security cannot commit waste, or rather cannot dispose of any portion of the inheritance, because the word "waste" is an improper expression: it does not apply to a person who is the absolute owner at law, who is only subject to the equitable rules of this Court; and this Court will interfere by injunction to prevent him from destroying any part of the inheritance. You are in possession of a property which is sufficient to keep down the interest of the mortgage, to keep down and pay all the arrears of the interest of the mortgage, and you are not entitled to anything else. You may file a bill to foreclose, if you please; but you are not entitled to destroy any part of the inheritance, and if you do, it is at your risk and peril; and if you destroy a part of the inheritance, you must make that good to the mortgagor in taking the accounts. The mortgagor now says, the whole estate is mortgaged to you, and as you have disposed of a certain quantity of minerals without any sufficient reason, you must make that good, now that I desire to pay you off; and, according to the case of *Thornycroft v. Crockett*, he must be charged with the value of the inheritance, and not allowed anything in diminution of that. But where the security is insufficient, a totally different set of considerations arise. There a mortgagee is entitled to make the most of his property, for the purpose of realizing what is due to him: he may cut timber, and he may open a mine, and this Court will not by injunction interfere to prevent his so doing—assuming, of course, that he does not bring himself within the cases of wanton destruction; in all which cases the Court will at any time interfere and under any circumstances; but when it is *bond fide*, as in the present case, the Court will never interfere to prevent his felling timber or opening a mine, and the like, but he does it at this risk and peril: that if he has a great loss in working the mine he cannot charge a penny of that loss against the mortgagor; and if he obtains a great profit the whole of that profit must go in discharge of his mortgage debt. That is the condition upon which he speculates; but, subject to that

condition of speculation, he is entitled to make the most of the property for the purpose of producing his mortgage debt.

What occurred in the present case was this: a mortgagee and mortgagor being entitled between them to an undivided moiety of the property, they concur with the owner of the other undivided moiety in making a sett of the whole of the minerals of a portion of the property, of the two undivided moieties, to a company upon payment of a royalty of one-eighteenth of the gross produce. The company worked it; and certainly, in the absence of any evidence to the contrary, it must be assumed that they worked it properly; and if it had been worked by the mortgagee himself personally, and it had been supposed he had made a profit, then the mortgagor would have been entitled to an account, and that would have been the only mode in which he could question the propriety of the mode of working it. But upon the evidence, it seems the company spent 17,000*l.* and they got 10,000*l.*; accordingly the company was bankrupt—or at least, *quod* company, it was unable to go on, and the whole thing was abandoned. But the owner of the two undivided moieties got under their royalty 13*l.* each, and of course they must account for that sum; that is not disputed; but they in reality, as it appears, gained something out of the minerals, which otherwise could not by possibility have been gained.

But that is not the only view which makes it impossible for the defendant to succeed on the surcharges. The defendant himself was resident upon the spot, and cognizant of the whole matter. He is a person experienced in mining transactions, who, according to his evidence on cross-examination, has been educated in mines all his life and has risen to the situation of being an agent of mines, which is a responsible and important situation in Cornwall. He was cognizant of the whole of the facts; he knew that this mining-lease was being carried out; he knew that it had been granted in 1855, and he made no complaint until just before December 1859—a period of four years—so that the working was allowed to proceed, and, certainly, after it is concluded he cannot complain. In the case of *Hughes v. Williams*, it was considered the

bounden duty of the mortgagor, if he knew that the mortgagee was doing something injurious to the property and not making the most of it, to inform him of what was going on, and what ought to be done; and upon that ground particularly it is impossible to allow the surcharge, and this (though the conclusion at first was not without doubt) will not alter the balance in respect of the destruction of the three acres and a half of land which were destroyed for the purpose of this mine. It appears in evidence that it was not wantonly or improperly done, but that it was the unavoidable consequence of working the mine; and after what has taken place the mortgagor cannot complain of that being done, more especially as the co-owners of the undivided moiety are of the same opinion upon that subject. I forbear to go into the other circumstances connected with the case—such as the question of the co-owners,—and whether this is really opening a mine or merely working a mine already opened. They are questions of some nicety, but it is unnecessary to consider them, as the two grounds already dilated upon are sufficient to disentitle the defendant from making any variation in the manner in which the account has been taken in chambers. As the security is insufficient, the plaintiffs are entitled to be paid their costs. Had it been sufficient they must have added them to their security.

ROMILLY, M.R. }
Nov. 19. } PROUD v. PROUD.

Statute of Limitations—Devise of Real Estate charged with Payment of Legacies.

A devise of real estate, subject to and charged with the payment of legacies, does not create a trust for securing their payment or prevent the Statute of Limitations (3 & 4 Will. 4. c. 27.) from running against the legatees.

John Teasdale, by his will, dated the 30th of January 1811, devised to each of his nephews, John Teasdale and Henry Proud, and their respective heirs and assigns, one moiety of his estate at Farlam, in the county of Cumberland, subject to the payment of the several annuities, lega-

cies and bequests thereafter mentioned, and he charged each moiety with the payment of half his just debts and funeral and testamentary expenses, in case his personal estate should fall short, and with the payment of one-half of the mortgage money and interest then charged upon the whole of his real property; and he gave and bequeathed unto each and every of the children of his sister, Sarah Proud, the yearly sum of 10*l*. a-piece when and as they should severally attain the age of twenty-one years, to be paid until the youngest of such children as might be living should have attained the said age, and then he gave and bequeathed to each of such children the sum of 300*l*. in lieu of the said annuity or yearly sum; and in case any of the said younger children should die before attaining twenty-one, he gave and bequeathed the share or shares of him, her or them so dying unto the survivors and survivor of them, the said Henry Proud to take a proportion thereof.

And the testator also gave and bequeathed all his personal estate, goods, chattels and effects whatsoever unto and equally to be divided between his said two nephews, subject to the payment of his just debts and funeral and testamentary expenses; and in case the same should be found insufficient for that purpose, then he charged all his real estate whatsoever with the payment thereof, and he directed his executors to raise such sum as might be sufficient, by mortgage or otherwise, out of his said real estate.

And he appointed his sister, Sarah Proud, his executrix.

The testator died on the 1st of April 1811.

The will was proved by Sarah Proud. She got in the personal estate of the testator; but it was insufficient to pay the mortgage on the estate and the legacies bequeathed by the will. She had four daughters, Elizabeth, Margaret, Isabella and Anne, who were nieces of John Teasdale, and they were all living at his death.

Henry Proud took possession of the estate, and his mother and four sisters continued to reside with him as part of his family, and they assisted in the management of the farm. Anne Proud, the youngest daughter, attained the age of twenty-

one on the 18th of July 1832, when the several legacies became payable.

Isabella Proud continued to reside with the family until about 1833, when she went into service and only occasionally visited her mother in the intervals between her hirings; and on the 3rd of August 1841 she intermarried with William Little.

Sarah Proud died on the 28th of October 1848 intestate, and no person had taken out letters of administration to the testator.

Elizabeth, Margaret and Anne Proud for sometime continued to live with their brother as before; but in July 1860 they filed this bill, alleging that an arrangement had been made between them and their brother, Henry Proud, that in consideration of their residing with and being maintained by him, they should forego not only the annuities of 10*l*. severally given to them, but also the interest of their several legacies of 300*l*., and they now asked for the payment of their several legacies. Henry Proud, by his answer, denied the arrangement and claimed the benefit of the Statute of Limitations; but ultimately the plaintiffs agreed to accept 400*l*. and the costs of the suit in satisfaction of their legacies, and on the 18th of January 1862 a decree was, by consent, made for the sale of the estate; it also directed inquiries to be made whether the estate was subject to any and what incumbrances (other than the plaintiff's charge) and what was due and owing in respect thereof.

Under this decree William Little, in right of his wife, claimed the benefit of the same arrangement, and he carried in his claim; and on the 30th of July 1862, the chief clerk found that the estate was charged with the legacy of 300*l*. given to his wife, and that there was an arrear of interest thereon, amounting to 335*l*. 18*s*. 4*d*.

A summons was then taken out by the defendant to vary the certificate, and it was adjourned into court.

Mr. A. M. Shee, for the plaintiffs.

Mr. Hobhouse and *Mr. Brodrick*, for the defendant, Henry Proud.—No trust was created by the testator upon his real estate either for the payment of debts or legacies; the estate was certainly devised subject to their payment; this legacy, however, was unsupported by any trust or interest

in the land, and it was barred by the lapse of time.

Jacquet v. Jacquet, 27 Beav. 332.

Francis v. Grover, 5 Hare, 39; s. c. 15

Law J. Rep. (N.S.) Chanc. 99.

Greenway v. Bromfield, 9 Hare, 201.

Wilkinson v. Wilkinson, Ibid. 204.

3 & 4 Will. 4. c. 27. ss. 25, 40.

Mr. Rendall, for Mr. and Mrs. Little.—

The arrangement made between the parties clearly took the estate out of the 3 & 4 Will. 4. c. 27. The estate was also subject to incumbrances of the testator, and until they were satisfied, no present right to the legacies could arise; assuming that it did, the legatee might have to file a bill to redeem. So long, however, as the estate was in the hands of mortgagees the statute could not begin to run, especially in a case where the devisees took the estate subject to the legacies and a consequent trust which pledged the estate for payment.

Hunt v. Bateman, 10 Ir. Eq. Rep. 360.

Ravenscroft v. Frisby, 1 Coll. C.C. 16;

s. c. 13 Law J. Rep. (N.S.) Chanc. 153.

Faulkner v. Daniel, 3 Hare, 199.

THE MASTER OF THE ROLLS.—The right to receive and give a discharge for the legacy arose on the youngest daughter attaining twenty-one; that is a fact which must be admitted for the purposes of the 3 & 4 Will. 4. c. 27. It is also clear that a charge only was made upon the estate for the payment of the legacy, and that no trust was created for securing the payment. This was decided in *Jacquet v. Jacquet*, and again in *Dickenson v. Teasdale* (1). What is and what is not to be considered a trust depends upon a most minute accuracy of judgment; but between a devise subject to debts or legacies and a mere charge, no such distinction exists, and the arrangement which Mrs. Little claims the benefit of certainly affords no ground for giving the relief asked upon the present claim; but assuming such an arrangement to have been made, after twenty years it is most undoubtedly barred by the lapse of time. The certificate of the chief clerk must, therefore, be varied.

Wood, V.C. }
Jan. 12. }

KNIGHT v. CORY.

Practice—Costs, Security for—Misdescription of Residence.

The plaintiff could not be found at the residence described in his amended bill. An application by a defendant (made a party to the suit by the amended bill), that the plaintiff might be ordered to give security for costs, was refused, with costs, the misdescription having arisen by mistake, and no inquiry as to the plaintiff's residence having been made of his solicitor.

This was a motion, on behalf of the defendant George Pell, that the plaintiff might be ordered to find security for the costs to be incurred in the suit.

The original bill in this cause was filed on the 30th of April 1861, and the plaintiff, Alfred Knight, was therein described as of No. 52, Holywell Street, Westminster. On the 4th of October 1862 the bill was amended, and in such amended bill the plaintiff was described as of the same place, and the defendant G. Pell was made a party to the suit.

In support of the application, it was stated on affidavit that the defendant G. Pell had made inquiry for the plaintiff at 52, Holywell Street, Westminster, and was informed that the plaintiff had, about Midsummer, 1861, removed to No. 15, Howard Street, Strand, with Mrs. Cooper, his landlady; that on inquiry at the last-mentioned address it was found that the plaintiff, in January 1862, left Mrs. Cooper, being considerably indebted to her; that she did not know his address; and that she stated that she had inquired of his solicitor in this cause, but that such solicitor had said that he did not know the plaintiff's address.

The defendant G. Pell made no inquiry of the plaintiff's solicitor, but, on the 11th of December 1862, served him with notice of motion that the plaintiff might be ordered to give security for costs in the suit.

The plaintiff's solicitor, on receiving such notice, at once, by letter, informed the defendant G. Pell of the plaintiff's address.

Mr. W. M. James and *Mr. Townsend*, in support of the motion, contended that the plaintiff had not acted innocently and

(1) *Ante*, 37.

from mistake solely, so that this case differed from *Hurst v. Padwick* (1), and came within the authority of *Player v. Anderson* (2), *Calvert v. Day* (3) and *Oldale v. Whitehead* (4).

Mr. W. Pearson opposed the application, and submitted that a mere accidental mistake would not entitle a party to ask for security for costs: there must be an intention to mislead—*Manby v. Bewicke* (5). The plaintiff's solicitor was known to the defendant G. Pell, and it was his duty, on finding that the plaintiff had left the address stated in the bill, to make inquiries of the plaintiff's solicitor, which he neglected to do—*Bailey v. Gundry* (6).

Mr. James, in reply.

WOOD, V.C.—In the absence of fraud, a plaintiff or defendant, being a subject of the realm, and having a fixed abode, could not be required to give security for costs. The plaintiff could, if he pleased, change his residence, provided he did so without any fraudulent intent, of which there was no evidence in the present instance. This case appeared to come within the authority of *Hurst v. Padwick*. It was true that the plaintiff's address, as given in the amended bill, was wrong, and that his landlady, on being applied to, not only could not give his address, but stated that she was unable to obtain his address from his solicitor; but it must be remembered that the plaintiff was indebted to his landlady, and probably wished to conceal himself from her. At any rate, the plaintiff's solicitor was well known, and the defendant G. Pell neglected to inquire of him as to where the plaintiff was living. In cases where a solicitor on being applied to had refused to give his client's address, the Court had ordered security for costs to be given; but here there had been no refusal on the part of the solicitor, and the misdescription having been given by mistake, the plaintiff could not be compelled

to find security for costs. As to the costs of this application, the question arose whether expense had not been needlessly incurred by the defendant G. Pell in consequence of his neglect to inquire of the plaintiff's solicitor. The statement by the landlady did not absolve the defendant G. Pell from the duty of making such inquiry before making the present application. The motion, therefore, would be refused, with costs.

WOOD, V.C. }
Dec. 18;
Jan. 13. }

WEATHERLY v. ROSS.

Injunction—Ancient Lights—New Windows—Right to obstruct—Costs.

The plaintiff being owner of a house in which there were ancient lights, rebuilt it, and in so doing altered the position of some of the ancient windows and also opened new windows. The defendant proposed to build so as to obstruct both the new and ancient windows:—Held, that as the defendant could not possibly obstruct the new windows without at the same time obstructing the ancient lights, the plaintiff was not entitled to an injunction as prayed. The decision in Renshaw v. Bean (1) approved.

Held, also that the plaintiff, on undertaking to close up the new windows and to restore the ancient lights to their original position, would be entitled to an injunction; but that as this was new relief, he must pay the costs of the suit.

A building, known as the Waterman's Arms, had certain windows on the east side, which for more than twenty years enjoyed rights of light and air over a yard and the roofs of certain houses belonging to the defendant. In 1848, the Waterman's Arms was pulled down and a new building of two stories and about 35 feet in height was shortly afterwards erected on the same site, having five windows on the east side which received light and air partly over a small yard belonging to the plaintiff, but chiefly over the yard and houses belonging to the defendant.

(1) 18 Q.B. Rep. 112; s.c. 21 Law J. Rep. (N.S.) Q.B. 219.

(1) 17 Law J. Rep. (N.S.) Chanc. 169.

(2) 15 Sim. 104; s.c. 15 Law J. Rep. (N.S.) Chanc. 189.

(3) 2 You. & Col. (Ex. Eq.) 217.

(4) 28 Law J. Rep. (N.S.) Chanc. 333.

(5) 8 De Gex, M. & G. 468; s.c. 24 Law J. Rep. (N.S.) Chanc. 664.

(6) 1 Keen, 53; s.c. 5 Law J. Rep. (N.S.) Chanc. 199.

On the east side of the Waterman's Arms as so rebuilt, and contiguous thereto, were two messuages, not quite so high as the Waterman's Arms, belonging to the defendant. These were pulled down in 1861, and the defendant proposed to erect a granary of 63 feet in height, extending over the site of the messuages so pulled down, and also over the whole of the defendant's yard.

The plaintiff then filed a bill, by which he claimed five ancient windows, and prayed that the defendant might be restrained from proceeding with or making any erection or building along the eastern boundary of the plaintiff's said yard or any part thereof, or upon any part of the defendant's said yard, or in any other manner so as in any way to darken or obstruct or injure any of the said ancient lights or windows of the plaintiff, or to obstruct or impede the free admission of light and air thereto.

By a decree made on the 14th of June 1862, it was ordered that the following questions of fact should be tried before the Court:

1. Whether before the rebuilding of the Waterman's Arms the plaintiff was entitled to the right of light and air through certain windows of the said premises.

2. Whether upon the rebuilding of the Waterman's Arms as they then stood, the ancient boundary line of the main walls of the said buildings on the east and south sides of the said buildings, wherein the said windows were situate, was departed from.

3. Whether, in the rebuilding of the Waterman's Arms, the said windows, or any or either and which of them, were or was preserved in the same positions, and are or is of the same or less dimensions than the windows in the said premises before the same were pulled down and rebuilt.

On the 5th of November 1862, the jury, by their verdict, found:

1. That the plaintiff was entitled to the right and easement of light and air through certain windows of their premises, viz. the cellar-window, the scullery-window and loft-window.

2. That the ancient boundary lines of the old building east and south were not departed from:

3. That the three ancient windows facing the east in the new building were not increased in size, but that the scullery and loft windows were more to the south than they were in the old building.

The cause now came on for further consideration.

Mr. Eddis (with whom was *Mr. Roll*), for the plaintiff, contended that the defendant could not justify an obstruction of the plaintiff's ancient lights by shewing that the usurpation of an easement by the new windows could not have been otherwise prevented. *Renshaw v. Bean* (1), which decided the contrary, could not be reconciled with *Jones v. Tapping* (2) and *Chandler v. Thompson* (3). And that the owner of ancient lights has a right to open new windows, for this is no injury to his neighbour, and the opening of such new windows does not destroy his right to ancient lights; the easement is not thereby lost.

Luttrell's case, 4 Rep. 86, a.

Gale on Easements, p. 282, et seq.

Wilson v. Townend, 1 Drew. & S. 324;

s. c. 30 Law J. Rep. (N.S.) Chanc. 25.

Hutchinson v. Copestake, 9 Com. B.

Rep. N.S. 863; s. c. 31 Law J. Rep.

(N.S.) C.P. 19.

Turner v. Spooner, 30 Law J. Rep. (N.S.)

Chanc. 801.

Even assuming *Renshaw v. Bean* to have been rightly decided, it was incumbent on the person claiming a right to obstruct the ancient lights to prove that it was impossible to obstruct the new windows without at the same time obstructing the ancient lights—*Binckes v. Pash* (4). In the present case there had been no abandonment of the easement, for there had been continued user of the ancient windows—*Moore v. Rawson* (5), *Cooper v. Hubbuck* (6). But if the Court should take a different view of the law on these points, the plaintiff was entitled to an injunction on restoring the ancient windows to their original position

(1) 18 Q.B. Rep. 112.

(2) 11 Com. B. Rep. N.S. 283; s. c. 31 Law J. Rep. (N.S.) C.P. 342.

(3) 3 Campb. 80.

(4) 31 Law J. Rep. (N.S.) C.P. 121.

(5) 3 B. & C. 332; s. c. 3 Law J. Rep. K.B. 32.

(6) 30 Beav. 160; s. c. 31 Law J. Rep. (N.S.) C.P. 323.

and closing up the new windows—*Jones v. Tipling*.

Mr. Giffard and *Mr. Nalder*, for the defendant, contended that in the present case it was impossible to obstruct the new windows without obstructing the ancient lights. The case raised by the bill was "that the lights were all ancient lights," but the plaintiff had not proved this, the jury having found that only three out of the five windows were ancient lights, and that two of these were not in their original positions. This was virtually finding for the defendant. If the plaintiff restored the windows to their original position and closed up the new windows, he would be entitled to an injunction; but as the windows now stood, the bill must be dismissed.

Mr. Eddis, in reply.

Wood, V.C. (Jan. 13) said, the verdict of the jury was, in effect, a verdict for the defendant, and appeared to bring the case within the authority of *Renshaw v. Bean*. Doubts had been expressed whether the decision in that case was good law, but it had been approved of by seven Judges and disapproved of by only three, and his opinion was with the majority, for that decision appeared to be founded on reason and equity; if this were not so, where a right to one window had been granted, any number of other windows in the same perpendicular line above or below it, might be opened by the owner of the dominant tenement and entirely new rights of light and air be thus in time acquired. A Court of equity would not allow a man, by a fraud upon a grant of one window, to acquire a further easement. Any man had a right to open new windows, but his neighbour had an equal right to obstruct them; and it appeared that in the present case this was not possible without, at the same time, obstructing the ancient lights. The position of the plaintiff now was very different to what it was at the time the bill was filed; but he was bound to rely on his case as laid, and if through ignorance or carelessness he had mis-stated his own case, he must take the consequences.

The bill alleged a right of light and air to all the windows. According to the verdict, therefore, the plaintiff was entitled to no relief on the original bill.

If the plaintiff would undertake to close up the new windows and to replace the ancient lights in their original position, he would be entitled to an injunction; but the plaintiff should have offered to do this in his bill, for in that case it was probable that the defendant would have submitted without further litigation; and this new relief the plaintiff could only have as an indulgence and on payment of the costs of the suit. As on the issue it was a drawn battle, and neither party was completely successful, there would be no costs of the issue on either side.

ROMILLY, M.R. }
 Nov. 21; } JONES v. SOUTHALL
 Dec. 9. }

Legacy—Ademption—Demonstrative Legacy—Gift in Default of Appointment.

A testatrix bequeathed her residuary estate to such persons as B. C. should appoint by deed or will, and in default of appointment to his next-of-kin; B. C. made his will, but died before the testatrix:—Held, that the will could not operate as an execution of the power, but that the gift in default of appointment took effect, and the next-of-kin were entitled.

Upon an intended marriage between B. C. and C. W., which under the 5 & 6 Will. 4. c. 54. was void in its inception as being contracted with the husband of a deceased sister, C. W. assigned various mortgage debts, stocks and securities to trustees by way of settlement. She afterwards by will directed her trustees to hold all the trust monies and the securities upon trust in the proportions mentioned for the several persons named who should be living at the decease of B. C.; she then gave several legacies to persons by name. C. W. survived B. C.; she destroyed the settlement and also the assignment of some of the securities to the trustees, and took re-transfers of stock into her own name. and died without altering her will:—Held, that the legacies were not adeemed by the destruction of the deeds, but that they were adeemed to the extent to which she had called in, received and re-invested the trust monies on new securities.

C. W., believing herself to be the wife of B. C., made her will; and after reciting her

desire to give several legacies, she requested B.C. (who died before her) to pay several legacies out of property of hers which she assumed he had become entitled to on their marriage:—Held, that they were demonstrative legacies, and payable out of the general estate.

Catherine Wood, in contemplation of a marriage with Benjamin Crane, executed a settlement dated the 27th of June 1842, by which, in consideration of marriage, she assigned a mortgage of 1,200*l.* on the Broadwas turnpike-road, and various specific sums of money with their securities (then vested in the executors of her father), to William Plumtre Grape and Edward Southall upon trust for herself until the solemnization of the marriage, and afterwards during the joint lives of herself and B. Crane, for her separate use, and after the decease of either upon trust for the survivor for life, and after the decease of the survivor for the benefit of the issue of the marriage, and if none, in case Catherine Wood should survive and there should be a failure of children, in trust for C. Wood, her executors, administrators and assigns; but if she should die in the lifetime of B. Crane, then after his death and such failure of children in trust for such person or persons as she by deed or will, notwithstanding coverture, should direct or appoint, give or bequeath the same, and in default of appointment in trust for her next-of-kin.

The ceremony of marriage was duly performed in Edinburgh; but the 5 & 6 Will. 4. c. 54. prevented any such marriage being contracted, as Catherine Wood was the sister of Benjamin Crane's deceased wife; but notwithstanding this they cohabited during their joint lives as husband and wife.

On the 4th of October 1842, Catherine Wood made her will; and after describing herself as Catherine, the wife of Benjamin Crane, late Catherine Wood, spinster, and reciting the marriage settlement, the power of appointment therein contained in the event of her husband surviving her, and of her having no child, she ratified and confirmed the settlement, and in pursuance and in exercise of the power thereby reserved to her, and of all other powers enabling her in that behalf, directed and appointed that the trustees of the settlement should

stand possessed of all and singular the trust monies comprised therein, and the securities on which the same should be invested, from and after the decease of Benjamin Crane, and such failure of issue, in trust for such of the several persons whom she named as should be living at the decease of Benjamin Crane, in the parts and shares thereinafter mentioned, to whom she bequeathed the same accordingly. She then named the legatees, and gave several sums of money as legacies; and as to the residue of the trust monies and personal estate comprised in such settlement, from and after the payment of such legacies, which she directed to be paid at the end of six months after the decease of B. Crane, and the expense of proving her will, she gave and bequeathed one moiety thereof to such person or persons as her husband B. Crane should by deed or will appoint, and in default of appointment to his next-of-kin; and the other moiety she gave to her sisters Jemima Wood and Anne Jones, in equal shares, with a proviso that in case of the death of any of the legatees except her sisters in the lifetime of B. Crane, the legacies given to them should sink into the residue of her personal estate.

The will then contained a clause, set out in the judgment, by which the testatrix requested B. Crane to pay several legacies out of certain property which she assumed to have become his by virtue of his marital right.

On the 5th of June 1844 B. Crane made his will, and gave all his real and personal estate to his wife, Catherine Crane, subject to the payment of his debts and an annuity of 20*l.* to the defendant, Sarah Pardoe, his half-sister; and he appointed Catherine Crane his sole executrix.

B. Crane died on the 27th of December 1846, leaving the testatrix surviving, and without having had any issue by her. She died on the 2nd of January 1857, without having made any alteration in her will, leaving the plaintiff her only surviving sister, and sole next-of-kin at her death.

By a decree made in the suit on the 17th of April 1861 (1), the settlement made by Catherine Wood was declared valid as a voluntary settlement, and her will, though

(1) *Jones v. Southall*, 30 Beav. 187; s.c. 30 Law J. Rep. (N.S.) Chanc. 875.

it purported to be made in execution of a power contained in the settlement, was also declared good; and, among other inquiries, inquiries were directed to ascertain the position of the property at the death of the testatrix.

Under this direction the chief clerk certified that in 1846, during the life of B. Crane, a sum of 400*l.* secured by mortgage was paid off, and invested by the trustees of the settlement in their own names in the purchase of 411*l.* 16*s.* 10*d.* 3*d.* per cent. reduced annuities. That shortly after the death of B. Crane, the settlement, with a deed of even date, assigning a mortgage debt of 700*l.* to the trustees of the settlement, were given up by them to the testatrix, and that she afterwards destroyed them. That about the same time 411*l.* 16*s.* 10*d.* consols, and also 2,000*l.* consols, were transferred by the trustees, at the request of the testatrix, into her name, in which they stood at the time of her death; that 200*l.* due on bond was paid to her in April 1847 by the debtor, with the consent of the trustees; that in 1855, 600*l.*, being one-half of the sum due on the mortgage of the turnpike tolls, was also paid to the testatrix, and was, on the 13th of July 1855, lent by her to George Peake on his bond, which was to be void on his paying the money to her with interest. It was also collaterally secured by a mortgage dated the 24th of August 1855, made between G. Peake of the one part and the testatrix of the other part, and it was so invested at her death. That 938*l.* 9*s.* 2*d.* due on the mortgage of Sapey Mill remained on that security at the death of the testatrix; but that in 1847, and again in 1851, she had endeavoured to sell the premises by auction without the intervention of the trustees. That the investment of the second half of the 1,200*l.* due on the mortgage of the turnpike tolls had been allowed to remain on that security; that, at the date of the settlement, the testatrix was transferee of this mortgage, but that neither the transfer to her or from her to the trustees was ever registered, as required by the 3 Geo. 4. c. 126. s. 81.

Mr. Selwyn and *Mr. T. A. Roberts*, for the plaintiff.—The will of the testatrix could not affect any property which at the time of her death was not subject to the

trusts of the settlement. The turnpike bonds were never subject to the trusts of the settlement; they were never registered in the names of the trustees, who consequently never had any legal title. The testatrix also had resumed the sole ownership of the property; she destroyed the deeds, and put an end to the settlement. At the same time, the legacies and the funds given for their payment were taken away. Considering, therefore, that the legacies were specific, they were adeemed not only by the resumption of the property, but also by the several acts which had either altered or varied the investments. The attempt, also, to sell the mortgage upon Sapey Mill was an ademption of the security as a fund appropriated to the payment of the legacies. The testatrix, by the gift of a moiety of her residuary estate to such persons as B. Crane should appoint, gave him a power which he might be considered to have executed by his will in favour of the testatrix herself; but if the power never arose, the gift over must fail, as it was altogether dependent upon it. In that case, therefore, the plaintiff would become entitled to the entire residuary estate of the testatrix. The gifts which the testatrix requested B. Crane to pay created no obligations; they were not legacies either general or specific: but assuming they were, still they must fail, as being given upon a condition that the party to pay them should be living and entitled to the property out of which they were to be paid by virtue of his marital right.—

Jones v. Jones, 5 Exch. Rep. 16.

Pigot's case, 11 Rep. 26, b.

1 *Stephen's Commentaries*, 478, 3rd edit., 5th edit. 504, and the cases there cited.

Rider v. Wager, 2 P. Wms. 328.

Barker v. Rayner, 5 Mod. 208.

Badrick v. Stevens, 3 Bro. C.C. 431.

Gardner v. Hatton, 6 Sim. 93.

Pattison v. Pattison, 1 Myl. & K. 12; a. c. 2 Law J. Rep. (N.S.) Chanc. 15.

Baker v. Hanbury, 3 Russ. 340.

Mr. Lloyd and *Mr. A. Smith*, for Sarah Pardoe.—The plaintiff has omitted to trace some of the funds; they must, therefore, if they exist, be considered as part of the residuary estate: but those which have been traced cannot be considered as

adeemed, since the testatrix gave all the monies with the securities on which they should be invested. They must, therefore, for all purposes of the will, be considered as existing. The power which the testatrix intended B. Crane to execute over a moiety of her personal estate never arose, inasmuch as he died before her—7 Will. 4. and 1 Vict. c. 26. s. 27. The gift over for the benefit of the next-of-kin was a substantive gift, in no way depending upon the power. It was clearly the intention of the testatrix to make two separate gifts, the last of which had taken effect.

Ashburner v. Macguire, 2 Bro. C.C. 108.

Dingwell v. Askew, 1 Cox, 427.

Clough v. Clough, 3 Myl. & K. 296.

Clarke v. Browne, 2 Sm. & Gif. 524.

Murray v. Jones, 2 Ves. & B. 313.

Hardwick v. Thurston, 4 Russ. 380.

Williams on Executors, 1048, 1136.

Warren v. Rudall, 4 Kay & J. 603; a.c. 29 Law J. Rep. (N.S.) Chanc. 543.

Mackinnon v. Sewell, 5 Sim. 78; a.c. 2 Myl. & K. 202; 3 Law J. Rep. (N.S.) Chanc. 161.

Jefferys v. Jefferys, Cr. & Ph. 138.

Bridge v. Bridge, 16 Beav. 315; a.c. 22 Law J. (N.S.) Chanc. 189.

Birch v. Baker, Mos. 373.

Fryer v. Morris, 9 Ves. 360.

Le Grice v. Finch, 3 Mer. 50.

Chatteris v. Young, 6 Madd. 30.

Edwards v. Saloway, 2 De Gex & Sm. 248; a.c. 17 Law J. Rep. (N.S.) Chanc. 329; 2 Phil. 625.

Jones v. Westcomb, Prec. Ch. 316.

Avelyn v. Ward, 1 Ves. sen. 420.

Mr. Baggallay and Mr. Freeman, for the trustees, on behalf of the second class of legatees, who were not before the Court, said it had been argued that no legacies had been given, and that the will contained a request merely: they clearly, however, were legacies, and must be paid out of the general personal estate, where a general intent was clear, and a particular fund was named for its satisfaction; if that failed, they became payable out of the general estate. In this case it was clear that the parties were to take the legacies; they must, therefore, be considered as demonstrative.

Mr. Swan, for other legatees.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS (Dec. 9).—
The first question is, whether the will of Benjamin Crane operates as an execution of the power contained in the will of the testatrix, which it does not, as no power created by the will of the testatrix had any existence until her death had given validity to the instrument itself; and this is the first time it has been argued that a man could execute a power of which he was the intended donee named in the will of the person who survived him. Under the old law it was obvious that, having no reference either to the power or the fund which was the subject of it, it could not operate as an execution of the power; and under the 7 Will. 4. & 1 Vict. c. 26. s. 27, it is equally obvious that it could have no such operation. That section makes a general disposition by will operate as an execution of a power. Such disposition it treats as evidence of intention to execute the power; and therefore it makes such a disposition an execution of the power, unless the contrary intention appears upon the face of the will. But no intention can be presumed respecting the execution of a power of the existence of which the testator was ignorant; in other words, the testator could, by his will, execute only such powers as were then in existence; and when his will took effect he was not the donee of any power at his death, the time at which the will begins to speak; and, therefore, unless he survived the testatrix, he never could become the donee of a power created by her will, which had no operation, except from her death. The gift then, in default of appointment, takes effect: it is only a gift to a class of persons provided a certain event does not happen. The class to whom the gift is made is the next-of-kin of Benjamin Crane, and the event upon which it is to take effect is the non-execution of the power by him. The event has occurred: he has not executed the power, simply because he could not; but this does not alter the case. His capacity or incapacity to influence the occurrence of the event upon which the gift over took effect is wholly immaterial. If the gift had been to the next-of-kin of Benjamin Crane in the event of his dying before Catherine Crane, the fact of his death previous to that of Catherine Crane would have given effect to

the legacy, although the occurrence of the event depended, not upon the will of Benjamin Crane, but upon the will of God. Here, if he had survived the testatrix he would have executed the power. He died before her, and, therefore, he did not execute the power. As he has not done so, the gift takes effect in favour of his next-of-kin. This also appears to be the plain meaning of the testatrix's will, which may be thus expressed: "I wish a half of the residue to go as Benjamin Crane shall direct. If he does not or cannot give any direction upon the subject, then I wish his next-of-kin to have that half."

The next question which arises relates to whether there has been any ademption of the sums mentioned in the settlement. The testatrix, by her will, directs "that the trustees of the settlement shall stand possessed of all the trust monies comprised in the settlement, and the securities on which the same shall be invested from and after the decease of Benjamin Crane, in trust for the persons mentioned" in the will. It is clear, therefore, they are specific legacies. The first consideration is, whether these are all adeemed by reason of the trustees having delivered up the settlement to the testatrix, and her having destroyed it; but such a delivery and destruction did not produce any effect. The settlement never had any validity, as it was founded upon a marriage consideration which did not arise, and the destruction of it affected nothing. In fact, if it had possessed any operation, the destruction would have left it exactly as it was before. The words of the will simply describe the specific funds, the division of which is to take place among certain legatees.

The next question is, whether the dealing with these funds by the testatrix subsequently to the date of the will has adeemed any, and which of them.

The first is a sum of 1,200*l.* and interest secured by a mortgage of the tolls of the Broadwas turnpike-road. In 1855, 600*l.*, part of this, was paid off, and lent by the testatrix to George Peake, and secured by his bond and mortgage. The remaining 600*l.* continued due upon the security of the tolls until the death of the testatrix. This fund is adeemed to the extent of the 600*l.* paid to the testatrix.

It is contended that under the words "*and the securities on which the same shall be invested,*" the legatees are entitled to follow out and trace these funds into the fresh securities in which they have been invested by the testatrix from time to time, and that they preclude any question of ademption. But that argument cannot prevail. I do not mean to say that if the settlement had been valid and effectual, and if in pursuance of the power contained in it the trustees had invested the settled fund in fresh securities from time to time, considerable weight might not have attached to the argument, or that the words of the will might not have been in that case construed to mean funds in the settlement, whatever they were; and if it was the true construction of the will that only the funds subject to the settlement and none other should be applied in payment of the legacies, then, as the settlement had no operation, it might support the argument that this bequest had no operation at all, inasmuch as there are no funds in settlement. But this is not a just construction of the will, and those words in the will simply import a description of the fund specifically appropriated to the payment of certain legacies, and the reference to "*the securities upon which they shall be invested*" merely gives the existing securities by way of more completely identifying and disposing of the fund, and does not operate as a bequest of future securities to be thereafter taken for a future advance of any portion of those funds if they should be either called in or voluntarily paid off. The words of the will are merely referential to the other document, as containing the description of the fund; and they may be read exactly as if the testatrix, instead of using the words in the will, had inserted the various funds which were mentioned in the document referred to, and which the certificate enumerated.

The first fund, therefore, is adeemed to the extent of one-half. The second is a sum of 400*l.* and interest secured on the mortgage of a reversionary interest. This also is paid off and invested by the trustees of the settlement in the purchase of 411*l.* 16*s.* 10*d.* new 3*l.* 10*s.* per cent. This fund is also adeemed for the reason already stated.

The third fund is a sum of 200*l.* se-

cured by bond, which has been paid off and received by the testatrix, and not re-invested. This also is therefore adeemed.

The fourth fund is 938*l.* 9*s.* 2*d.* secured upon the mortgage of Sapey Mill, and 700*l.* charged upon lands called Burley. Both these sums now remain due upon the original securities, and both are available for the payment of the legacies to which they were specifically appropriated.

The fifth and last fund is 2,000*l.*, 3*l.* 10*s.* per cent. reduced annuities. There was no dealing with this fund other than that, after the death of Benjamin Crane, it was transferred by the trustees into the name of the testatrix, in whose name it stood at her death. This is no ademption, and this sum is specifically available for the payment of debts.

The only remaining question which arises is that upon the will, which relates to the five legacies, which are given in the following words: And whereas on my marriage with my said dear husband, Benjamin Crane, he became entitled, in right of such marriage, to certain personal estate belonging to me which was not comprised in the before-mentioned settlement, and I am desirous of leaving certain legacies payable immediately on my decease. I do, therefore, hereby request my said dear husband to pay out of such personal estate, notwithstanding the same has now become his own property, the following legacies, viz.: "to the poor of the parish of Knightwick who do not receive regular parish pay, ten pounds." This was followed by four other legacies, the three last of which were to be paid within six months from her decease.

All these legacies are payable. The argument against them is, that they are simply a direction or request to Benjamin Crane to pay these legacies, and that they are not legacies of hers, but a request to him to give legacies, which request has no operation. But the words of the will do not support that argument; they are five legacies given by her will, with a request that they shall be paid by Benjamin Crane out of a particular fund. They are in the nature of demonstrative legacies; that is to say, they are general legacies directed to be paid out of a particular fund. Omit the introductory words, and there can be no question but that the five legacies were legacies

given by the will of the testatrix; and all that she does is, that, before giving them, she mentions the sources from which they are to be paid. If Benjamin Crane had survived her, that might have raised a question of election; but it could not have disappointed the legatees. Assume that the fund which she appointed for the payment of these legacies fails, the legacies are not also to fail. Suppose she had said, "I give the following legacies to A. B. &c. and request these legacies to be paid by my executors out of a sum of stock standing in my name," using (observe) the words "out of"—not by giving a part of the stock itself, so as to make it specific and not demonstrative—then the effect would have been, that they would have been general legacies to be paid out of a specified fund; but if the fund failed, the legatees must be paid out of the general personal estate. Here the words "I am desirous of leaving certain legacies," and the subsequent enumeration of the five legacies, the last three of which she directs to be paid six months after her decease, point at the fact that these were general legacies, which the previous words shew were coupled with a request to her husband to pay them out of a fund belonging to him, or which was supposed to belong to him; which request, whether complied with or not, does not alter the validity of the bequest.

WOOD, V.C. { *Re* THE STATE FIRE INSURANCE COMPANY.
Dec. 18. { WEBSTER'S CASE.

Company—Winding up—Contributory—Forfeiture of Shares.

The directors of a company having treated shares as forfeited for non-payment of calls, and the company being afterwards ordered to be wound up, the shareholder's name will not be placed upon the list of contributories on the application of the official manager.

Whether it would be done on the application of the creditors' representative—quære.

The State Fire Insurance Company, now in course of winding up, was formed in 1856; and by the deed of settlement it was declared that if any instalment of the

amount payable upon the shares should not be paid on the appointed day, interest at 5l. per cent. should be payable; and if such instalment and interest should not be paid within three months after such appointed day, the share or shares in respect of which the instalment was payable should be *ipso facto* forfeited to the company, and the directors should, notwithstanding such forfeiture, enforce the payment of such instalments from the shareholders making such default.

Mr. Webster was the original holder of 100 shares in the company, upon which he had paid a deposit of 5s. per share, and in respect of which he had signed the deed of settlement. In October 1860 a call of 5s. per share, payable on the 2nd of January 1861, was made. This call was not paid by Mr. Webster, and by their report, presented to the shareholders at the general meeting of the company on the 15th of August 1861, in which the balance-sheet was made up to the 31st of March previous, the directors treated these shares as forfeited, and credited the company with a sum of about 27,000l. for shares forfeited by reason of the non-payment of calls. In July 1861 a further call was made; but no notice of this had been sent to Mr. Webster, nor did he ever receive any notice of the subsequent proceedings of the company.

The order for winding up the company was made in December 1861, and the matter now came before the Court upon the application of the official manager that Mr. Webster's name might be placed upon the list of contributories.

Mr. Rolt and *Mr. Druce*, for the official manager, contended that there had been no such deliberate act on the part of the directors as was necessary to constitute a forfeiture of the shares; and the shareholder himself could not be allowed to escape his liability to the debts of the company by permitting his shares to become forfeited—

Doe d. Bryan v. Bancks, 4 B. & A. 401.

Malins v. Freeman, 4 Bing. N.C. 395; a.c. 6 Scott, 187; 7 Law J. Rep. (N.S.) C.P. 212.

Willson v. Carey, 10 Mee. & W. 641; a.c. 12 Law J. Rep. (N.S.) Exch. 17.

Ex parte Hawthorn, 1 Mac. & G. 49; a.c. 1 Hall & Tw. 225; 18 Law J. Rep. (N.S.) Chanc. 179.

Ex parte Cape's Executor, 2 De Gex, M. & G. 562; a.c. 22 Law J. Rep. (N.S.) Chanc. 601.

Sutton's case, 3 De Gex & Sm. 262.

Ex parte Carew, 7 De Gex, M. & G. 43; s.c. 24 Law J. Rep. (N.S.) Chanc. 769.

Ex parte Holme, 2 Ibid. 113; a.c. 22 Law J. Rep. (N.S.) Chanc. 226.

Smith's Mercantile Law, 509.

Chitty on Contracts, 631.

Mr. Bagshawe, for the creditors' representative.

Mr. Willcock and *Mr. Roxburgh*, for Mr. Webster, were not called upon.

WOOD, V.C.—Upon the first point in this case I think I ought not to hesitate. It seems to me that as between the company and this gentleman he cannot be placed on the list. I do not think that this case reaches, or nearly reaches, the class of authorities that have been cited upon the question whether this forfeiture, occasioned by the non-payment of the call, is an absolute forfeiture or a forfeiture at the option of the company, because it appears to me that the company has exercised the right of forfeiture. *Mr. Rolt* says that is not a forfeiture *per se*, but only if the directors exercise their option to declare it so; and that option must be deliberately exercised, which has not been done in this case.

It is not necessary for me in this case to construe the clause in the deed. I assume for the purpose of this case the forfeiture to be optional; and assuming that, what I find is this: The directors make up a balance-sheet up to the 31st of March, two days before the actual time for forfeiture of these shares. They assume that the aspect of the affairs of the company on the 31st of March will not be altered two days afterwards; and assuming, as they very well could, that these calls would not be paid, they take credit in the balance-sheet for those shares as a benefit actually secured to the company. *Wollaston's case* (1) seems to be very strong upon the point. There, a call being made, the directors gave notice

(1) 4 De Gex & Jo. 437; a.c. 28 Law J. Rep. (N.S.) Chanc. 721.

requiring payment within twenty-one days of the date of the notice on pain of forfeiture. Woollaston did not pay, and though it was argued there, with considerable energy, that the directors were taking upon themselves to do that which required much more deliberation, and that after the twenty-one days they might have seen reason to change their minds, and therefore that prospective forfeiture could not be held to be an actual forfeiture, yet the Court held that the shareholder having acquiesced, and the company having acquiesced for about two years, there was no doubt that the forfeiture had taken place. But here is a deliberate act done months after the forfeiture accrued. In their balance-sheet, made up to the 31st of March, they take credit by anticipation for the shares, and on the 15th of August they meet their shareholders, and tell them what is perfectly true, that a number of shares became forfeited to the company in accordance with the terms of the deed of settlement (and it cannot be a question that they were forfeited), and that the directors have instructed their solicitors to institute legal proceedings against all the defaulters, and it is anticipated that a large sum will be realized from this source. They then congratulate their shareholders upon having a considerable fund "which they will acquire for the benefit of the company without being liable to deal with it as capital, and without any of those persons being able to claim any benefit resulting from it." They then proceed to state the affairs of the company, and it is so far in favour of the view taken on behalf of the official manager, that they do not represent the affairs of the company as being in a very flourishing condition; they rather say their circumstances are somewhat depressed; but they say there is no contemplation of winding up, and, "notwithstanding the losses that have taken place, and which shareholders who embark in fire companies may fairly anticipate at their commencement, and until a sufficiently extended area of business has been obtained, the directors are convinced that the foundation has been laid of a business of so sound a character that it only requires a further extension of capital to make the present investment both permanent and profitable." The shareholders

adopt the report which contains that account, and tells them they have 27,000*l.* in pocket by reason of those forfeited shares; and if they have taken the money, how can they turn round now and say, we would rather not have the shares? I think, therefore, that the application of the official manager to place Mr. Webster's name on the list must be refused.

As regards the other point, whether Mr. Webster may not be liable to the creditors, I do not think the company or the directors have anything to do with that; nor am I now dealing with that. It appears to me that the company are primarily liable as between themselves and Mr. Webster; and I think there should be some substantive application on the part of the creditors if they seek to make him liable. Mr. Webster, the creditors' representative, and the official manager, will all have their costs out of the estate.

WOOD, V.C. }
Dec. 9. } HUGHES v. YOUNG.

Marriage Settlement—Covenant to settle Wife's future Property—Reversionary Interest—"Settled."

*By a marriage settlement 3,000*l.* was assigned by the father of the intended wife to trustees, to be held after his decease upon trusts as to 2,000*l.*, part thereof, for the wife, her husband and children, and as to the residue, upon trust for the husband absolutely; and it was covenanted that all the property which the wife, or the husband in her right, should during the coverture become seised or possessed of or entitled to, should be settled upon the trusts therein declared of the premises thereby settled:—Held, first, that property to which the wife became entitled in reversion during the coverture was bound by the covenant; and, secondly, that the sum given by the settlement, in trust for the husband absolutely, was not settled.*

By the settlement made on the marriage of the Rev. John Young Hughes with Justina Mercy Rhodes, dated the 14th of July 1847, three several sums, amounting to 3,000*l.*, were assigned by the lady's

father to trustees, upon trust, after the decease of the father, as to 2,000*l.*, part thereof, to invest the same and pay the interest to Mrs. Hughes for her life for her separate use, without power of anticipation; and after her decease, and subject to a life interest therein given to the husband, upon certain trusts for the children of the marriage; and as to the residue of the 3,000*l.*, after payment of all expenses, upon trust for J. Y. Hughes, the husband, absolutely; and the settlement contained a covenant that all the estate, property and effects which the said Justina Mercy Rhodes, or J. Y. Hughes in her right, should at any time or times during the said intended coverture become seised or possessed of or entitled to, either at law or in equity, under any gift, devise or bequest in her favour, by or on the part of the said Richard Rhodes (her father), should be forthwith thereafter assured and settled for all the estate and interest of the said J. Y. Hughes and Justina Mercy Rhodes, or either of them, upon the same trusts, &c. as were therein expressed and declared of and concerning the said funds and premises thereby settled, or such of the same as should then be subsisting, &c.

Richard Rhodes, the father of Mrs. Hughes, by his will, dated the 3rd of October 1850, after certain specific and pecuniary bequests, gave all the residue of his property to his wife for life, with remainder to Mrs. Hughes absolutely.

He died on the 7th of September 1851; Mrs. Hughes died on the 10th of November 1861, and Mrs. Rhodes, the widow of the testator, died on the 16th of December 1861.

The plaintiffs were the infant children of the marriage of Mr. and Mrs. Hughes, and asked, by their bill, for a declaration that all the real and personal estate by the will of the testator devised and bequeathed to Justina Mercy Hughes became and was subject to the covenant and declaration in the settlement, and was subject to the trusts and provisions therein contained with respect to the 2,000*l.* thereby settled.

Mr. Shebbeare (with whom was *Mr. Rolfe*), for the plaintiffs, cited—

Archer v. Kelly, 1 Drew. & Sm. 300; s.c. 29 Law J. Rep. (N.S.) Chanc. 911.

Wilton v. Colvin, 3 Drew. 617; s.c. 25 Law J. Rep. (N.S.) Chanc. 850.

Wilcox v. Smith, 4 Ibid. 51; s.c. 26 Law J. Rep. (N.S.) Chanc. 596.

Mr. Osborne and *Mr. G. N. Colt*, for the defendant Hughes.—The covenant does not include property in reversion. Mrs. Hughes, having died in the lifetime of the testator's widow, never became seised, possessed or entitled within the meaning of the covenant for settling her future property. But if this should be held not to be the true construction, the after-acquired property must be divided in the same way as the 3,000*l.*, subject to the settlement; and consequently one third part will belong to the husband. They cited *Atcherley v. Du Moulin* (1).

Mr. Daniel, *Sir Hugh Cairns*, *Mr. Roupell*, *Mr. Walford* and *Mr. Fry* appeared for other parties.

Butcher v. Butcher (2) was also cited.

Wood, V.C. said, there appeared to him to be no substantial distinction between *Graftley v. Humpage* (3) and this case. There the covenant was to settle any property which the intended wife, or the husband in her right, should at any time or times during the coverture succeed to the possession of or acquire, and this was held to bind a sum of money which had been bequeathed by the lady's father, in the event of her decease without issue, and, in default of appointment by her, to her executors, administrators or assigns. The present, if anything, was a stronger case than that, the words being "seised or possessed of or entitled to." *Atcherley v. Du Moulin* was a different case. The covenant there was very special; it was to settle all such personal estate as the husband and wife, or either of them in her right, should during the coverture be or become entitled to. At the date of the settlement the wife had a contingent interest in a legacy; it could not be ascertained till the death of her father whether she ever would become entitled, and the father did not die till after the determination of the coverture; the legacy, therefore, never became vested during the coverture. In

(1) 2 Kay & J. 186.

(2) 14 Beav. 222.

(3) 1 Ibid. 46; s.c. 8 Law J. Rep. (N.S.) Chanc. 98.

this case the lady's father was a party to the settlement, and it expressly referred to what might come to her from him, so that he must have contemplated this very property; and the husband became "entitled" to it on the death of the father, though his right might have been defeated by his death in his wife's lifetime—*Ripley v. Woods* (4).

With regard to the other point, his Honour considered it would be an abuse of words to speak of the 1,000*l.* as settled; it was to be paid to the husband at once, and was plainly distinguished from the 2,000*l.* which was put into the settlement.

It would therefore be declared that all the real and personal estate given by the will of Richard Rhodes to his daughter Justina Mercy Hughes was bound by the covenant in the settlement, and subject to the same trusts as the 2,000*l.* thereby settled.

WESTBURY, L.C. }

Nov. 20, 21; }

Dec. 10. }

THOMAS v. JONES.

Power of Appointment—Survivorship—General Devise—Contrary Intention—Married Woman—7 Will. 4. & 1 Vict. c. 26. ss. 8, 24, 27.

Under the Wills Act, 1 Vict. c. 26, a general devise by will executed after the 1st of January 1838 operates as an execution of a power of appointment vested in the testator after the execution of the will.

The 8th section of the act does not prevent a general devise by a married woman from operating as such an appointment.

Semble—a general power of appointment over an equitable estate given to the survivor of two persons to be executed by deed or will would, independently of the Wills Act, be well exercised by a will made during the lives of both the persons by that one of them who afterwards proved to be the survivor, for a contingent power is in equity analogous to a contingent equitable interest, and as such an interest is (independently of the 8 & 9 Vict. c. 106.) capable of being alienated, so is the power capable of being exercised before the contingency occurs.

(4) 2 Sim. 165.

A testamentary power of appointment over real estate was given to the survivor of A, B. and C; C. afterwards became a married woman, and by her will, executed after the 1st of January 1838, made a general devise of her residuary real estate, giving, amongst other things, a life interest to B. C. afterwards became the survivor:—Held, that the will operated as an execution of the power, and that the gift of a life estate to B, whom the testatrix must necessarily survive before the power could vest in her, was not a sufficient expression of a contrary intention to take the case out of the act.

This was an appeal from a decision of Wood, V.C., reported 2 J. & H. 475, and 31 Law J. Rep. (N.S.) Chanc. 732, where the facts will be found fully stated.

Sir Hugh Cairns, Mr. Hobbhouse and Mr. Hugh Williams, for the plaintiff, supported the appeal.

The Solicitor General, Mr. Giffard and Mr. W. Pearson appeared for the principal defendants.

Mr. Freeling and Mr. Waller, for other parties.

In addition to the authorities cited in the Court below, the following were relied on:

Bernard v. Minshull, Johns. 276; s. c.

28 Law J. Rep. (N.S.) Chanc. 649.

Stillman v. Weedon, 16 Sim. 26; s. c.

18 Law J. Rep. (N.S.) Chanc. 46.

Trimmell v. Fell, 16 Beav. 537; s. c.

22 Law J. Rep. (N.S.) Chanc. 954.

The Countess of Sutherland v. Northmore,

1 Dicken, 56; s. c. 1 Sugd. Pow. 331.

(7th edit.)

Church v. Mundy, 15 Ves. 396.

Eccles v. Cheyne, 2 Kay & J. 676.

The LORD CHANCELLOR (Dec. 10).—The question in this case arises under the following circumstances. By the will of Sarah Davies, executed in the year 1825, freehold estates were appointed to trustees, to hold, subject to certain prior interests, to the use of such persons and for such estates, intents and purposes, and in such manner and form as the survivor of the testator's three children, David, John and Margaretta, should, by deed, instrument in writing or will, direct or appoint. Under this will the legal estate in fee was vested

in the trustees; and a power, therefore, was a right to declare a trust, and thereby to dispose of the equitable ownership.

In the year 1838, John, one of the three children, was dead, but David, and Margaretta, who had married Mr. Nichol, were living.

By the marriage settlement of Mrs. Nichol, her husband covenanted with the trustees that he would permit the will of his wife to be proved in the proper Ecclesiastical Court, and that it should be lawful for her to exercise all powers of appointment that might accrue to her during her coverture.

In the month of August 1838, Margaretta, being still under coverture, made her will, and thereby, after certain specific devises of other estates, she made a general devise and bequest of all her real and personal property for the benefit of her own children if she should have any, and if she had no child who survived her, then to her brother David for life, with remainder to his children, and in default of children unto the two natural children of her brother John.

David died in the year 1848, leaving Margaretta the survivor. There was no republication of the will of Margaretta after the death of David. Margaretta died in the year 1858.

The question arises between the plaintiffs, who claim under the limitations contained in the will of Sarah Davis, in default of the execution of the power of appointment given to the survivor of the three children, and the respondents, who claim under the will of Margaretta Nichol.

The argument of the plaintiffs is, first, that at the date of the will of Margaretta, in 1838, the power of appointment given to the survivor of the three children had not arisen and could not be exercised; and, secondly, that the will is not within the operation of the present Statute of Wills, and cannot be made a valid appointment by force of the provisions of the statute.

As to the first question, the power of appointment was a general power, that might be used for the benefit of the persons entitled to exercise it. It was, therefore, equivalent to ownership. In fact, it was a right of exercising ownership that would cer-

tainly belong to one of the three designated persons, but uncertain as to the individual in whom it might become vested. There was a possibility of absolute ownership of the power in each one of the three children from the time of the death of the testatrix. To assert that the right to exercise such a power does not arise until the person of the donee be ascertained is simply to beg the question at issue, and to affirm a conclusion with regard to a contingent right to a power which is wholly untrue with respect to a contingent right to an equitable estate. I think that a power to the survivor of three persons to declare a trust for her own benefit is not to be distinguished in principle from a trust for the benefit of the survivor. The one is a contingent interest, the other a contingent power. But if in equity, as the law stood even before the statute of the 8 & 9 Vict. c. 106, a contingent interest was alienable by deed or will, what is there to prevent a person who has a contingent right to appoint an estate for his own benefit from exercising that power subject to the contingency? And what is there in principle to prevent the instrument so executed from becoming a valid execution of the power as soon as the contingency happens? I speak of general powers only, and such as affect equitable estates. At common law the principle which made contingent remainders inalienable might well extend to prohibit the exercise of a contingent power over the legal ownership. But in equity this rule never prevailed, and if a right to declare a trust for his own benefit be given to the survivor of two persons, it would seem that either might, before the contingency is ascertained, exercise this possible right subject to the contingency; and that the appointment of the person who proved to be the survivor would take effect as soon as the contingency was determined.

With respect to authority upon this subject, there is very little to be found. There are cases which decide that powers which are given for the benefit of special objects, and are therefore in the nature of a trust, or which are given to trustees to be used as sound discretion may dictate, at a particular period, must not be exercised by anticipation. But cases of this nature are wholly inapplicable to the present, because they

proceed upon an obligation of duty which does not control the exercise of an unconditional right of ownership.

Cases where the time for the exercise of the power is expressly defined are also inapplicable. The decision of Lord Thurlow in the case of *MacAdam v. Logan* (1) and other cases of the same description is not disputed; and the dictum attributed to Lord Ellenborough in *Doe v. Tomkinson* (2) may be admitted to be correct if it be considered with reference to the then existing state of the law, and confined to a power of appointing a use and not a trust.

In the last edition of Lord St. Leonards' work on *Powers*, published in 1861, there is found in page 124 the following passage: "It seems that under the 1 Vict. c. 26. a general power by will to the survivor of two persons may be executed at any time by the will of the actual survivor. If this be so it alters the previous law." But I do not find that the previous law is anywhere explained or stated, except by a passage in page 269: "There is a distinction where the power is given to a designated person to be executed upon a contingency, and a power given to a contingent person, if we may use the expression;" and for this the case of *Doe v. Tomkinson* is cited. At the same time, it seems to have been assumed that as an use limited to the survivor of two persons could not as the law formerly stood be aliened until after the survivorship, so the power to declare an use given to the survivor of two persons could not be exercised except by the actual survivor.

If, therefore, it was necessary to decide the question in the present case, I should be of opinion that a general power of appointment over an equitable estate given to the survivor of two persons to be executed by deed or will could be well exercised by a will made during the lives of both the persons by that individual who afterwards proved to be the survivor.

But in the present case, if the validity of such an appointment were conceded to the respondents, yet, as in the will of Mrs. Nichol the power is not referred to, and there is no specific gift of the property which is the subject of it, the general devise made by

that will would not be a good execution of the power without the aid of the present Statute of Wills; and if the will be entitled to the benefit of that statute, it may be a good execution of the power even if the law be taken to be that there cannot be a valid exercise of the power either at law or in equity, unless made after the contingency happens, by the person who is the survivor. The objection of the appellants is founded on the 8th section of the statute, and may be thus stated: The statute cannot be applied to render valid any devise contained in the will of a married woman which would not have been valid before the act. But the will of Margaretta Nichol, if made before the statute, would not have been valid as an appointment of the estate in question; therefore, say the appellants, the Court cannot apply to this will the beneficial principles and rules of construction which are introduced by the 24th and 27th sections of the act, and which are necessary to render the will a valid appointment. In other words, the plaintiffs contend that the application to this will of the 24th section of the statute, thereby giving a subsequent date to the will, is to confer a testamentary capacity which would not otherwise exist; and that this is forbidden by the 8th section. They insist that if by applying the statute you make the will of a *feme covert* include that which but for the statute it would not, you enlarge her capacity and make her will valid as to property of which, without the statute, it would not be a valid disposition.

It is obvious that the result of this reasoning would exclude all wills of married women from the benefit of the provisions of the act, wherever by virtue of its enactment such wills would receive a more extended operation. Such could hardly have been the intention of the legislature; we may, perhaps, ascertain the meaning of the 8th section by adverting to the state of the law at the time of the introduction of the act, and observing the manner in which the act is construed. By the law, as it stood at the time when the act was passed, an infant might make a valid will of personal estate, but married women had no testamentary capacity except by virtue of a delegated authority. By means of a power or under a trust, as in case of separate

(1) 3 Bro. C.C. 310.

(2) 2 M. & S. 165.

estate, a married woman might, by a writing in the nature of a will, dispose of real or personal estate, and with the licence and consent of her husband she might make a will, properly so called, of personal property. It was the intention of the legislature by the new statute to render infants absolutely incapable of making a will; but it has, I think, preserved the testamentary status of married women equally as it stood under the existing law. Therefore, a married woman's devise of real estate must still be made by means of a trust or power created, for the purpose; and her capacity to bequeath personal estate must still be derived from the licence and authority of her husband. A distinction exists between the testamentary power of a *feme covert* and the effect and operation of her testamentary appointment. No greater testamentary power is to be obtained from the act than would otherwise have existed. But an effect and operation may be given under the statute to a testamentary instrument executed by a married woman, which may make that instrument a valid exercise of an existing testamentary power which, before the statute, it would not have been held to be. But to render the will of Margaretta, made in 1838, a valid appointment by way of devise of the estates in question under the statute, it is still necessary that Margaretta should have had at the time of her decease full power and right to make such a testamentary appointment without the aid of the statute. This she undoubtedly had, and her will by being made to speak at the time of her death still depends for its operation on the extent of her then existing testamentary authority.

It seems to me, therefore, that the meaning of the 8th section may be correctly given by this paraphrase. No married woman shall acquire under this statute any greater testamentary right or power than married women are now capable of possessing by the existing law. In short, the legal testamentary status of a *feme covert* is to remain the same. And this is confirmed by observing the manner of the construction of the act.

First, the word "will" is made to include appointments by will, or by writing in the nature of a will, in exercise of a power; and, next, the 3rd section is so worded as

to give the most extensive testamentary power to every person, which word would include infants and married women, and render them as competent as any other persons but for the effect of the 7th and 8th sections. By the 7th section the infant is absolutely disqualified; and by the 8th section the legal position of the *feme covert* is made to remain as before. Personally she acquires no enlarged capacity from the statute, although her testamentary instrument or will when made may have the benefit of more liberal rules of interpretation. But the appointment and the will are still to be confined within the limits of the authority of the maker existing at the time of the death. It is not, however, necessary that the authority should exist at the time of the execution of the instrument, if it be afterwards acquired, and be subsisting at the time of the death of the testatrix. Such appears to me to be the meaning of the language of the act, and to have been the intention and policy of the law.

Subject, therefore, to the objection which remains to be considered, I have no difficulty in holding that by virtue of the 24th section the will of Margaretta is to be read and applied as if it had been executed immediately before her decease; and that, under the 27th section, the general devise contained in the will so executed is a good execution of the power of appointment given to the survivor. But it is said that an intention contrary to each of these conclusions appears by the will, and therefore that neither section is applicable. The sign of this intention is said to be the fact that David the brother takes an estate for life under the general devise; but how can that fact or the subsequent death of David be taken to prohibit the will from speaking at the time of the death of the testatrix? Might it not have been simply re-executed after the death of David? and would the devise to David, which had lapsed by his death, have interfered with the operation of the testamentary instrument when so re-executed? There is nothing to prevent the will from taking effect at the death, and being considered as if it had been then again executed. We must, therefore, take the general devise as contained in the will, as if it was re-executed after the death of David; and if this be so, is there anything

to prevent the will from operating as if the appointment to David had never been contained in it!

To prevent the application of the 24th section an intention must be shewn excluding that effect which is given to the will by the statute, namely, a continuing operation during the subsequent life of the testatrix; and to exclude the operation of the 27th section you must take the will as having been executed immediately before the death, and shew on the face of it an intention sufficient to deprive the general devise of the effect given to it by the statute, namely, that of being a valid execution of any general power of appointment which, at the time of his decease, might have been exercised by the testator. The statute must apply, unless the conclusions of the 24th and 27th sections are on the face of the will clearly repelled. I must, therefore, affirm the decree of the Vice Chancellor, and, as a necessary consequence, I must dismiss this petition of rehearing, with costs.

STUART, V.C. }
Jan. 20. } BARNES v. ROBINSON.

Baron and Feme—Wife's Equity to a Settlement out of Real Estate as against the Assignees in Insolvency of her Husband—Bill by Wife.

A wife, suing in formâ pauperis without a next friend, held to be entitled as against the assignees in insolvency of her husband to a settlement for her separate use for life of the rents of real property, the legal estate in which was vested in trustees for her benefit for life.

This was a suit by a married woman, suing in *formâ pauperis*, without a next friend (1), against the assignees in insolvency of her husband, for the purpose of obtaining a settlement for her separate use for life of the rents of real estate vested in trustees for her benefit for life.

Sarah Read, by will, dated in November 1849, gave all her real estate to trustees upon trust to pay the rents of certain houses in Nottingham to her daughter, the

(1) *Vide* Re Barnes, 31 Law J. Rep. (N.S.) Chanc. 455.

plaintiff, Elizabeth Barnes, for life, and after the plaintiff's death, the testatrix gave such real estate for the benefit of the children or descendants of the children of the plaintiff.

The testatrix died in June 1852.

In December 1859, the plaintiff's husband, Thomas Barnes, petitioned the Court for the Relief of Insolvent Debtors for protection from process, and the defendants Waller and White were appointed official and creditors' assignees respectively.

The bill alleged that Barnes was now a labourer, and that his earnings were not sufficient to maintain his wife, and that he did not maintain her. No settlement had been made upon the plaintiff upon her marriage, and she was now living with her daughters, who were themselves in a state of great poverty.

The bill prayed for an account against Robinson and Watts, the trustees of the testatrix, of the rents of her real estate, and for a declaration "that the plaintiff was entitled to the sum so found due from the defendants Robinson and Watts as last aforesaid, and to the rents and profits of the said hereditaments and premises which should accrue due during her life for her separate use, and that the defendants Robinson and Watts might be decreed to pay the same to the plaintiff upon her sole receipt, or else that a proper settlement or provision might be made for the plaintiff out of the same."

The income of the property was 35*l.* per annum.

Mr. Greene and *Mr. F. C. J. Millar*, for the plaintiff, relied on *Bosvil v. Brander* (2) and *Sturgis v. Champneys* (3).

Mr. Shee, for the trustees.

Mr. Bevir, for the assignees in insolvency of Thomas Barnes.—If the property in question had been personalty, the assignees could not have resisted the wife's equity to a settlement thereof. The property here, however, was realty, and the wife could not come as plaintiff and ask for a settlement. The circumstance of the wife being plaintiff made the present case distinguishable from *Sturgis v. Champneys*, where the wife was a defendant and resisted a claim by the assignees in insolvency of her husband to

(2) 1 P. Wms. 458.

(3) 5 Myl. & Cr. 97; s. c. 9 Law J. Rep. (N.S.) Chanc. 10.

real estate to which she was entitled for life, and the legal estate in which was vested in mortgagees.

STUART, V.C.—I think there is no doubt about the equity of the wife to a settlement in this case. If the assignees had been plaintiffs, it is clear that the wife would have been considered to be entitled, but it is said that as the property here is realty, the wife cannot succeed unless the plaintiffs are persons claiming in right of the husband.

In all cases of personal property, the wife may, as plaintiff, assert her right to a settlement in the same manner as if those claiming in right of her husband had been plaintiffs. That being so in regard to personalty, the same principle must be applied to real estate. It would be ridiculous to say that a starving wife can only be relieved if other people come to the Court to obtain possession of her property.

I think the plaintiff has a right to maintain this suit, and that her right to a settlement for her separate use for life of the whole of the income of the property in question cannot be denied.

WESTBURY, L.C. }
Jan. 12, 23. } PRATT v. BULL.

Judgment—Charge on Land—Order of Court of Probate directing Payment of a Sum of Money—1 & 2 Vict. c. 110.—20 & 21 Vict. c. 71. s. 25.

An order of the Court of Probate directing the payment of a sum of money does not by being registered with the senior Master of the Court of Common Pleas at Westminster constitute a valid charge on land.

This was an appeal from a decision of Stuart, V.C., allowing a demurrer to the plaintiff's bill, reported *ante*, p. 21.

Mr. Malins, Mr. H. Matthews (of the common law bar) and Mr. Bilton appeared for the appellant.

Mr. Bacon and Mr. Hardy, for the respondent.

The LORD CHANCELLOR (Jan. 23).—By the act of the 1 & 2 Vict. c. 110. the legis-

lature has given to every judgment and decree of the superior Courts at Westminster, both at law and in equity, a very peculiar effect and operation. The judgment or decree is to operate as a charge upon the estate and interest of the debtor in any lands, tenements or hereditaments, and the creditor, at the end of the year, is to have the same remedies in a Court of equity against the hereditaments so charged as he would be entitled to if the judgment debtor had, by writing under his hand, agreed to charge his estate with the amount of such judgment debt and interest thereon. This enactment gives to the creditor, in respect of his judgment, the character and right of an incumbrancer by contract on any interest which the debtor may have in real estate. The object of the enactment was to enable the judgment creditor to attach and realize, by a suit in equity, such estates and interests of his debtor as could not be extended under a writ of *elegit*. It gives a new right to the judgment creditor to be prosecuted by a new suit in a Court of equity; but the charge and the right of suit to enforce it cannot be called, with any propriety of language, part of the powers of the Court by which the judgment or decree was made for enforcing such decree or judgment. If it be so called, then a suit in equity, to have the benefit of a charge created by a judgment of the Court of Queen's Bench, becomes part of the process, jurisdiction and authority of the last-mentioned Court. Nor can the new suit that may be brought on the decree be denominated part of the power, jurisdiction or authority of the Court of equity for enforcing that decree, which words are the appropriate language for denoting the means which the Court has of giving effect to its decree, namely, process of execution of various kinds.

By the 25th section of the Court of Probate Act, 20 & 21 Vict. c. 71, it is enacted that "the Court of Probate shall have the like powers, jurisdiction and authority for enforcing all orders, decrees and judgments made or given by that Court as are by law vested in the High Court of Chancery." The question in this case is, whether under and by virtue of this 25th section a judgment or order of the Court of Probate for the payment of money is attended with the

same rights and consequences of creating a charge upon the interest in land of the person against whom it is made, as are by the statute of the 1 & 2 Vict. c. 110. given and attach to judgments and decrees of the superior Courts of law and equity at Westminster existing at the time of the passing of that statute. I am of opinion, for the reasons already stated, that the charge and right of suit in equity given by that statute to the persons who obtain decrees of the High Court of Chancery cannot in any sense be treated as part of the powers, jurisdiction and authority of the Court of Chancery for enforcing its decrees; and that these words in the 25th section of the Court of Probate Act denote only the ordinary powers of enforcing decrees by writs of execution and process in contempt; and therefore I affirm the order which has been made, and dismiss the appeal with costs.

LORDS JUSTICES. *Ex parte HARDING, in re*
 Nov. 14. { THE PLUMSTEAD, WOOL-
 WICH AND CHARLTON
 WATER COMPANY.

Joint-Stock Company — Winding-up Company registered as a Company with Limited Liability — Official Manager — Costs.

A company was, in 1852, registered as one of unlimited liability, under the act, 7 & 8 Vict. c. 110. After the passing of the act of 1856 (19 & 20 Vict. c. 47.) it was re-registered as one of limited liability. In 1858 one of the Vice Chancellors made an order for winding up the company, and appointed Mr. R. P. H. official manager, who proceeded in the winding-up. On appeal to the Lords Justices, their Lordships discharged the order for winding-up, and subsequently one of the Commissioners in Bankruptcy made an order for winding up, and appointed an official liquidator. R. P. H. paid over all the assets in his hands to such official liquidator, and presented a petition to the Commissioner for payment of his costs and expenses as official manager out of the estate of the company, but the petition was dismissed on the ground that there was no jurisdiction to make the order; and, on

appeal, the order of the Commissioner was affirmed, but without costs.

This was an appeal, presented by Mr. Robert Palmer Harding, against an order made by Mr. Commissioner Goulburn. The petitioner had been appointed official manager of the above-named company by Vice Chancellor Kindersley, and before the Commissioner he prayed that he might be paid out of the estate of the company his costs and expenses incurred by him as official manager. The facts of the case, which are a little complicated, were stated in the petition as follows: that the company was, on the 14th of October 1852, registered as a joint-stock company under the provisions of the act, 7 & 8 Vict. c. 110; that upon the passing of the Joint-Stock Companies Act, 1856, the 19 & 20 Vict. c. 47, it was re-registered on the 5th of November 1856 as a company with limited liability, and continued to carry on its business with no other alteration until the month of November 1858; that by the 60th section of the act, 19 & 20 Vict. c. 47, "the Court" is defined to mean for the purpose of winding up companies, the Court of Bankruptcy in the case of limited companies and the Court of Chancery in the case of unlimited companies; that Vice Chancellor Kindersley considering that the Court of Chancery had jurisdiction so to order, although the company was registered as a limited company, directed on the 19th of November 1858 that the company should be wound up in Chancery, and accordingly, on the 2nd of December following, he appointed Mr. Robert Palmer Harding official manager; that Mr. Harding, in conducting the winding-up, obtained the sanction of the Court to file a bill against Mr. Lewis Davis, and on the 3rd of February 1860 he exhibited his bill against that gentleman in the Court of the Master of the Rolls; that on the hearing of the cause an objection was taken, on behalf of the defendant, that the order of Vice Chancellor Kindersley of the 19th of November 1858 for the winding up the company was null and void, as the Court of Chancery had no jurisdiction in the case of an unlimited company by reason of section 60. of the act, 19 & 20 Vict. c. 47, and that therefore the appointment of Mr. Harding as official

manager was also void, and that he had no interest in the matter sufficient to maintain his suit; that the Master of the Rolls considered the objection valid, and thereupon dismissed the bill, without costs; that on appeal to the Lords Justices, which was heard with an application by some of the contributories of the company to discharge the order for winding-up of the 19th of November 1858, their Lordships affirmed the order of the Master of the Rolls, and discharged the order of the Vice Chancellor (1); that thereupon a petition to wind up the company was presented in bankruptcy, and an order was made accordingly, and an official liquidator was appointed, to whom Mr. Harding handed over all the assets in his hands, making no deduction therefrom for the costs and expenses in conducting the winding-up; that soon afterwards he presented a petition to the Court of Bankruptcy for payment out of the estate of the company (which was ample) of all his costs of the winding-up under the order of the 19th of November 1858, the costs of the suit against Mr. Davis and his (the petitioner's) own fees, amounting altogether to the sum of 600*l.*; that the petition was heard before Mr. Commissioner Goulburn, who, considering that he had no jurisdiction to make the order, dismissed it. Under this state of circumstances, Mr. Harding appealed.

The appeal was commenced in the month of June 1862; and on a question of jurisdiction being raised, their Lordships ordered it to stand over until after the passing of the act of 1862, then in its passage through parliament (2), and the appeal now came on for hearing.

Mr. Glasse and *Mr. Roxburgh*, for the appellant, argued that the Court had jurisdiction to order payment of all costs properly incurred, as was plainly manifest from the fair purport of the following enactments:

(1) See 2 De Gex, F. & J. 20; s. c. 29 Law J. Rep. (N.S.) Chanc. 741.

(2) It was arranged that a clause should be inserted, if thought desirable, to give the Court jurisdiction in this and such like cases. A clause was inserted in the bill by the Solicitor General, which passed the House of Commons, but was rejected in the House of Lords—The Companies Act, 1862, (25 & 26 Vict. c. 89).

Sections 59, 83. and 103. of the Winding-up Act, 1848, 11 & 12 Vict. c. 45.

Sections 74, 86. and 87. of the Joint-Stock Companies Act, 1856, 19 & 20 Vict. c. 47.

Section 11. of the Joint-Stock Banking Companies Act, 1858, 21 & 22 Vict. c. 60.

Mr. Daniel and *Mr. Jessel*, for the official liquidator, opposed the petition, though they admitted that the claim of Mr. Harding was perfectly just. He had parted with the money in his hands, and the Court now had no jurisdiction to make the order asked for, so that his case was a most unfortunate one. The Court of Chancery, under the events that had happened, never had authority to order the winding up of the company, and consequently the appointment of Mr. Harding to the office of official manager was wholly void. All the proceedings of that gentleman in the performance of that office were therefore equally void, and any charge upon the estate for those proceedings could not be made to the detriment of creditors who were the only legitimate claimants thereupon. His position was simply that of a trustee whose supposed *cestui que trust* had been proved to have no interest or title whatever in or to the trust estate.

Mr. Glasse was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—In my opinion it would have been desirable if the legislature had interfered in the matter, but it has not thought fit to do so. This Court has made a decision affirming a decision of his Honour the Master of the Rolls, and that decision must be assumed to be correct. Mr. Harding has throughout these proceedings manifested the best intentions, but he has acted without the requisite legal authority. There has been a mistake of the law; and as that is so, and as the present question is one of Mr. Harding's remuneration and the payment to him of the costs of a suit and of the other proceedings taken whilst he was acting in the character of official manager, I feel, and so does my learned Brother, that we are unable to interfere to do that which, upon all other grounds, we should be most desirous to do.

LORD JUSTICE TURNER.—I regret much that I am compelled to come to the same conclusion, but I think it is quite impossible that this Court can accede to the prayer of this petition. It is deeply to be regretted that Mr. Harding has been employed, and most diligently employed, under an order of this Court which, as it turns out, this Court had no jurisdiction to make; for the judgment of this Court has most clearly established that there was no jurisdiction to make the winding-up order in November 1858. It is impossible to construe the Winding-up Acts in favour of a person who is called the "official manager," but who in truth never did fill that character at all. I repeat that it is with great regret that I can find no ground whatever for granting the prayer of this petition.

STUART, V.C. }
Jan. 12. } SWEET v. MEREDITH.

Practice — Vendor and Purchaser — Motion to rescind Contract after Decree for Specific Performance — Reference to Judge at Chambers to assess Damages.

Where, after a decree against a purchaser for specific performance, he made default in payment of the purchase-money, the Court, upon the application of the vendor, rescinded the contract and stayed all further proceedings in the cause, except as to any application which might be made by the vendor to assess the damages incurred by him in consequence of the breach of the contract.

This suit was instituted, by the Rev. Charles Baxter Sweet, clerk, the owner of the advowson of a rectory, against a purchaser, to enforce the specific performance of a contract for the sale of the advowson for 5,500*l*.

The cause came on for hearing in March 1862, when it was declared that the plaintiff was entitled to a decree for specific performance of the contract (1); and the defendant was directed to pay the purchase-money upon the execution of the conveyance by the plaintiff.

In consequence of the death of Charles B. Sweet, the suit was revived by an order

of revivor of the 16th of April 1862, by the present plaintiffs, George Sweet and William Foot Sweet.

The conveyance had been duly executed by the conveying parties, but the defendant had failed to pay the purchase-money, and on the 9th of August 1862 an order was made for payment of the purchase-money by the defendant on the 18th of August 1862, or within seven days after service of the order upon him. The purchase-money being still unpaid, an attachment was, on the 22nd of August 1862, issued against the defendant, who, it was stated, had gone to Ireland to avoid process.

Mr. Karslake, on behalf of the plaintiffs, moved for an order to rescind the contract and to stay all proceedings in the cause, and for payment of the costs of this application by the defendant. He referred to *Foligno v. Martin* (2).

STUART, V.C. said, that on the authority of that case, the order asked for might be made.

Mr. Karslake asked that the plaintiffs might have liberty to apply to assess the damages which they had incurred in consequence of the defendant's breach of the contract.

STUART, V.C. said the plaintiffs might have an order to this effect also.

The order made was as follows:—
"Upon motion this day made, &c., this Court doth order that the contract mentioned in the pleadings of the first-mentioned cause, and set forth in the third, sixth and seventh paragraphs to the plaintiff's bill therein, be rescinded, and that all further proceedings in this cause be stayed, except as to any application which may be made to this Court to award and assess the damages which the plaintiffs George Sweet and William Foot Sweet, clerk, have sustained by reason or in consequence of the breach of the said contract; and it is ordered that the defendant Robert Fitzgerald Meredith do pay unto the plaintiffs George Sweet and William Foot Sweet their costs of this application, to be taxed by the taxing Master."

(1) *Vide* 31 Law J. Rep. (N.S.) Chanc. 817.

(2) 16 Beav. 586; s. c. 22 Law J. Rep. (N.S.) Chanc. 502.

STUART, V.C. }
 Jan. 22. } NASH v. BROWNE.

Vendor and Purchaser—Stipulation in Contract as to Admission by Purchaser of Vendor's Right as Heir to last Owner—Defective Pedigree—Form of Decree—Direction to settle Conveyance "by all necessary Parties."

By the terms of a contract for the purchase of real estate, it was stipulated that "a copy of the pedigree on which the claim of the vendor as heir-at-law to the last owner was based should be furnished to the purchaser, who should admit the right of the vendor as such heir-at-law, and should not require any further evidence of marriages, births, failure of issue, descents, intestacies, survivorships, or other matters of pedigree than such as were in the possession of the vendor." The vendor furnished a pedigree which was defective:—Held, upon the construction of the contract that the purchaser had thereby admitted the vendor's right as heir-at-law to the last owner, and that he could not object to any defect in the vendor's pedigree purporting to shew such heirship.

Decree for specific performance, with direction to settle conveyance "by all necessary parties" in case the parties should differ.

This was a suit by a vendor against a purchaser for the specific performance of a contract, dated in October 1861, for the purchase for 4,300*l.* of a messuage and lands situate in the county of Essex.

The contract was made between the vendor John Nash of the one part, and the purchaser Joseph Augustus Browne of the other part. The following is the only portion of the contract which is material to this case:—"The said John Nash in the year 1848 entered into possession or the receipt of the rents of the estate, claiming as heir-at-law to his cousin the last owner. A copy of the pedigree, on which such claim is based, will be furnished to the said Joseph Augustus Browne, who shall admit the right of the said John Nash as such heir-at-law, and shall not require any further evidence of marriages, births, failure of issue, descents, intestacies, survivorships or other matters of pedigree than such as are in the possession of the said John Nash; he the said John Nash executing to the said Joseph Augustus

Browne a bond of indemnity in the penal sum of 4,000*l.* against the claims of all parties to the said lands as heir-at-law of the said John Henry Nash (the last owner) deceased, for the term of seven years."

The vendor and the last owner John Henry Nash, were each descended in the fourth degree from a common ancestor.

The plaintiff's solicitor furnished to the defendant's solicitor, together with the abstract, a copy of what purported to be the pedigree mentioned in the contract, the object of which, as the plaintiff alleged, was merely to shew the general nature of the plaintiff's claim to be heir-at-law of John Henry Nash, who died intestate in January 1848, although, as the plaintiff further alleged, the defendant was by the terms of contract bound to admit the right of the plaintiff as such heir-at-law.

The following were the purchaser's requisitions on the copy of what purported to be the pedigree mentioned in the contract. The pedigree should set forth matter which, if true, would shew the heirship of the vendor to John Henry Nash; the true construction of the contract being simply that the purchaser shall not require evidence in support of the pedigree beyond what the vendor may have in his possession. The pedigree according to the vendor's own shewing is defective, for neither the time of the marriage of Edward Nash, the father of John Nash, the testator, who by his will and codicil devised his estates to his son John Henry Nash, the last owner, nor the name of his wife, nor the time of the marriage of William Nash, the testator's grandfather, nor the name of his wife, were known; nor was the time of the marriage of Thomas Nash, the vendor's great grandfather, nor the name of his wife, known.

The vendor replied, that all questions respecting the pedigree were understood to be answered by the bond which the purchaser's solicitor stipulated for, and which bond was mentioned in the contract.

The purchaser then refused to complete, and the bill in this suit was filed in March 1862.

The defendant, the purchaser, by his answer submitted that by the terms of the contract he was not bound to admit the vendor's right as heir-at-law of the last owner, and that he was according to such contract en-

titled to have it shewn by a proper pedigree that the vendor was both in fact and in law such heir; and as the paper writing furnished by the vendor to the purchaser's solicitor did not shew the plaintiff to be such heir, and was not a pedigree at all, he was not bound to admit the plaintiff to be such heir-at-law.

Mr. Bacon and Mr. Boyle, for the plaintiff, the vendor.

Mr. Malins and Mr. Nalder for the defendant, the purchaser, referred to *Southby v. Hutt* (1).

STUART, V.C.—The question in this case is one of construction of a contract. The contract seems clear. It has been contended for the purchaser, the defendant, that the admission of the plaintiff's right as heir-at-law is not absolute but qualified. It is said to have been qualified by the language of the contract. That language, however, admits the right of John Nash as heir-at-law to the preceding owner. I have looked at the case of *Southby v. Hutt*, which lays down the principle by which this case must be decided. Lord Cottenham was of opinion that if the conditions of sale amount to a declaration that the purchaser is to take such title as the vendor has, the vendor may so stipulate; and the purchaser in such case cannot object to any infirmity in the title, or in the evidence to verify it. The objection of the defendant as purchaser having failed, he must pay the costs of the litigation. There must be a decree for specific performance, and a reference to chambers to settle the conveyance in case the parties differ.

Mr. Malins suggested that the direction should be to settle the conveyance "by all necessary parties," in case the parties differed. He referred to a case of *Morris v. the Swansea Harbour Railway Company*, (not reported,) in which he said the Lords Justices had made a similar direction.

STUART, V.C. accordingly directed the words "by all necessary parties" to be inserted in the decree.

WOOD, V.C. }
Feb. 16. }

BOLFE v. PERRY.

Will—Widow—Divorce a Mens et Thoro—Statute of Distributions.

A woman who under the old practice had been divorced a mens et thoro on the ground of adultery, and had not since been reconciled to her husband,—Held, upon his dying intestate, to be entitled, as his widow, to a share of his personal estate, under the Statute of Distributions.

Before the year 1834, Nehemiah Perry married Sarah Perry, one of the defendants in this suit; and on the 31st of May 1836, a sentence of divorce *a mens et thoro* was pronounced against the said S. Perry on the ground of adultery. There was no reconciliation or renewal of cohabitation between N. Perry and S. Perry at any time after such sentence of divorce.

N. Perry, by his will, dated the 6th of September 1847, appointed his brother, Thomas Perry, and Joseph Scruby his trustees and executors, and after directing that his debts and funeral and testamentary expenses should be paid out of his personal estate, the testator bequeathed the residue of his personal estate to his daughter, S. A. Perry. And the testator devised all the real estate which might belong to him at the time of his decease to the use of the said T. Perry and J. Scruby, their heirs and assigns, upon certain trusts, which failed. And the testator continued as follows: "And my mind and will is, that if my said daughter should die without leaving lawful issue before the decease of my brother the said T. Perry (which event happened), then I give and devise all my real estate and property unto the said T. Perry, his heirs and assigns for ever. And I further declare that if the said T. Perry should die during the lifetime of my said daughter, and my said daughter should not marry, or marry and have no children, then I give and devise the same unto such person or persons, their heirs or assigns, respectively, as my said daughter shall, by her last will and testament in writing, or any codicil thereto, direct or appoint."

On the 2nd of December 1861 the testator made another will, which was as

(1) 2 Myl. & Cr. 207; Dart's Ven. & Pur. 94, 3rd edit.

follows: "This is the last will and testament of me, N. Perry. I appoint John Rolfe and Edmund Emson, of Littlebury, in the county of Essex, farmers, executors and trustees of this my will. I give the following legacies: to Rebecca Nash, my servant, the sum of 100*l.*, and if she remains and waits upon me up to the time of my death, I give her 50*l.* in addition to the 100*l.*"

N. Perry died on the 7th of December 1861. T. Perry and J. Scruby renounced any title to probate of the will of 1847, and J. Scruby, by deed, disclaimed the trusts thereby vested in him.

On the 14th of February 1862 probate of both wills was granted to the plaintiffs, J. Rolfe and E. Emson.

The testator's daughter died before him without issue, and his brother, the said T. Perry, was at the time of his death his heir-at-law.

The testator's real estate was at the time of his death subject to certain mortgages.

Mr. Wickens, for the plaintiffs, submitted the following questions to the Court: First, whether, in the events that had happened, there was an intestacy as to the testator's personal estate? Secondly, whether the defendant S. Perry, as widow, was entitled to any share in the personal estate under the Statute of Distributions? and thirdly, whether the defendant T. Perry was entitled to have the mortgages paid off out of the testator's personal estate?

Wood, V.C., on the first question, thought that the word "property" in the will of 1847 did not include personal estate, and that as the second will did not affect the construction of the first, there was an intestacy as to the personal estate.

Mr. Rendall, on the second question, for the next-of-kin, submitted that the widow was not entitled to any share as one of the next-of-kin. If a woman eloped from her husband and remained with the adulterer she lost her dower, unless she afterwards became reconciled to her husband. "*Sponte virum mulier fugiens et adultera facta Dote sua careat nisi sponsi sponte retracta.*"—*Co. Litt.* 32 *b.* The present case was analogous to the case of Dower. Before the Statute of Distributions the administrator took for his own benefit, subject only to the payment

of debts, and the Ecclesiastical Court had a discretionary power to grant administration either to the widow or the next-of-kin. The object of the statute was to prevent persons having a stronger claim than the administrator being deprived of the property by the mere grant of administration—*Pettit v. Smith* (1). The Ecclesiastical Courts would not now grant administration to a widow who had committed adultery; a wife who had so conducted herself was no wife, and on the death of her husband intestate his estate ought to be divided as if she were dead. On this point he cited—

Pettifer v. James, Bunb. 16.

Shute v. Shute, Prec. Chanc. 111.

Anon., 9 Mod. 44.

Carr v. Eastbrooke, 4 Ves. 146.

Bull v. Montgomery, 2 Ves. jun. 191.

Mr. Amphlett, for S. Perry, the widow, contended that although the Ecclesiastical Court had a discretion as to the grant of administration, the question as to the distribution of the testator's estate was purely one of title. Was S. Perry the testator's wife at the time of his death? as there had been no divorce *a vinculo matrimonii*, it could not be contended that she was not.

Wood, V.C. said, that if a wife who had committed adultery came to the Court as plaintiff, the Court would refuse to help her, but that the authorities did not go further than that. In the present case the wife was brought before the Court by the executors, seeking to ascertain the rights of all parties. The main question was whether at the death of the testator S. Perry was his wife or not. There was no authority for saying that she was not his wife, until a divorce *a vinculo matrimonii* had been pronounced against her. She was therefore entitled to her share of the personal estate.

It was agreed between the counsel in the case that the third point should be argued before the Lord Chancellor or the Lords Justices.

(1) 1 P. Wins. 7.

WOOD, V.C. }
Feb. 16, 18. } DUNDAS v. WOLFE MURRAY.

Will, Construction of—Legacy, whether vested or contingent—Severance of Fund—Interest.

*A testatrix directed the trustees of certain funds over which she had a power of appointment, from and immediately after her death, to stand possessed thereof upon trust to raise thereout 5,000*l.* and to pay the same to the five children of her deceased sister in equal shares, the shares of sons to be paid at twenty-one, the shares of daughters at twenty-one or marriage, and to apply the income arising from the residue of the trust funds as in the will mentioned:—Held, that this was a vested legacy, that it was severed from the remainder of the trust funds, and that the legatees were entitled to the interest of the fund set apart to answer it.*

This suit was instituted, by the infant children of Sir David Dundas, to determine the true construction of the will of Elizabeth C. Wolfe Murray.

Under the will of Catherine, late Duchess-Dowager of Leeds, certain stock was vested in trustees in trust for her granddaughters, C. M. Whyte Melville and E. C. Whyte Melville, for their respective lives, in equal shares for their separate use, without power of anticipation, with benefit of survivorship, and after the decease of the survivor as such survivor should by will appoint. C. M. Whyte Melville married Sir David Dundas, and E. C. Whyte Melville married James Wolfe Murray. Lady Dundas died in 1856, leaving her sister Mrs. Wolfe Murray her surviving.

Mrs. Wolfe Murray by her will, dated the 20th of December 1856, after reciting the death of her sister, and that she thereupon became entitled to dispose absolutely of the residuary estate bequeathed by the will of the said Duchess of Leeds; and that she was desirous of exercising the power of appointment given her by the said will of the said Duchess of Leeds, thereby directed and appointed that from and immediately after her decease, the trustees of the will of the Duchess of Leeds should stand possessed of the stock and monies under that will, "upon trust to raise thereout the sum of 5,000*l.* sterling, and to pay

the same unto and equally between the five children of her late sister Lady Dundas, namely, Sydney James Dundas, Charles Henry Dundas, Mary Louisa Dundas, Lucy Jane Dundas and George Whyte Melville Dundas (the plaintiffs in this suit): the shares of such of them as were sons to be paid to them on their respectively attaining the age of twenty-one years, and the shares of such of them as were daughters to be paid to them on their respectively attaining that age or being married, which should first happen, with benefit of survivorship between such five children in case of the death of any one or more of them being a son or sons under the age of twenty-one years, or being a daughter or daughters under that age without having been married. And upon trust out of the interest and annual income arising from the residue of the said trust funds, to pay certain annuities therein mentioned, and subject to the payment of such annuities upon trust to pay the whole of the income arising from the said trust funds unto her husband J. Wolfe Murray during the term of his life; and after the decease of her said husband to pay and divide the principal of the said trust funds and premises equally between all her children by her said husband, except an eldest or only son, living at her decease; the shares of sons to become vested in them on their respectively attaining the age of twenty-one years, and the shares of daughters on their respectively attaining that age or marriage, which should first happen; with benefit of survivorship between such younger children respectively, in case of the death of any one or more of them before he or she should attain a vested interest; and in case all such children should die without having attained a vested interest, then in trust for such eldest son, his executors, administrators and assigns.

Mrs. Wolfe Murray died on the 4th of October 1857, leaving five children, who were defendants to this suit, her surviving.

The trustees of the will of the Duchess of Leeds immediately set apart a sum of stock to answer the above-mentioned legacy.

Mr. Springall Thompson, for the children of Sir D. Dundas, contended that this

was a vested legacy; there was a distinct present gift followed by a direction as to when it was payable—

Chaffers v. Abell, 3 Jur. 577.

Williams v. Clark, 4 De Gex & Sm. 472.

The benefit of survivorship was in effect a gift over in case of death before attaining twenty-one; and the fund had been severed from the rest of the estate, both of which circumstances tended to vest this legacy—

Smither v. Willcock, 9 Ves. 233.

Saunders v. Vautier, Cr. & Ph. 240; s. c. 10 Law J. Rep. (N.S.) Chanc. 354.

Being a vested legacy, the legatees were cited to the interest. On this point he cited—

Acherly v. Wheeler, 1 P. Wms. 782.

Tyrrel v. Tyrrel, 4 Ves. 1.

Boddy v. Dawes, 1 Keen, 362; s. c. 6 Law J. Rep. (N.S.) Chanc. 145.

Mr. Woodhouse, for James Wolfe Murray, contended that this was a contingent legacy, and on this point cited—

Re Bennett's Trusts, 3 K. & J. 280.

Re Hart's Trusts, 3 De Gex & J. 195; s. c. 28 Law J. Rep. (N.S.) Chanc. 7.

Watson v. Hayes, 5 Myl. & Cr. 125; s. c. 9 Law J. Rep. (N.S.) Chanc. 49.

And even if this legacy was vested, the interest was not given to the children—*Festing v. Allen* (1).

Mr. C. Parke, for the children of Mrs. Wolfe Murray, submitted that in all the cases cited there had been either an actual gift of the interest or a clear intention that the legatees were to take it, which was not the case in the present instance. The mere fact of severance was not alone sufficient to make a postponed legacy carry interest, and in the present case the interest ought to be capitalized, and the income only of such capitalized interest paid to the father Mr. Wolfe Murray. He cited the following cases—

Re Harris's Trusts, Johns. 199.

Holgate v. Jennings, 24 Beav. 623.

Crawley v. Crawley, 7 Sim. 427; s. c. 4 Law J. Rep. (N.S.) Chanc. 265.

Mr. Hemming, for the trustees of the will of the Duchess of Leeds.

Mr. Springall Thompson, in reply.

Wood, V.C. (Feb. 18.)—This case arises upon the will of Mrs. Wolfe Murray, by which she exercised a power of appointment that was vested in her; and the following questions have arisen on the construction of that will. Firstly, whether the legacy of 5,000*l.* was a vested legacy. Secondly, as to what was to be done with the income which would accrue before the children attained twenty-one years, whether they would be entitled to that income, or whether, according to the general rule which prevails with regard to legacies, no interest would be payable until one of such children attained the age at which the share of the 5,000*l.* itself would become payable to that child. Then, a subordinate question arose, if the children did not immediately take the income of their several shares, how that income was to be disposed of: whether it was to be considered as a part of the general residuary fund subject to the appointment, and to be treated as capital and invested, and the annual income paid to the husband of the testatrix as tenant for life; or whether it was to be considered as absolutely undisposed of and vested in the trustees of the Duchess of Leeds' will.

As regards the first question, I can have no doubt that the legacy was a vested legacy, because the sum of 5,000*l.* is to be raised immediately upon the death of the testatrix, and the direction is in this form: "Upon trust to raise thereout the sum of 5,000*l.* sterling, and pay the same unto and equally between the five children" there named; and then come the words "the shares of such of them as are sons to be paid to them on their respectively attaining the age of twenty-one, and the shares of such of them as are daughters, to be paid to them on their respectively attaining that age or being married." Here is a fund which the lady has acquired the absolute power of appointing in consequence of the death of her sister. She thinks it right that a portion of that fund should be given to the children of her sister; and with this object, instead of directing the trustees to pay 1,000*l.* to each nephew and niece when and as they should attain twenty-one being sons, or attain that age or marry being daughters, the testatrix takes out of the whole fund immediately after her decease this sum of 5,000*l.*, and, having so taken it out in a mass, the trustees of the Duchess

(1) 5 Hare, 573.

of Leeds' will are directed to hold it for the benefit of the children; but, subsequently, comes the direction that each share as regards each particular child shall be paid at the times in the will specified, and then the residue of the fund after this 5,000*l.* has been taken out is given over to her own family: she makes a separation of the two funds for that purpose. This is not simply the case of a limitation of a legacy payable at twenty-one to each of the children; a legacy so given as distinguished from a residue will not bear interest until the time of payment. I think it is clear from this will that the 5,000*l.* is given *instantly* to the trustees of the Duchess's will, and, as Lord Cottenham said in *Saunders v. Vautier*, "it makes no difference that the same persons are executors for the general purpose of the estate, and also the trustees of a particular fund which is set apart." This fund being taken out and separated for the benefit of the nephews and nieces, appears to me to have been devoted to that purpose in three ways. First, there is the direction immediately after the death to raise the sum; secondly, although there is a benefit of survivorship amongst the children, there is no gift over generally of the 5,000*l.* in the event of all the children failing; and, thirdly, (which is the strongest point of all) immediately following the clause which she has then inserted for the benefit of the nephews and nieces, there are these words: "upon trust out of the interest and annual income arising from the residue of the said trust funds," clearly shewing that she had separated the 5,000*l.* at once from the whole estate; that what she is disposing of for the purpose of annuities and the other purposes of the will, though not so exactly shewn in the following parts, is clearly indicated in this first clause, which follows upon the gift as the interest and annual income arising from the residue of the trust funds, after first setting apart the 5,000*l.* for the benefit of the nephews and nieces.

The separation of a fund is a point which has been relied on in several authorities, besides that of *Boddy v. Davies* (which, perhaps, might stand on its special circumstances). The case of *Love v. L'Estrange* (2), referred to by Lord Cottenham in *Saunders v. Vautier*, is a case which, as explained by Sir W. Grant

in *Hanson v. Graham* (3), indicates how far the Court has been inclined to go when it sees that a fund is set apart and appropriated for the benefit of the legatees, both with reference to vesting and interest; and the remarks of Sir W. Grant in that case struck me as strongly applicable in the present instance. In *Festing v. Allen*, Sir J. Wigram, referring to the case of *Saunders v. Vautier*, says, "It is impossible to hold that the mere necessity of making such a severance in some events only (as in the case of the residue becoming payable before the legacy itself is payable, or other cause unconnected with the legacy itself,) can have the effect of giving interest upon a deferred legacy before it becomes payable." That is true, but here there is a distinction as it seems to me: it is not the mere part of the fund which is to produce the legacy becoming necessarily severable in consequence of other trusts connected with the will, that will make interest payable upon the legacy before the time when the payment arrives; but there must be a severance, as Sir J. Wigram says, connected with the legacy itself; and it appears to me that the severance here is connected with the legacy itself, and that the severance takes place immediately in one lump sum, severed instantly, and to be turned into cash instantly; and then the testatrix proceeds to deal only with the interest of the residue of the fund.

Under all these circumstances, I think that there is plain indication that this was intended to be a vested interest, and not only a vested interest, but to be separated *instantly* from the general mass of the property over which the testatrix exercised her power of appointment, for the benefit of those who were the objects of the gift. And therefore I must declare that, according to the true construction of the testamentary appointment of Mrs. Elizabeth Murray, the 5,000*l.* thereby appointed upon trust in favour of the plaintiffs became a vested interest in the legatees upon her decease; and that it ought to be held by the trustees of the fund in trust for the benefit of the legatees immediately from the decease of the testatrix, and that the legatees are in the mean time respectively entitled to the income arising from their respective shares.

(2) 5 Bro. P.C. 59.

(3) 6 Ves. 238.

LORDS JUSTICES. { *Ex parte* HILL, *in re*
 Nov. 22. { THE CARDIFF PRESERVED
 COAL AND COKE COM-
 PANY (LIMITED).

Joint-Stock Company—Contract by Director of with Company—The Joint-Stock Companies Act, 1856.

A director of a joint-stock company, registered under the *Joint-Stock Companies' Act, 1856* (19 & 20 Vict. c. 47), cannot make a binding contract for profit to himself in a transaction with the company.

Where a director had advanced money to the company from time to time under an arrangement for receiving a bonus or commission of 6d. per ton on the amount of produce sold by the company, and the account between him and the company as entered in the company's books, included this commission, the Court refused to allow it, but directed the account to be taken allowing interest on the advances at 5l. per cent.

In this case there were two appeals from the decision of the Commissioner of Bankrupts at Bristol, against an order allowing the claim of Mr. Hill for 648l. 7s. as a creditor of the company at the sum of 368l. 3s. 9d.

Mr. Hill appealed against the disallowance of the part of his claim, and Messrs. Norton and others appealed against the allowance of any part of Mr. Hill's claim.

It appeared from the evidence that in the year 1859, the company being in want of money, an arrangement was made between the directors and Mr. Hill, who was one of the directors, that the latter should advance to the company from time to time money to carry on its operations, and should receive 6d. per ton upon all the preserved coal and coke manufactured and sold by the company in lieu of interest. This arrangement was carried on until some time in the latter part of the year 1860, when the company sold its business to the Crown Preserved Coal Company (Limited) for 6,500l., the latter company retaining out of the purchase-money 1,750l. to pay the liabilities then existing of the Cardiff Company. Amongst these liabilities, as alleged by Mr. Hill, was a debt due to Messrs. Cory, amounting to over 600l., and which he appeared to have arranged with Messrs.

Cory, by the desire of the Crown Company, at 500l., and was by them authorized to pay that amount to Messrs. Cory out of the proceeds of a cargo of coal consigned to him by the Crown Company, and which he accordingly did. The appellants, Messrs. Norton, insisted that there was no debt due by the Cardiff Company to Messrs. Cory, and that the payment made to them by Mr. Hill was made on his own account, and claimed to have credit in Mr. Hill's account for the value of the entire cargo of coal, without allowing thereout the payment made to Messrs. Cory. If they were right in this contention, and the Commissioner was right in disallowing the portion of Mr. Hill's claim, which he had disallowed, there would be no debt due to Mr. Hill. The portion of the claim disallowed consisted of the 6d. per ton commission, before referred to.

Mr. Bacon and Mr. Roxburgh, on behalf of Mr. Hill, contended that there was no provision in the statute under which this company was formed, prohibiting a director from entering into a contract with the company, and that if such a contract was a fair and *bonâ fide* one, which this was, there was nothing to affect it. The prohibition against contracts by directors with the company contained in section 29. of the 7 & 8 Vict. c. 110. did not exist in the 19 & 20 Vict. c. 47.

Mr. Giffard and Mr. De Gex, for Messrs. Norton, on this part of the case, were not called upon.

Their LORDSHIPS said that it required no statutory enactment to invalidate a contract between a director of a company for his own benefit with the company, and that the claim for commission could not be allowed, but that the account between Mr. Hill and the company ought to be taken, allowing interest at 5l. per cent. on both sides of the account of advances and repayments.

The case stood over for this purpose, and came on again on the 6th of December 1862, on the other appeal, when their Lordships, considering that the attention of the learned Commissioner had not been directed to the question of Messrs. Cory's debt, referred the matter back to him for further inquiry.

WOOD, V. C. } GLADSTONE v. MUSURUS
Dec. 11. } BEY.

*Jurisdiction — Foreign Ambassador —
Fund in Medio.*

Although the Courts in this country cannot make an order against a foreign ambassador who does not submit himself to the jurisdiction, yet the Court of Chancery will restrain a third party from handing over to him a fund the right to which is in dispute, notwithstanding his title to the fund may be absolute at law.

This was a motion to restrain the defendant, Constantine Musurus Bey, from causing to be paid and delivered, and to restrain the other defendants, the Bank of England, from paying over and delivering, to any person other than the plaintiffs or their nominees, or except under the direction of the Court, the sum of 20,000*l.* Turkish bonds, which had been deposited by the plaintiffs in the Bank as caution money or security for the performance of their engagement to establish a National State Bank in the Ottoman Empire. It appeared that, in the year 1858, the plaintiffs, who were English merchants, obtained from the government of Turkey a firman or concession granting to them the necessary rights and privileges for establishing the bank in question; and such concession contained, amongst others, the following terms:

“(10). The capital of the Bank shall be 1,000,000*l.* sterling, which may be increased to 2,000,000*l.* or 3,000,000*l.*, with the consent of the Imperial Government. The bank may not commence its operations until the capital of 1,000,000*l.* shall be paid in, and such payment is to be made within six months from the date of the delivery of the firman for the concession, against the payment of 20,000*l.* as security.”

“(18). In exchange for the Imperial firman for this concession the grantees undertake to pay, as security for the perfect execution of this contract, 20,000*l.* in money or Ottoman securities to the Turkish ambassador at London, to be deposited in the Bank of England, on account of the Ottoman Government. The said security shall be replaced at the disposal of the

grantees directly the bank commences its operations at Constantinople, in conformity with the stipulations contained in these presents.”

“(19). The said bank shall commence operations at Constantinople within six months at the latest after the delivery of the Imperial firman, and in default thereof the security of 20,000*l.* shall be confiscated in favour of the government.”

The concession also gave to the bank the exclusive right of issuing notes, and there was an additional article indorsed upon the concession, stipulating that the operations of the bank should commence three months after the withdrawal of the “Kaimés,” or government paper money of Turkey, and giving to the Sublime Porte the right of confiscating the caution money if the bank operations should not be commenced in three months after the “Kaimés” should have been withdrawn. The concession was delivered to the plaintiffs in February 1859, and shortly afterwards they deposited in the Bank of England, to the credit of M. Musurus, the Turkish ambassador, the caution money of 20,000*l.* bonds, required by the 18th article of the concession. These bonds had ever since remained in the bank to the credit and under the sole control of M. Musurus. The banking company was duly formed and shares were taken to a large amount; the Turkish government, however, had not withdrawn the paper money from circulation, nor, in consequence, had the company either commenced operations at Constantinople or raised the stipulated capital of 1,000,000*l.*, and the result was that many of the shareholders, after waiting for more than two years, took proceedings to recover their deposits. These were returned to such of the shareholders as demanded them, and the directors issued a circular to the other shareholders stating that they had no alternative but to wind up the undertaking. Upon this many shareholders refused to receive back their deposits, and insisted upon the undertaking being proceeded with. In July 1862, the intention of the government to withdraw the paper money was, for the first time officially announced in the *Journal de Constantinople*, and it was now in process of withdrawal. A long

correspondence then ensued between M. Musurus and the directors, in which the former stated that, in the view of his government, the concession had been abandoned and forfeited by the acts and defaults of the concessionaries and directors and the caution money forfeited; that the Turkish government, however, did not desire to reap any advantage from such forfeiture, and he was empowered to return the caution money upon the delivery up of the concession within a specified time. The directors, on the other hand, insisted that there had been no forfeiture, inasmuch as the additional article indorsed on the concession was an integral part thereof, and constituted the withdrawal of the paper money a condition precedent to the establishment of the bank. They declined to give up the concession, and filed the present bill praying in the terms of the notice of motion. To this bill the Sultan was also made a party, in order that he might, if he should so think fit, appear and assert his claim, if any, to the said caution money. He, however, did not appear.

Mr. Rolt, Sir Hugh Cairns and Mr. Druce, for the plaintiffs, in support of the motion.

The Solicitor General (Sir Roundell Palmer), Mr. Giffard and Mr. Wickens, for the defendant, Musurus Bey, objected that, he was not, as the ambassador of a foreign power, subject to the jurisdiction of the Court—(7 *Ann. c. 12*).

[Wood, V.C. said it was clear that, as against M. Musurus, the motion must be refused, with costs. He had not submitted himself to the jurisdiction, and the plaintiffs could not bring him before the Court.]

It was then contended, for the plaintiffs, that the Court had jurisdiction to restrain the Bank from parting with the fund until the question of title was settled, and that a sufficient case had been made out to justify the Court in interfering to protect the fund in the mean time. There were substantial questions to be tried at the hearing, and until those questions had been decided, it did not appear who were entitled.—

The Secretary of State in Council of India v. Kamachee Boye Sahaba, 13 Moo. P.C. 22.

The Duke of Brunswick v. the King of Hanover, 6 Beav. 1; s. c. 13 Law J. Rep. (N.S.) Chanc. 107; 2 H.L. Cas. 1.

Mr. Cotton, for the Bank of England, urged that where a fund was the property of a foreign prince, the Court had no jurisdiction to meddle with it—*Wadsworth v. the Queen of Spain* (1). But if it had such jurisdiction, the Bank must be protected from the consequences of obeying any order the Court might make.

WOOD, V.C.—I am glad to have heard this argument, and I have no doubt that I ought to grant an interim injunction; because the real question is, whether there is such a case to be tried at the hearing as to make it proper that this fund should be kept safe in the mean time. If there is, I ought to keep the fund safe, unless by so doing, and under the very peculiar circumstances of this case, I should be making an order against the Bank of England, from the consequences of which I am unable to protect them. The Bank of England are brought here as the holders of a fund, which it certainly must be taken on the bill—(and there is no doubt of it, I apprehend, in point of law)—could be withdrawn from them by a cheque signed by the Turkish ambassador. The bill is then filed, stating what the facts are with relation to this sum of money; and if the money were the absolute unqualified property of the Sultan, then that case of *Wadsworth v. the Queen of Spain* might have some application. There might be some difficulty in attempting to enforce a claim against that which was the property of the Sultan, either by way of attachment or otherwise, so as to bring the Sovereign within the jurisdiction of the Court. But the way in which it is put by the bill is this: it is said that this fund is not at present the absolute property of the Sultan, but a fund *in medio*, in which the plaintiffs have a right not yet absolutely parted with, and which is in a contingent event to become the Sultan's property, and in another contingency to become the property of the plaintiffs; that it is, therefore, a fund in which both the Sultan and they have a

(1) 17 Q.B. Rep. 171; s. c. 20 Law J. Rep. (N.S.) Q.B. 488.

contingent interest. It is, in fact, exactly analogous to the cases put by Lord Langdale (though arising in a different form), in which a fund will ultimately have to be dealt with by the Court, which may, in one event, become the property of the plaintiff, and, in another event, become the property of the Sultan. Well, the case stands clearly thus upon the facts here; and when I say "upon the facts here," I suppose there really is no reason to doubt that, on the hearing, they will be much the same as they are now. I do not say that, at the hearing, if the Turkish government should think it right to intervene, there may not be a point to be argued upon the effect that should be given to the additional article indorsed upon the concession, under all the circumstances that have been introduced. But, as I stated, in the bill it stands that the original concession was in this form: by article 18, 20,000*l.* was to be deposited as a security only for the perfect execution of the contract; that security was to be replaced at the disposal of the grantees directly the bank commenced its operations at Constantinople; and it was placed there by them merely as a security, and was to be withdrawn by them in the event of their establishing their bank "in conformity with the stipulations contained in these presents."

The next article says, that unless they establish the bank within six months after the delivery of the firman, the security is to be confiscated in favour of the government. And then there is an additional article, as alleged by the bill, and the actual instrument has been verified, that the bank was not to be established until three months after the paper money, which was then in circulation, should all have been withdrawn.

The additional article is signed by the ambassador of the Turkish government, and the signature of the present plaintiffs, by way of acceptance of the firman, comes after that additional article, and immediately at the foot of it, and after the signature of the Turkish minister. Therefore, upon that state of facts, at all events, there is at least the question to be tried whether that additional article is not part of the original agreement. If so, on the facts stated here (and of the truth of which I say again there is really no doubt), that the paper money has not

at the present moment been withdrawn, though it is in process of being withdrawn, the time has not arrived in which the money could be confiscated. Then there is the averment and the correspondence set forth tending to shew that the money is about to be claimed, unless they will consent to give up the concession altogether. In justice to the Turkish ambassador, as he is absent, I am bound to say that in this correspondence he states that the government do not wish to avail themselves of the money; that the money is at the disposal of the plaintiffs, provided they will give up the concession. It does not appear to me, however, at present, on the materials before me, that they are obliged to give up that concession as a bargain for preventing the money from being handed over. They say "we will abide by our concession at present, and when the paper money is withdrawn it is for us to say whether the bank is to be started or not." The only doubt (and that, again, is a doubt that may have to be determined at the hearing, when all the parties come before the Court) is, whether or not the proceedings that took place as to what is called the winding-up of the concern amounted to such a breaking up or abandonment of the concession as to entitle the Turkish government to treat it as abandoned. That will be a matter again to be heard and determined at the hearing; but I cannot say that it is clear that that would be the result in the present state of things before me; and unless it is so, it is not right that this 20,000*l.* should be, as it may be tomorrow, unless steps are taken, withdrawn by the cheque of the Turkish ambassador. Take a case that may well be supposed, of a foreign minister here accepting a simple trust, becoming trustee of a marriage-settlement or the like, and becoming the sole trustee of funds invested in the Bank of England, it is quite true I could not deal with him on account of the impossibility of a process being had against an ambassador. But the funds being in the Bank of England, it appears to me clearly that I could prevent the Bank of England from handing them over to him, upon a distinct intimation on his part that he intended to apply them to his own use. And so it appears to me that I cannot deal with this gentleman here because he is a foreign minister; but,

the funds being here, this Court has jurisdiction to prevent them from being wasted and getting into hands (and, perhaps, all the more on that account) from which they cannot be withdrawn. Therefore, all I have to do is to consider simply whether the Bank of England will really be protected by this order. It appears to me that the Bank will be most amply protected in this state of circumstances; because, if the Turkish ambassador should present his cheque, under the order of this Court the cheque will not be honoured, and the only mode in which he can arrive at the money will be by taking some process of his own. I feel a very strong opinion that if he chose to take that course the position of things would be very much altered. He would be submitting himself to the jurisdiction of English tribunals, and in that case English tribunals would have the power of saying, for that purpose only, that they would administer justice between all parties concerned in a litigation which he had himself commenced. Therefore, whatever course might be adopted in regard to the money, the order of this Court will give in this case just the same protection to the Bank as in the case of a person who has not been served with an order in consequence of his being absent from the jurisdiction of the Court. I think, therefore, I ought to make an order to restrain the Bank from paying or delivering, or permitting to be paid or delivered, to any person or persons otherwise than under the direction of this Court, the said sum of 20,000*l.* Turkish bonds, or any part thereof. In fact, the order will be as prayed, with the exception of those words, "other than the plaintiffs or their nominees." It will only be an injunction till the hearing of the cause or further order.

LORDS JUSTICES. }
 Jan. 16. } *In re ROWLEY.*

Lunacy—Practice—Costs of Mortgagor.

A lady, before lunacy, became the mortgagor of certain premises. After her lunacy committees were appointed, and one of them called in the mortgage money and served the mortgagor with a petition praying that the committees might be appointed to reconvey

the mortgaged estate to him. The Court decided that the mortgagor was entitled to his costs of appearance out of the lunatic's estate.

Mrs. Elizabeth Rowley, prior to her lunacy, had advanced monies to several persons on mortgage. After she had been declared lunatic, committees of her person and estate were in due form appointed, and it appearing to the committees of the estate that the mortgage monies ought to be called in, one of them had given notice to the several mortgagors of an intention of calling in the money. The case came before the Court on a petition by the committees of the estate, praying that they might be appointed in the place of the lunatic to execute all proper deeds and other assurances for the purpose of re-conveying such hereditaments and premises to the several parties entitled thereto, or as they should direct, freed and discharged from the several respective mortgage debts thereby secured, and that such mortgaged securities, now in the custody of the Master, might be delivered to the petitioners as such committees, to be delivered over by them to the several persons entitled thereto, on completion of such re-conveyances, and that the costs of all proper parties incidental to this application might be paid out of the estate of the lunatic.

The petition was served upon the several mortgagors, but only one appeared.

Mr. Speed, for that mortgagor, asked for his costs out of the lunatic's estate, citing *Re Wheeler* (1).

Their LORDSHIPS considered that although the question was one which did not seem to be very clearly settled, they apprehended that where the petition was presented by the mortgagor for a re-conveyance or vesting order, the legal estate being outstanding in the mortgagee's lunatic heir, the costs would be ordered to be paid by the mortgagor. But their Lordships considered that it was the duty of the committees to place themselves in such a position as would enable them to re-convey a perfect title to the mortgagors, and if they brought

(1) 1 De Gex, M. & G. 434; s. c. 21 Law J Rep. (N.S.) Chanc. 759.

any mortgagor before the Court previous to so doing, the estate of the lunatic, whose misfortune occasioned the imperfect title, must bear the costs.

STUART, V.C. }
Jan. 19. } ENO v. TATAM.

Mortgage—Bequest of Personal Estate subject to Payment of Testator's Debts—Exoneration of mortgaged Estate—17 & 18 Vict. c. 113.

A bequest contained in a will, dated in 1857, of all a testator's personal estate, "subject to the payment of his debts," renders such personal estate primarily liable for the payment of a sum of money with which the testator's real estate was charged by way of mortgage.

Dictum of Lord Campbell, in Woolstencroft v. Woolstencroft (1), not followed.

Hildred Eno, by will, dated the 11th of November 1857, after appointing his wife, Harriet Eno, to be executrix, and William Sykes and Isaac Sykes to be trustees thereof, bequeathed as follows: "I give my household goods, live and dead stock, and other my personal estate and effects whatsoever and wheresoever unto my wife absolutely, subject to the payment of my debts, funeral and testamentary expenses." The testator then gave all his real estates to his trustees, upon trust to let the same either from year to year, or for a term not exceeding seven years, provided his wife should so long live, and to stand possessed of the rents and profits thereof in trust for his wife for her life, and on her death upon trust to sell the same, and to stand possessed of the monies arising from such sale, for the benefit of his brothers and sisters and nephews and nieces.

By a codicil to his will, dated the 6th of May 1859, the testator, after stating that since the making of his will his wife had borne him a son, declared that all his real estates should, after the decease of his wife, be held by his trustees upon trust, in the events which had happened, for his said son and only child, the plaintiff, Hildred Alliss Eno, absolutely.

(1) 2 De Gex, F. & J. 351; s.c. 30 Law J. Rep. (N.S.) Chanc. 22.

The testator died on the 2nd of September 1859.

At the time of his death the testator was seised in fee simple of certain real estate, situate at Stickney, in Lincolnshire, which was subject to a mortgage debt of 1,700*l.* thereon created by him.

In January 1860 Harriet Tatam, the testator's widow, intermarried with the defendant, William Tatam.

W. Sykes and I. Sykes had duly disclaimed the trusts of the testator's will, and no new trustees had been appointed in their stead.

This was a suit on behalf of the infant son of the testator against William Tatam and Harriet his wife for (among other things) the administration of the testator's estate, and praying a declaration that his personal estate was, as between the plaintiff and the defendants, primarily liable to the payment of the mortgage debt of 1,700*l.* and interest, and that such personal estate might be applied in discharge of that debt.

Under an order obtained for the purpose, Mrs. Tatam appeared separately from her husband.

Mr. Schomberg, for the plaintiff, referred to—

Mellish v. Vallins, 2 Jo. & H. 194; s.c. 31 Law J. Rep. (N.S.) Chanc. 592.

Woolstencroft v. Woolstencroft, 29 Law J. Rep. (N.S.) Chanc. 511; s.c. on appeal, 2 De Gex, F. & J. 351; 30 Law J. Rep. (N.S.) Chanc. 22.

Wilson v. Newman, before the Master of the Rolls, not reported.

Mr. Martindale, for Mrs. Tatam, supported the plaintiff's case. He referred to *Smith v. Smith* (2).

Mr. Bacon and *Mr. Bedwell*, for Mr. Tatam, who, in right of his wife, was entitled to the testator's personal estate, contended that a bequest of personalty "subject to the payment of the testator's debts," was not a sufficient indication of intention on the part of the testator to make the personal estate primarily liable for the payment of mortgage debts, under the statute 17 & 18 Vict. c. 113. They relied upon the dictum of Campbell, L.C., in *Woolstencroft v. Wool-*

(2) 3 Giff. 263; s.c. 31 Law J. Rep. (N.S.) Chanc. 91.

stencroft, to the effect that the same rule should now be observed with respect to exempting mortgaged land from the payment of the mortgage money charged thereon as was, before the 17 & 18 Vict. c. 113. came into operation, observed with respect to exempting the personal estate;—the mortgaged land being now primarily liable, as the personal estate had been liable previously.

STUART, V.C.—The difficulty in this case seems to me to turn upon those particular words of the act which say that the expression of “any contrary or other intention” shall be sufficient to shew that the personal estate is primarily liable. I have already in the case of *Smith v. Smith* stated my impression as to the dictum which Lord Campbell is reported to have expressed in the case of *Woolstencroft v. Woolstencroft*, and my impression certainly is, that Lord Campbell had not clearly in his mind what the rule was which was established by the case of *Bootle v. Blundell* (3), and by other cases, as to what was necessary to exonerate the personal estate from the payment of debts. I do not think that anybody can say that, according to the law as settled by those older cases, the expression of “any contrary or other intention” merely would have exonerated the personal estate. That was not the law of the Court. Such was not the doctrine of the cases.

In the present case there is a gift to the wife of the testator's household goods, and of all his personal estate, subject to the payment of his debts. It has not been observed at the bar, but it appears that in the case of *Mellish v. Vallins*, which resembles this, except in the transposition of the clauses, the direction extends to the payment of “all” debts. In the present case, the direction is “subject to the payment of my debts.” But I do not think anything can turn upon that circumstance, because when a testator says “subject to my debts,” he means “subject to all my debts.” What the testator has given here is what remains after all his debts are paid; and I cannot come to any other conclusion upon the true construction of the gift

of the personal estate to this lady, than that what she is entitled to is the residue after the payment of all the testator's debts, funeral and testamentary expenses. Now, if she is to take the personal estate subject to the payment of all debts, this mortgage is one of them; and I can find no ground for construing this gift, so as to except the mortgage debt. Vice Chancellor Wood, in *Mellish v. Vallins*, has made this important observation, that one of the arguments relied upon to induce the legislature to pass the act called “Mr. Locke King's Act,” was the rule of construction of this Court, that if a testator gave an estate subject to a mortgage, that was not sufficient to exonerate the personal estate. Every one must see that such a construction was a remarkably strong one to be arrived at by this Court; but that construction was upheld by the weight of authority. Lord Campbell's construction of the act seems to me to go this length, that if a testator says, “I give all my personal estate to my wife, subject to the payment thereof of all my debts,” still the personal estate is not subject to the payment of a mortgage debt. I can come to no other conclusion upon this act of parliament than that the words “any contrary or other intention” must have their proper meaning; and if I find a will in which there is some intention expressed contrary to that of the mortgage debt being paid out of the mortgaged estate, I am bound by the language of the act. There being here the expression of such a contrary intention, I have come to the conclusion that, in this case, the provisions of the act of parliament with respect to making the mortgaged estate primarily liable for the payment of the mortgage debt charged thereon cannot take effect, and that this lady takes the testator's personal estate subject to the payment of the debts; and therefore that she does not take anything until she has paid the mortgage debt, which, in my opinion, is not primarily payable out of the mortgaged estate upon which it was charged.

KINDERSLEY, V.C. }
 Nov. 10; THE ATTORNEY GENERAL v. ETHERIDGE.
 Dec. 8. }

Trusts—Particular Baptists—Strict or Open Communion.

By a trust deed, executed in May 1841, a certain chapel at Ramsgate was conveyed to trustees upon trust at all times thereafter to permit the said chapel to be used, occupied and enjoyed as a place for public religious worship by the society of Protestant dissenters of the denomination called "Particular or Calvinistic Baptists," and by such other persons as should thereafter be united to the said society and admitted members thereof:—Held, that the doctrine of strict communion was not an essential doctrine of every Particular Baptist church; that it was a matter of order and practice which each church had an inherent right to vary; and that a large majority of the congregation of this chapel having arrived at the conclusion that unbaptized persons might be admitted to the communion, such a practice was not a breach of the trusts of the deed.

This was an information filed, at the relation of Mary Spencer, of King Street, Ramsgate, against Benjamin Copeland Etheridge, the minister, and other persons, trustees of Cavendish Chapel, Ramsgate, and it prayed, *inter alia*, that it might be declared that according to the true construction of the trust deed of the 15th of May 1841, no persons other than Particular Baptists, or such as had been baptized by immersion when adult, upon a personal profession of repentance towards God and faith in Jesus Christ, and who professed the doctrine of limited or particular redemption, were entitled to the benefit of the trusts of the said deed, or to be admitted to a participation of the Lord's Supper at the said chapel. Secondly, that the trusts of the said indenture of the 15th of May 1841 might be performed and carried into execution under the direction of the Court. Thirdly, that the defendant Etheridge might be restrained from admitting to Church membership, or to the communion of the Lord's Supper at Cavendish Chapel, and from administering the communion there to any persons or person not being a Particular Baptist or a baptized believer.

NEW SERIES, 32.—CHANC.

Fourthly, that the defendants might be restrained from permitting any persons not being Particular Baptists to use the said chapel, or to partake of the Lord's Supper at the said chapel; and that the defendant B. Copeland Etheridge might be removed from being the minister of the said chapel.

The bill contained the following statements.—

Before the separation of the Church of England from the Church of Rome the doctrine of paedobaptism, or the baptism of infants, and the rite of baptism by sprinkling, as held and practised by the Roman Catholic Church, had become the subject of earnest controversy. Many, as the Waldenses, Lollards, and Wycliffe himself, maintained that adults only ought to be baptized, and that baptism ought to be performed by the immersion of the whole body in water; and early in the sixteenth century the persons maintaining these opinions came to be designated "Anabaptists," and in later times they have been usually distinguished by the name of "Baptists" simply. Soon after the Reformation the Baptists separated from the Established Church and formed themselves into distinct congregations or churches. These separate congregations or churches all agree in holding baptism to be a Gospel ordinance, which ought to be administered to those only who have previously given satisfactory proof of repentance towards God and faith in the Lord Jesus Christ; that it ought to be administered by immersion of the whole body, when adult, upon a profession of repentance and faith. These separate congregations or churches, however, differed amongst themselves on other points of doctrine and practice, some holding, with Calvin, that particular individuals were predestinated or elected to salvation and eternal life, while others held, with Arminius, that salvation and eternal life were freely offered to all. Those who held with Calvin were called "Calvinistic" or "Particular Baptists," while those who held with Arminius were denominated "Arminian" or "General Baptists." In early times the words "congregation" and "church" were, at all events with reference to Particular Baptists, synonymous terms; but in later times a distinction has become recognized and established between

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them—a church of Particular Baptists being a society of baptized believers, that is to say, of persons who, having received the rite of baptism by immersion when adult, upon a personal profession of repentance and faith, are united together in the bonds of Christian fellowship for the worship of God and the administration and reception of the ordinances of baptism and the Lord's Supper; while the term "congregation" has come to be applied to all who regularly attend the public worship of God in the same place, whether they have or have not been received into the fellowship of the church. A church or society of Particular Baptists is an organized body, having pastors or ministers, and office-bearers called deacons, whose chief duty is to administer the pecuniary affairs of the church. Each church or society is absolutely independent of all other churches, even of Particular Baptists, in all matters, as well spiritual as temporal. Each church holds certain specified doctrines of religion and principles of church government, and also certain specified rites or modes of celebrating Christian ordinances, and these they maintain to be derived from or in accordance with the revelation and will of God as contained in his Word. Each church has its own rules and modes of action with reference to the admission and ejection of members, and the terms of communion or fellowship amongst themselves. These matters are all peculiar and essential to the church, and with them the general congregation or attendants at public worship (not being also members of the society) have nothing to do. Admission to membership or church fellowship implies and involves an adhesion to and the maintenance of the doctrines and practice of the church into which any individual may be received; and it is admission to membership with the church, and this alone, which gives the right to participate with the church in its celebration of the ordinances of religion and in particular of the Lord's Supper. In former times the buildings where the societies or churches of Particular Baptists and other dissenters were accustomed to assemble for public worship were held on lease or otherwise at a rental, and not being the absolute property of the church or society were not devoted in perpetuity to its use, and under

such circumstances it was competent for any church or Christian society to alter and depart from the doctrines and ordinances of religion which it originally maintained, and as the persons for the time being constituting the church might think fit, and in this way it has happened that many churches of General Baptists which were originally orthodox have become Unitarian, and many Particular Baptist churches have come to receive into membership with them, or have admitted to occasional communion of the Lord's Supper, persons who are not baptized believers, that is to say, who have not been baptized by immersion when adult; and to such an extent has this practice been carried within the present century, that a distinction is now recognized between churches and societies calling themselves Particular Baptist churches, with reference to what is called "the terms of communion," or the conditions upon which persons are received amongst them to the communion of the Lord's Supper. Those churches which admit to a participation with them of the Lord's Supper only baptized believers, as that expression is known and recognized amongst Particular Baptists, being called churches of "strict communion," while those who admit to membership or occasional communion of the Lord's Supper persons who are not baptized believers are termed churches of "free," "mixed" or "open" communion. However, no church or society is or can be a Particular Baptist church which allows of "free," "open" or "mixed" communion; inasmuch as it is the essential condition and particular characteristic of a Particular Baptist church that all its members and all those who partake of the Lord's Supper with them should be Particular Baptists, and it is by a loose and improper use of the term, and by way of courtesy only, that societies who allow of free, open, or mixed communion are called Particular Baptist churches, although the minister and a majority of the members for the time being may happen to be persons holding in the main the same doctrines as Particular Baptists. In later times, when any member of Particular Baptists or other dissenters have been desirous of uniting themselves together as a church or Christian society, and of procur-

ing a place of public worship, they have for the most part purchased or built a chapel by means of subscriptions of money amongst themselves and others favourable to their views; and in these cases the chapel, with the school-rooms or other buildings attached to it, are conveyed in perpetuity to a body of persons in trust for the benefit of the individual church or Christian society by or for whom the same had been erected or bought, with a declaration of the trusts upon which the same should forever thereafter be held, so as to connect and identify the property with certain articles of faith and practice, and thereby prevent the same from being diverted to any other purpose, or occupied, used, or enjoyed by any person not holding and maintaining the same articles and practice as the church or Christian society who first established the trust. In or about the year 1850, a number of Particular Baptists, holding to the practice of strict communion, formed themselves into a church or Christian society at Ramsgate, in the Isle of Thanet, and being desirous of having a chapel or building for the public worship of God in accordance with their own views, they purchased a chapel called Beulah Chapel, in Ramsgate aforesaid, which, by an indenture, bearing date the 17th of April 1834, and made between Benjamin Williams of the one part, and several persons as trustees of the other part, was conveyed unto and to the use of the said parties thereto of the second part, their heirs and assigns for ever, subject nevertheless to a mortgage therein mentioned for 600*l.* and interest; upon trust, nevertheless that the said trustees should, from time to time, and at all times thereafter, permit the said chapel to be used, occupied, and enjoyed as a place for the public religious worship and service of God by the society of Protestant dissenters at Ramsgate aforesaid, of the denomination called Particular or Calvinistic Baptists, and by such other persons as should thereafter be united to the said society and admitted members thereof, and should attend the worship of God in the said chapel, and should, from time to time, and at all times thereafter, permit the vestry-room adjoining thereto to be used with and appendant to the said chapel, and occupied and enjoyed accordingly, and should permit such person of the denomination of Particular Calvinistic

Baptists as the major part of the members of the said society present at a meeting to be held for that purpose, should from time to time elect and choose to be their minister or pastor to preach and expound the Holy Scriptures, and otherwise to officiate in the said chapel according to the usual order and customs of the society of Protestant dissenters of the denomination aforesaid; and when and so often as the person who should be elected such minister or pastor as aforesaid should die or be removed or displaced from his office by the major part of the members of the said society present at a meeting to be held for that purpose, as thereinafter mentioned, they should, until another person should be duly appointed minister or pastor of the said society, permit such person or persons of the denomination aforesaid to preach in the said chapel or otherwise officiate therein according to such order and customs as thereinbefore mentioned as the deacons for the time being of the said society, or the major part of them, should appoint in that behalf; and if they should disagree in their choice, then as the majority of the members of the said society present at a meeting to be held for that purpose should in the manner thereinbefore mentioned appoint in that behalf; and the said indenture contained divers other directions and provisions. The lastly-stated indenture was duly enrolled in Chancery, pursuant to the statute of 9 Geo. 2. c. 36. In the year 1837, the Rev. John Mortlock Daniell was chosen minister of the church assembling at Beulah Chapel. He was a "strict Baptist," and he held to the practice of "strict communion," and throughout his ministry, with the exception hereinafter mentioned, the practice of "strict communion" was inviolably maintained. The church and congregation considerably increased under Mr. Daniell's ministry, and the said chapel was, from time to time, altered and enlarged by means of subscriptions raised amongst members of the church and others favourable to its views and practice. Early in 1839 Mr. Daniell became desirous of a further enlargement of the chapel, which he proposed should be effected by the purchase of an adjoining house, but this design was abandoned, and it was ultimately proposed and determined to erect a new and larger chapel in another part of Ramsgate, and that

the old chapel should be sold, and the surplus purchase-money, after discharging the mortgage debt and costs, applied towards the erection of the new one; that the sum of 700*l.* should be borrowed on security of the new chapel, and the rest of the money which might be required for completing the new chapel should be raised by subscriptions; and that Mr. Daniell should take upon himself the responsibility of carrying the undertaking into effect. Meanwhile Mr. Daniell's views upon the question of strict communion are supposed to have undergone a change, and he mentioned to a few of the members of the church that he was desirous of admitting to the Lord's table at Beulah Chapel persons other than baptized believers, and upon their expostulating with him on the subject several church meetings were specially convened and held in the month of December 1839; and at the last of these meetings, which was held on the 10th day of that month, Mr. Daniell having ascertained that the great majority of the church members were decidedly opposed to any change, stated that he saw what were the feelings of the church, and that he would not disturb its harmony by proposing any alteration. The practice of strict communion as the same had theretofore been observed was from thenceforth continued, in accordance with the unanimous wish of the church. The proposal of Mr. Daniell to alter the practice of the church had, however, greatly interfered with the arrangements for the erection of a new chapel and disturbed the peace of the church; and upon his acquiescing in the views and wishes of the members the undertaking was resumed and carried on with vigour, but it was determined and agreed that the new chapel, when completed, should not remain under the control of Mr. Daniell, but should be vested in persons to be chosen by the church, upon such trusts as would effectually secure the same for the benefit of the then existing church of Particular Baptists, and such persons holding and maintaining the same doctrines and practice as should afterwards be received into fellowship with them. Shortly afterwards a plot of land, in Cavendish Street, Ramsgate, aforesaid, was purchased in the name of Mr. Daniell, and by an indenture, bearing date the 19th of March 1840, and made between William Woodland and

Thomas Areton Grundy, therein described, of the first part, the said John Mortlock Daniell of the second part, and William Adley of the third part, the same was duly appointed and conveyed to the said John Mortlock Daniell, and the erection of a new chapel upon the said plot of ground, with school-rooms and other buildings, was commenced and proceeded with, and such new chapel was and is called Cavendish Chapel. Under the circumstances aforesaid further sums were raised by subscription for the completion of the chapel; and in July 1840, the church and congregation removed from Beulah Chapel, and took possession of and from thenceforth continuously worshipped at Cavendish Chapel. Although, however, the chapel was built and occupied in July 1840, a heavy debt, amounting to 1,365*l.* 11*s.* 1*d.* and upwards, was then still owing upon it, and in January 1841 the sum of 700*l.* was borrowed of one David Price, upon the security of the chapel, and applied towards payment of such debt. Shortly afterwards, suitable persons having been chosen by the church as trustees of the said chapel and the property connected therewith, an indenture, bearing date the 15th of May 1841, was executed between the said John Mortlock Daniell of the first part, and various persons therein named of the second part (the said persons of the second part being the persons who had been chosen by the church to be such trustees as aforesaid), whereby the said piece or parcel of land comprised in the hereinbefore stated indenture of the 19th of March 1840, and also the tenements or buildings used as a chapel, together with the school-room and other erections and buildings then standing and being on the said piece of land, or on some part thereof, were conveyed unto and to the use of the said several persons parties thereto of the second part, their heirs and assigns for ever; subject, nevertheless, to a certain therein mentioned deed of stipulation, and to the said mortgage security for 700*l.* and interest, but upon the trust and for the intents and purposes, and with and under and subject to the powers, provisoes and declarations thereinbefore expressed, declared and contained, of and concerning the same, (that is to say), upon trust that the said several persons parties thereto of the second part, their heirs or

assigns, or other the trustees or trustee for the time being acting in the execution of the trusts of the indenture now in statement, should from time to time and at all times thereafter permit the said chapel to be used, occupied and enjoyed as a place for public religious worship and service of God by the society of Protestant dissenters, at Ramsgate aforesaid, of the denomination called "Particular or Calvinistic Baptists," and by such other persons as should thereafter be united to the said society and admitted members thereof and should attend the worship of God in the said chapel; and should from time to time and at all times thereafter permit the school-room and other buildings adjoining thereto to be used with and appurtenant to the chapel and occupied and enjoyed accordingly; and should permit such person of the denomination of Particular Calvinistic Baptists as two-thirds of the members of the said society present at a meeting to be held for that purpose, should from time to time elect and choose to be their minister or pastor, to preach and expound the Holy Scriptures, and likewise to officiate in the said chapel according to the usual order and customs of societies of Protestant dissenters of the denomination aforesaid, with power to appoint successors in a similar manner. The said indenture was prepared and executed with a view to secure, and it was understood by the said John Mortlock Daniell, and all the members of the said church, as effectually securing the use and enjoyment of the said chapel to them and the future members of the said church, and the maintenance intact of the doctrines and practice of the church as then existing and established, and accordingly the practice of "strict communion" was continued and maintained inviolate down to the latter end of 1843 or the early part of 1844. About that time, however, the said John Mortlock Daniell took upon himself to admit to the Lord's Supper certain persons who were not Particular Baptists, or baptized believers, and for nearly three years he continued so to do, not only without the authority of the church, but against the known views and wishes of a majority of the members, many of whom strongly protested against the innovation, while others, rather than resort to legal measures or quarrel

with Mr. Daniell, withdrew from the church. The innovation thus introduced by Mr. Daniell proved disastrous to the interests of the society: the members greatly diminished in numbers and declined in zeal, and the debt upon the chapel largely increased. Under these circumstances Mr. Daniell, towards the latter end of 1846, proposed to abandon the practice of admitting persons other than baptized believers to the Lord's table, and, at a church meeting duly summoned in the manner prescribed by the said indenture of the 15th of May 1841, and held on the 21st of December 1846, a resolution was proposed and unanimously carried in the following terms, (that is to say): "That the Lord's table be restricted to baptized believers, and that the church thus remains in its constitution and communion." This resolution, which was forthwith acted upon and adhered to, restored harmony and prosperity to the church; many of the members who had seceded in 1844 returned, and chiefly by their efforts the debt, which in the mean time had increased to 2,000*l.*, was reduced to 700*l.*, and prior to the renewed innovation hereinafter mentioned it was further reduced to the sum of 400*l.* From the said month of December 1846, down to the time hereinafter mentioned, "strict communion" continued to be the unbroken practice of the church. Mr. Daniell resigned the office of minister shortly afterwards, and thereupon the Rev. Francis Wills was chosen in his place. Mr. Wills held that office until the year 1853, and throughout his pastorate the practice of strict communion was observed and maintained. In the year 1848, during Mr. Wills's ministry, it was thought advisable that a declaration of faith, with rules and regulations for the government of the church, should be compiled, and for that purpose church meetings were from time to time duly summoned and held in the manner prescribed by the said indenture of the 15th of May 1841, and on the 5th of May 1848, and the draft of a declaration of faith, with certain rules and regulations, was considered, and ultimately adopted unanimously by the meeting. The said declaration contained the following amongst other passages: "'That the Lord's table be restricted to baptized believers, and that the church thus

remains in its constitution and communion.' We agree to receive into our communion all who love our Lord Jesus Christ in sincerity, who may desire to unite with us, and manifest their faith in him by a conversation becoming the Gospel, provided they have been baptized according to the Word of God, and do not maintain sentiments opposed to the leading doctrines of grace as set forth in the preceding declaration of faith."

Among the rules adopted were the following :

"1. We agree that all who desire to unite with us shall, after conversation with the pastor, be proposed to the next church meeting, when two members shall be appointed to converse with each individual proposed. The result shall be stated at a subsequent meeting, and, if the individuals feel at liberty, they shall also attend personally, and state their experience before the church, or by letter; or if their testimony, together with that of the pastor, be satisfactory, they shall be admitted members of the church, subject to their being baptized according to the Word of God. Should members belonging to other churches wish to unite with us, application shall be made to those churches requesting their dismissal."

The foregoing declaration and rules were, until the innovation hereinafter mentioned, uniformly adhered to by the said church and minister thereof. In the year 1853 Benjamin Copeland Etheridge, one of the defendants hereto, was chosen and appointed to succeed Mr. Wills, and down to the period hereinafter mentioned he adhered to and maintained inviolate the practice of strict communion. However, some time in the year 1858, it was discovered and ascertained that the defendant Benjamin Copeland Etheridge, had allowed one or more unbaptized persons to partake of the Lord's Supper in Cavendish Chapel. This circumstance created great dissatisfaction and uneasiness in the church, and several of the members earnestly, though privately, remonstrated with the defendant Benjamin Copeland Etheridge on the subject, but he refused to alter his course, and many of the members being unwilling to adopt harsh measures against their pastor, simply abstained from partaking of the Lord's Supper as administered by him in common with persons not being baptized believers.

A general meeting of the church was held in the month of October or November, 1859, when the defendant Benjamin Copeland Etheridge endeavoured to obtain some sanction and confirmation of his conduct; and a resolution proposing a continuance of the practice as altered by him was moved and seconded, but rejected by a majority of those present. Mr. Stephen Knight, the deacon, thereupon moved that the order of the church should remain in accordance with the declaration; but the defendant Benjamin Copeland Etheridge, who, as minister, occupied the chair, refused to put the motion, and ultimately the meeting was brought to a premature close by the sudden illness of the defendant Benjamin Copeland Etheridge, without any decision upon the motion having been come to. On Sunday, the 4th of December 1859, notice was given that a general meeting of the members of the church would be held on the following Wednesday, the 7th of December 1859. This meeting was held and attended by about forty-four members, and a resolution was proposed and seconded to the effect that the communion be open to all believers. This resolution was strongly opposed, and Mr. Stephen Knight, the deacon, claimed precedence for the resolution which he had proposed at the previous meeting, in accordance with the practice at general meetings of the church. To this, however, the defendant Benjamin Copeland Etheridge would not accede, and insisted upon putting the other resolution, and also that the voting upon it should be by ballot. The practice of the church having always been to decide every question by a shew of hands, the proposal of voting by ballot was strongly objected to by many present. However the defendant Benjamin Copeland Etheridge caused voting papers to be handed to the members, some of whom, however, refused to receive them; and, after protesting against that method of voting, left the meeting. The vote by ballot was persevered in and taken amongst such of the members as remained and thought fit to vote, and by this means many of the members opposed to open communion having left, and others refusing to vote, there was an apparent majority in favour of the motion; such majority, however, did not amount to two-thirds of the members present. Imme-

diately after the meeting of the 7th of December 1859, a protest was drawn up and signed by thirty members of the church, and addressed to the trustees, who, upon being thus appealed to, held a meeting on the 7th of March 1860, when they passed the following resolution: "That the majority of trustees of the Cavendish Chapel, Ramsgate, now assembled in the British School Room, Broadstairs, to take into consideration an appeal from members of the church meeting at Cavendish Chapel, Ramsgate, sympathize with the appellants, and consider that they have been unfairly dealt with by the pastor, the Rev. B. C. Etheridge, in not calling a second church meeting to reconsider the subject of their grievance, and are decidedly of opinion that the chapel cannot be held by a church admitting unbaptized persons to the Lord's table, that being, in their opinion, a violation of the trust deed of the chapel, and feeling that there have been some informalities in reference to the late meeting, suggest to the church and the pastor the propriety of entirely rescinding those resolutions lately made in relation to altering the terms of communion."

The bill alleged that the practice of admitting unbaptized persons to communion was not consistent with the tenets of the Society of Particular or Calvinistic Baptists; and that it was contrary to the trusts of the deed under which this chapel was held; and the bill prayed a decree in the terms already set forth.

A considerable amount of evidence was read, consisting of affidavits made by the relator, the plaintiffs and the defendants before the special examiner; and also a number of books, pamphlets, and other documents tending to shew the doctrines and practices of the Baptists.

Mr. Lloyd, Mr. Hardy and Mr. Davey appeared for the plaintiffs, and contended that this chapel was held upon trusts in connexion solely with the doctrines of the Particular or Calvinistic Baptists, and no others were entitled to the benefit of the trusts; and that it was contrary to those trusts, and contrary to the doctrine of the Particular Baptists, to allow any persons but those who had been baptized according to their custom by total immersion, as adults, to join in the communion with the other communicants.

Every congregation and church of Baptists was independent in point of authority and jurisdiction of every other, and no congregation could control the principles of those, however few, who held different views. It was not disputed by either party that the true baptism of adults was by total immersion on confession of faith; but the question was, whether there was any right, under a deed framed like the trust deed of this congregation, to admit persons who were not baptized in the true method to communicate in this chapel with those who had been so baptized. The strict communionists objected to communicate with those who had not been baptized, and the consequence of these innovations was, that the strict communionists had absented themselves from the ordinances of the church. It was to be observed that a distinction was drawn in this case between open membership and open communion. The defendants alleged that there had always been this distinction existing among the Baptist body; but the plaintiffs denied that allegation. The defendants, while admitting that open membership would not be consistent with the trusts of their deed, still asserted that open communion was perfectly consistent with those trusts; and that those churches which might be precluded from receiving unbaptized persons into membership were, nevertheless, constantly in the habit of receiving such persons to the communion. This, it was contended, was a device of modern times contrived only for the purpose of evading the provisions contained in particular deeds. To admit persons to the communion and to stop short of admitting them to membership was to place the means above the end, and to give a higher value to what was subsidiary and secondary than to what was essential and spiritual. Moreover, in membership the question lay with the members of the church to determine whether a person was to be admitted or not. The minister could not admit to membership, but he could to the communion; and therefore the practice of open communion without membership was practically placing the choice of the communicants in the hands of the minister alone.

The following authorities were referred to:

The Attorney General v. Pearson, 3 Mer. 353.

The Attorney General v. Shore, 11 Sim. 592.

The Attorney General v. Gould, 28 Beav. 485; a.c. 30 Law J. Rep. (N.S.) Chanc. 77.

Crosby's History of the Baptists, vol. 1, pp. 147, 184, 431; vol. 2, p. 345; and vol. 3, p. 44.

Dr. Watts on Infant Baptism, edition of 1707, pp. 44, 431, 560.

Ivimey's Confession of Faith, 296.

Spilisbury's Treatise, 54, note.

History of Bunyan, 592.

History of Robert Hall, vol. 6, p. 171, 175, 379.

Sir Hugh Cairns and Mr. Marten, who appeared for the defendants, were not called upon to address the Court.

KINDERSLEY, V.C. (Dec. 8).—This is an information and bill relating to the chapel of the Particular Baptists at Ramsgate. So far as it is an information, it is at the relation of a lady, Miss Spencer, who was formerly a member of the society worshipping at the chapel, but who has ceased to be so; and the plaintiffs are some of the trustees, and some of them are members of the society. The plaintiffs, so far as it is a bill, file it on behalf of themselves and all other persons interested in the trust premises hereinafter mentioned—the trust premises being the chapel in question. The defendants are, first of all, the minister or pastor, Mr. Etheridge, and then the other trustees. The object of the suit is, in substance, to remove the minister, Mr. Etheridge, from his office of minister, on the ground that he has acted in violation of the trusts on which the chapel is holden, and also to remove the trustees, who are defendants, on the ground that they have allowed Mr. Etheridge so to act. The deed of trust in question is a very simple one, and is set forth in the information.—(His Honour then stated the essential portions of the deed of the 15th of May 1841, as stated above.)—Now, upon that trust we have got a distinct enunciation of the purposes for which, and the *cestuis que trust* for whose benefit, these premises were to be held in trust; and, therefore, such cases as *The Attorney General v. Pearson* and *The Attorney General v. Shore*, commonly called *Lady Hewley's case*, and other cases of that

description, have no sort of application. The principal question raised in those cases is not raised here. In those cases it was necessary to resort to extrinsic evidence to shew who the *cestuis que trust* were. Here we have got the *cestuis que trust* distinctly pointed out. The *cestuis que trust* are “The Society of Protestant dissenters at Ramsgate, of the denomination called Particular or Calvinistic Baptists, and such other persons as should hereafter be united to the society and admitted members thereof, and should attend the worship of God in the chapel;” and the purpose is, that that society, and those persons afterwards admitted members thereof, should have this as a “place for the religious public worship and service of God.” I may observe that it is required by these trusts that though the minister should be himself of the denomination of Particular or Calvinistic Baptists, the trustees need not be of that denomination. All that is required with regard to them is, that they should be Protestants—which, of course, would exclude the Church of Rome—and that they should be dissenters—which would, of course, exclude the Church of England. But with these exclusions, there is nothing whatever to prevent any person being appointed trustee, let his denomination be what it may. It may be remarked as something peculiar, that, notwithstanding the requisition that the minister should be of the denomination of Particular or Calvinistic Baptists, it is not stipulated in terms that persons who should afterwards be admitted members should be of that denomination.

This is very remarkable; because this is certainly a carefully-prepared deed; they had the precedent of the deed of the chapel which they occupied before—Beulah Chapel—before them. That was well considered; and they had also the advantage of those precedents, or of that precedent, which a certain society or association of Baptists has put forth as a convenient form. But it is very remarkable that although the society then existing at Ramsgate was a society of the denomination called Particular or Calvinistic Baptists, it is not required in terms that persons to be afterwards admitted as members of that society should be Particular or Calvin-

istic Baptists. Now, notwithstanding that peculiarity, I am not going to found my decision in any respect upon that, because my decision would be just the same if it had been required that the members afterwards admitted to the society should be Particular or Calvinistic Baptists. But still it is a remarkable fact, and, if it was necessary, it might be considered as having a considerable bearing upon a part, and an important part, of the arguments in this case. It is alleged by the relator and the plaintiffs that Mr. Etheridge has acted in such a manner as to violate these trusts; and the act on his part which is alleged to have had that effect is the act of admitting to the participation of the Lord's Supper in this chapel persons who are not themselves Particular or Calvinistic Baptists. The fact of his having done so is not in controversy; and the only question, therefore, that I have to determine is, whether that act of Mr. Etheridge—not a single act, but repeated—is an act which is in contravention of the trusts upon which the chapel is holden. I do not stop here to consider the question, whether, supposing that this act of Mr. Etheridge was a violation of the trusts, this Court would, under the circumstances, and having regard to all the trusts, give any, or if any, what relief upon that footing. I will assume, in favour of the relator and the plaintiffs, that if the act be an act in contravention and violation of the trusts of this deed, the Court would then grant the relief, or, at least, some portion of the relief, asked by this bill.

The question, then, that I have to consider is this: Is it contrary to any essential or general tenet or practice of the denomination of Protestant dissenters, called Particular or Calvinistic Baptists, that persons not being themselves of that denomination should be admitted to participate in the ordinance of the Lord's Supper in the chapel? Now, in considering this question, of course it is necessary to advert to the doctrines of the Particular Baptists, and with the exception of the question which is now immediately before me, there is really no controversy about what are the general tenets of the Particular Baptists. As Baptists, leaving out the words "Particular or Calvinistic," they hold, in common with General Bap-

tists, the doctrine that the mode of baptism by administering it to infants by sprinkling, and without total immersion, is improper and not Scriptural, and ought not to be practised; but that the proper mode of baptism is total immersion in water in the name of the Father, and the Son and the Holy Ghost; and that it is rightly administered only to those who make a personal profession of repentance towards God and faith in Jesus Christ, which profession, of course, can only be personally made when the party has arrived at years to enable him to make such profession; excluding, therefore, the baptism of infants, or what is commonly called *pædobaptism*. In that respect they are *Anti-pædobaptists*, though I may observe that the term *Anti-pædobaptist* does not embrace the whole of their doctrines with regard to baptism. It objects to infant baptism; but it does not involve the proposition that there should be total immersion, because one can conceive of baptism being administered to an adult by sprinkling without total immersion. But, at all events, the doctrine of baptism held by Baptists generally, whether Particular or General Baptists, is what I have mentioned. About that there is no controversy; and they consider and use language to express the idea that a person who has not been baptized in that manner, although he may have been baptized in infancy by the ordinary way in which that rite is administered by the Church of England and a great many dissenting bodies, is not what they call a baptized believer. They do not call any one a baptized believer except one that has been baptized by total immersion in the manner I have mentioned. Then, the Baptists are divided into two different sects or denominations, and that upon questions which have divided the Christian world almost from the earliest period, not only from the time of Calvin, but of Augustine and Pelagius, and even before that period, namely, the questions of predestination and election, and particular redemption and other doctrines, commonly called Calvinistic, connected with these subjects.

Those of the Baptists who have held what are commonly called the Calvinistic doctrine, separated from the others, and called themselves Particular or Calvinistic

Baptists; Calvinistic implies, of course, that they hold the doctrines of Calvin, and Particular is used synonymously, but is used especially because they hold the doctrine of Particular Redemption; and, therefore, they called themselves Particular or Calvinistic Baptists. I have nothing to do with the question of the propriety of these views—I have merely to deal with the civil question as to the trusts of the deed; and, no doubt, the Particular Baptists are entitled, just as much as any other persons are, to be protected in the enjoyment of that property which is dedicated to trusts for their benefit.

Before I proceed to consider the question which is immediately before me, I may observe this, which is to be borne in mind in considering all these questions with reference to the doctrines, or tenets, or practices of the congregations, or societies, or churches of Particular Baptists. It is this: that like many other dissenting bodies they hold this, and it is fundamental with them, that each church—that is to say, each society organized with its ministers and deacons or other officers—each society worshipping in a given place of worship, is not a branch of a church, not a portion of a more general church, but is a complete, distinct, independent church, standing in its integrity and completeness, and subject to no control, no authority, no interference, either of the State, or of any other church or body of persons whatever. That is a fundamental tenet with them; and, therefore, when we talk of the body, the great body of Baptists, or of Particular Baptists, we are talking about what does not exist in the proper sense of the term. There is no “body” of Particular Baptists; but the term may be used to express the great mass of persons who are baptized. It is not like the Church of England or the Presbyterian Church; but each particular congregation, with its organization of minister and deacons, is a complete church, and has no sort of connexion, except that kind which they may voluntarily adopt or reject as they please, with any other church or society whatever, even of their own denomination. That is to be borne in mind. Of course the result is this, that we can have nothing like Articles such as we have in the

Church of England, or a Confession of Faith such as we have in the Presbyterian body; but we can have this, that a certain number of Particular Baptist churches may agree to send delegates to meet together, and to mark out and enunciate that which these persons consider to be the doctrines of Particular Baptists. You can have that, and that we have, but we can have nothing to do with a general confession which is binding upon a church or the members of a church. Each Particular Baptist church—for I will use that term, inasmuch as it is used by themselves, meaning each particular congregation or society—is a church in itself independent of all others, and therefore what church “A” holds, church “B” may not hold; and what churches “A and B” may hold in common, church “C” may not hold; and you may go through the whole alphabet in that way. Any church may hold what it pleases. Of course, if it does not hold the doctrine of Particular Baptists with regard to baptism and the doctrines of Calvin, then, whatever it may call itself, it is not a Particular or Calvinistic Baptist Church; but provided it does, it may have what practice it pleases, and may do just what it wishes, and hold just what it likes. Now, with reference to the question which is before me, whether the admission to the participation of the Lord’s Supper of persons not being what they call baptized believers—whether that doctrine, tenet, or practice, is or is not in violation of the trusts, depends upon this: Is it or is it not an essential doctrine of the congregations, or societies, or churches of Particular or Calvinistic Baptists?

A great deal of evidence on both sides has been read, although I have not found it necessary to hear the arguments of the counsel for the defendants. The evidence has been very largely and fully commented upon by the learned counsel for the plaintiffs, and therefore I have been enabled, in the course of the considerable time that this case has been under argument, to make myself well acquainted with all the details of the evidence. The first portion of it which I shall have to consider is that which bears upon this question (not adverting to this particular congregation as distinguished from others), what do we find to be the

views and tenets, and doctrines and practices of the various churches or congregations of Particular Baptists, from the time when they first existed as a separate sect or denomination? And upon that head, the first branch of evidence which I shall advert to—is the evidence of various books and pamphlets, partly historical, partly biographical, partly theological and polemical, which have been from time to time published in relation to the history, doctrines and constitution of the various churches or congregations of Particular Baptists. I might, of course, go through every extract and every passage that has been referred to in these works, but it would occupy a great deal of time, and would not be, I think, of any great use. It is quite sufficient, I apprehend, for me to say what is the general conclusion that I draw from these books; and, looking at the whole of the evidence from beginning to end, the conclusion I arrive at—and it is a conclusion which has become more and more strengthened the more I have heard of that portion of evidence as well as other evidence—the conclusion, I say, is that almost from the earliest time of the existence of these societies or churches of Particular or Calvinistic Baptists, the earliest date of which is assumed to be somewhere about 1633, or the early part of the seventeenth century—the conclusion I draw is, that from the earliest times, or very nearly so, this question with regard to what is called strict or open communion—whether as a distinct isolated question apart from others, or in connexion with other questions, or with a wider view of the principle involved in it—has been the subject of controversy, and of difference of opinion and of party among the various churches, to this extent, that not only do some individuals in a given church think one way and some another upon it—not only do some ministers of churches think one way, and other ministers think otherwise—but some churches practise one way and some the other; and not only so, but the very same church—still using the term “church” to indicate the organized church or congregation worshipping at a given place—the very same church shall have begun either as an open-communion church

or as a strict-communion church, and in the course of years shall have changed that practice, and again in the course of years shall have reverted again to its original practice; in short, that every possible variety is to be found among these churches and chapels. And when I come to advert to the particular history and circumstances of this church which is now before me, it will be found that it is a strong illustration of what I have just been mentioning.

I do not think it at all necessary to advert to the next argument, though it was very strongly pressed, more largely than this. The argument is this: the question now raised is not the question that was raised in former times. I say, it may have been a different question, so far as that the question then discussed, and disputed, and controverted, was a question of a very much larger kind, and involving this; but this question of how far the churches should be exclusive, or how far they should be open with regard to membership, or with regard to communion of the Lord's Supper, is substantially and in principle the same question that has been the subject of so much discussion and controversy. But leaving now the evidence of that kind, I advert to another head of evidence, which appears to me to be a very material head, and that is the evidence that may be derived from the Confessions of Faith that have, from time to time, been put forth by different associations of churches of the denomination of Particular Baptists. Now, these Confessions of Faith have been published by a society, which I presume to be a society kept on foot by the general churches of Particular Baptists—the Hanserd Knollys Society—and are contained in the book which I hold in my hand.—[His Honour then read numerous extracts from the book mentioned, and continued]—I must say, considering what appears in evidence, and is not in controversy at all—considering that that is the Confession of Faith which so far as Baptist churches can admit the authority or the guidance of any Confession of Faith at all is treated by them as enunciating the doctrines and the practice of Particular Baptist churches—it appears to me that that Confession of Faith, being such as it is, is really conclusive upon the question now before me; so far as I can

collect, it forms an essential item of evidence, and I do not find any item of evidence which at all goes against that. I am going through the rest of the evidence, but it appears to me we have, as early as 1677, a representation of the state of the churches—namely, that they were at variance among themselves on the subject. And I dare say, if we could know all the details, some of those delegates who attended the meeting might themselves be favourable to the strict communion, and be yet sent by a church which practised open communion, and *vice versa*. It is very possible. But however that be, it appears to me that unless there is something to countervail that, that is really conclusive upon the question.

The next item of evidence which I will advert to—which appears to me a very strong item—is entirely in the same direction. Throughout England there are, I think, it is said, at the present moment, somewhere about 2,000 churches of Particular Baptists, a great many being in London. These churches, in different parts, in counties, and in different districts of the county, form themselves into associations. I do not intend to name all these associations, but there is, for example, the association of Particular Baptists called the Baptist Fund in London; another called the London Baptist Board; another called the London Baptist Building Fund; and so on. And there are throughout England, in different counties, associations of the churches, established for the purpose of keeping up what may be called the interest of the great body—if I may use the term—of the Particular Baptists, and of spreading their principles in the community. These associations receive contributions from the different churches, or from the members of those different churches, and they distribute the fund so collected, for purposes for which they are combined. They also assist churches, or the members of the churches, sometimes in building, and sometimes in other ways. And what do we find these associations consist of? Do they consist of churches which are all agreed in the doctrine, tenet and practice of strict communion? Quite the reverse. These associations are constituted by churches, or the representatives of churches, or persons coming from churches,

of all views on the subject of strict or open communion. I may take the instance mentioned in Mr. Etheridge's answer, paragraph 118:—

"I am," he says, "the secretary of the East Kent and Sussex Baptist Association. This association is regulated by certain printed rules, of which the first is as follows: That this association consists of Particular Baptist Churches in East Kent and Sussex."

And then it goes on to state that that association consists of fourteen or sixteen—some having joined since—but we will say fourteen churches: and what are these churches? It is sworn, and not contradicted, that half of them—I think rather more than half—hold to open communion, and the other half, or thereabouts, hold to strict communion. But they are all members of this association; they are all treated by the association, by themselves, and by each other, as Particular Baptist churches of East Kent and Sussex; and they consider that they are not the less so because they hold these tenets, some one way and some another. Well, it appears to me that that is strong evidence to shew that it is in point of fact a question of church order and church regulation—not a matter of essential or vital character, one without the holding of which a man is not a Particular Baptist, or a church is not a Particular Baptist Church, but a point upon which different churches by common agreement, I may say, concur in allowing one church to practise and hold one way, and another church to practise and hold another. I am not unaware that among the Particular Baptists there are some—those who come forward in this suit, as relator and plaintiffs, for instance—who do not recognize such churches as Particular Baptists—who say they are not, because they do not practise strict communion. But the question is, what are the tenets of Particular or Calvinistic Baptists?—what is the practice of the body? And I find, as I have said, that some think upon this particular question one way and some another—whether it is half-and-half, or whether the majority is one way and the minority another, or which way the majority is, is immaterial to the question. From an early period down to the present time there has been this open ques-

tion, subject to great controversy from time to time—a question still open, not yet decided, and never likely to be. But then it is said, not only that the question, which was agitated in the seventeenth century, was a different question, but that after the latter end of the century till about the latter end of the eighteenth, or the beginning of the nineteenth, the question slumbered; and, as it is observed in some of the works referred to, the churches that held and practised open communion were hardly regarded by the others as being churches at all. Of course, they would not be. Those churches which held to strict communion, of course, were very unwilling to recognize, in the proper sense of the term, as they say, or otherwise than what they call in a loose sense—for that is the language of the information—those churches as Particular Baptists which practised open communion. But whether it be a fact—I do not think it is—but whether it be or not a fact that the matter absolutely slumbered during a whole century, this we find, at all events, that in the latter end of the last century or the beginning of this, or particularly in the period antecedent to the formation of this chapel at least, the matter was the subject of very earnest controversy. In that period a very eminent Particular Baptist became a very popular and well-known preacher, not only by Particular Baptists and other denominations of dissenters, but by members of the Church of England,—I mean Robert Hall. Many of us, probably, have heard him. That gentleman was very strong in his views with regard to open communion; and, if I am not mistaken, he went to the extent of open membership.

I need not stop for any very long time to point out the distinction between open communion and open membership, or strict communion and strict membership. At the same time it is quite necessary that it should be carefully attended to. Membership is not governed by communion at the Lord's Supper. I mean to say, communion at the Lord's Supper is not the act of admission or the badge of admission into a church. Admission as a member into a church is by a different process, and it appears that in this church—and I believe it is the case with Particular Baptists in

general, though they may, no doubt, vary in this as they may in any other matters of church order and regulation—but in this church at all events the practice is this: a person wishes to become a member of the society or church; he applies generally to the minister, and the minister proposes him, or he may be proposed by any other member at the church-meeting. The church-meeting appoints two or more persons as delegates to communicate with the candidate, to converse with him, and to ascertain that in point of tenet and doctrine, and of course of walk and conversation and conduct, he is worthy to be admitted. When these delegates have had that conversation with him, and he satisfies their own minds, they report to the next church-meeting, and at that meeting the members present, if they think fit, elect him to be a member of the society. Very often they elect a person who has not already been baptized by immersion upon a profession of faith; but when they elect him they make it a condition that he should be baptized. I believe it will be granted that in this church they have never elected a member who was not required to be thereupon or immediately afterwards baptized by immersion. I see no evidence to the contrary. But, as I have said, that process, or ceremony, or regulation with regard to the admission of members is quite irrespective of the act of participation of the Lord's Supper. Even though they should never afterwards receive the Lord's Supper,—though of course they are required to do it,—they would not less have been elected members of this body. Mr. Robert Hall was, as I have said, an advocate for open communion, and, I believe, open membership; and he was met in controversy by a gentleman, not, perhaps, so eminent and so generally known as Mr. Hall, but no doubt a man of eminence and learning as a Particular Baptist—Mr. Joseph Kinghorn. One of Mr. Kinghorn's works has been put into my hand, published in 1816, and, therefore, at least in the year 1816—we know it was earlier—but even supposing it had slumbered for a century, the controversy was then going on; some churches were holding one way and some another. Supposing the controversy had not been heard of till this period, still if since the year 1800, we will

say, it has been going on, and many churches have held one way and many another—is not that sufficient? This church was founded in one view, which I shall advert to presently, in the year 1833, and in the other view, in 1841; but whatever year you take it was long subsequent even to this renewal of the controversy, supposing it to have been a mere renewal, in the early part of the present century or the latter part of the last: so that in every view, as far as the evidence goes, that I have hitherto considered we have ground for concluding that the doctrine of strict communion is not an essential doctrine for Particular Baptists, but is held by some and repudiated by others. I have not stopped to comment upon the meaning of the words “open,” and “strict” communion, as there is no controversy on that point. But I think I may say this—I shall have to advert to it again—that Mr. Hardy in his argument said I had nothing to do with open and strict communion—that I was to forget it all, and shut it out of my mind—that the whole thing turned upon a different point. I expressed at the time, I must confess, some surprise at that, because here in the bill and information itself the relator and the plaintiffs are most careful to give a particular and specific definition of strict and open communion, as well as of all the other terms that are used; and the whole matter, as I understand it, and as I believe was intended, when a similar case was before the Master of the Rolls, was a question of open or strict communion. But Mr. Hardy says that it has nothing to do with that—forget these terms, and only consider another point, which is that upon which the whole turns. I shall have to advert to that argument presently, but it appears to me that the whole question is “Is strict communion an essential view, or doctrine, or practice of the Particular Baptists?”

Having, then, dealt with the matter so far as relates to the tenets or practices of the Particular Baptists generally, I come now to that portion of the evidence which relates to this particular society at Ramsgate. In the year 1831 certain persons at Ramsgate, consisting of three men and eight women, determined to form themselves into a Particular Baptist church in that town. They

procured a chapel which had been before called Zion, but which they called Beulah. They became an independent congregation, and increased in numbers under several successive ministers, and from time to time, as the church increased in numbers, they enlarged the building. But at last, in 1839, or thereabouts, they found that whereas it was necessary further to enlarge it, they could not do so without buying some neighbouring premises, which either they could not get or did not think it expedient to get, and, therefore, they came to the determination that they must buy a different site and erect a chapel. Accordingly that was done, and either in 1840 or 1841 they removed from Beulah Chapel into what is now called Cavendish Chapel. They sold the old site, and applied the proceeds in part payment of the new site and building the new chapel. The rest of the money, between 4,000*l.* and 5,000*l.*, was contributed by individual members, or other persons not being members, and the largest portion seems to have been contributed by the present relator, who seems to have been very munificent in her contributions of money for the purposes of this church; and it appears from what is stated, I assume correctly, that she contributed upwards of 3,000*l.* towards the amount. Mr. Daniell, the then minister of the church, was very active in procuring contributions. Of course a great many were procured from the church members, but a great many were also obtained from other quarters—I think it is even said that some were procured from members of the Church of England. Well, what was the practice of this church? I will advert presently to the question whether the church which worships in Cavendish Chapel is to be considered as the same, and the *cestuis que trust* the same, as they were when they occupied Beulah Chapel, but I will assume for the present that they are merely a continuation of the same church. In point of fact I believe nobody disputes that, ecclesiastically speaking,—that is, in a spiritual sense—that they are the same. But it is truly said that there is a new trust deed. Of course there is, and of course I am to decide this question according to the new deed of trust. But what was the practice of the church at the

time of their first constitution in Beulah Chapel? The only distinct evidence we have upon that subject that I am aware of is this. According to the usage of dissenting churches, books, or rather a book, is kept, called the "church-book"—when one volume is finished the entries are continued in another. The church-book in this case consists of two volumes, and in the first we have an entry professing to be a minute of what took place at the meeting in 1833 when the church was formed. It is in evidence that this is not an original entry, but a copy from another book kept by or in the possession of a gentleman named Williams. I assume that the other book is not forthcoming, but this we have: that this minute being the first entry in the book is regularly followed; it has not been put in after the book was partly filled; and then the successive volumes are recognized and adopted to be the church-book of this society. Therefore, I think I may consider that this affords sufficient evidence, in the absence of anything in contradiction to it, of what was the practice of the church and their view with regard to this question.

[His Honour read the minute, which set forth that the chapel and premises were purchased by Mr. B. Williams, to be vested in trust for the Particular Baptist denomination, and detailed the steps taken prior to forming the church.]—The evidence is conclusive that with a trust deed exactly similar to that which existed in reference to Cavendish Chapel, they began with the practice of open communion, and that practice continued during the time of two successive ministers. In 1837 Mr. Mortlock Daniell was appointed minister, and he at first practised strict communion, but in 1839 he exercised his undoubted privilege of changing his mind, and he mooted the question to the church on the 6th of November 1839, and the matter was postponed; and on the 10th of December of the same year Mr. Daniell expressed his determination not to press the matter to a division, finding that the members were so equally divided for and against. In November 1841 Mr. Daniell made a communication to the church that he did not wish to press the question of open communion. In 1844 Mr. Daniell began to admit persons who were not bap-

tized believers, although they were members of other churches, and the consequence was that several members retired from the church, and went to a church at Broadstairs. On the 2nd of June 1845 a long discussion took place, and Mr. Daniell resigned, and the church passed a resolution that in future the Lord's Supper be restricted to baptized believers. Mr. Wills was then appointed minister. He was an open communionist; but of course, with this resolution on the church-book, strict communion was practised. In December 1846 a meeting was held and resolutions passed constituting the church a Strict Baptist church. After Mr. Wills, Mr. Etheridge was appointed the minister, and he practised strict communion for some time, but he changed his views, and practised open communion for a year or two; and at a meeting in December 1859 a resolution that the communion should be open was brought forward, and it having been agreed that the vote should be taken by ballot, that mode of voting was resorted to, and the resolution was carried by twenty-six to eleven, and ever since that time the minister of the church has practised open communion, as in point of fact it was practised for one or two years previously.

It appears, then, that the adoption of open communion was carried at a regular meeting, in a regular manner; and I cannot see any intimation of anything like violence, or turbulence, or confusion. The result was, of course, that there was a great deal of dissatisfaction on the part of those who were in favour of strict communion and a great deal of satisfaction on the part of the larger number who professed open communion, and that has resulted in the institution of this suit. A complaint or remonstrance was made to the minister, and, after stating the grievance, the parties complaining put the case, as it appears to me, exactly upon the footing on which it ought to stand. They do not suggest in that complaint that it is a matter of a breach of a doctrine of the Particular Baptists, but they say that they cannot submit to an infraction of the church's order. They assume that it was an infraction of church order, but it was nothing of the kind. Church order is a matter entirely under the regulation of the church for the time being.

I have now gone through the evidence of all descriptions which has been brought to my attention, so far as it appears to me necessary to advert to it in detail. The conclusion I draw with respect to this particular society is this. It is said by one side that this is the same church that was originally at Beulah Chapel; the other side say no, the great object being to disconnect the society at Cavendish Chapel from the society at Beulah Chapel, because they do not like to have against them the strong fact that the society at Beulah Chapel originally practised open communion. They hold, therefore, that they ought to be regarded as two distinct churches. It appears to me that they are the same church migrating from one building to another, and, inasmuch as they were going to part with one building, it was necessary to have a new trust, because the old trust deed only referred to the old premises. If the question is a material one, which I do not think it is, it appears to me that I must regard them as the same church or society. The plaintiffs and relator say that while they were preparing to migrate, it was decided that the church should go into the new chapel as they came out of the old; and they say that that meant, that as they were at that time practising strict communion, they were to continue to do so for all time. Now, in point of fact, it was a church of Strict Baptists, which has an inherent right to regulate their own church, order and practice; they had varied in their practice, and they had a right to vary it again, as might seem fit to the majority. I have dealt with the question as to what the evidence says relating to the Baptist body, or aggregation of bodies, and to this particular chapel, and it appears to me that the church was a church having a right to regulate its own practice on this subject. The discussion of the question of strict communion was also revived, at any rate long before Cavendish Chapel or Beulah Chapel was built, so that *quidcunque viâ* this trust comes into existence at a time when the question was in earnest and vehement controversy, and had been for many years.

I now advert to an argument which was very much pressed by the counsel

for the relators. As I understand it, the argument is this: what can you possibly mean by a Particular Baptist church or society except a church or society composed of persons who are baptized? and if you admit into membership one person who is not "baptized" it ceases to be a Particular Baptist Church. The argument goes on to admit that Mr. Etheridge has not admitted to membership any person who has not been baptized; "but," says the learned counsel, "only apply reason and logic to the matter, and then you must reason thus: The ordinance of the Lord's Supper is regarded by the Particular Baptists, if not as a sacrament, as an ordinance of higher order than any other ordinance, and it is impossible, logically and reasonably, to hold the doctrine of open communion, and consistently to refuse to hold the doctrine or practice of open membership. Therefore open communion is open membership, and open membership is a destruction of the character of a Particular Baptist Church; and as these trusts are for a church of that kind, reasoning that way you come to the conclusion that the admission of a single person to the Lord's Supper who is not himself a 'baptized' believer is a violation of the trusts of this deed." Now that argument just comes round to this: all of you Particular Baptists who hold to and practise open communion are extremely illogical in your reasoning; if you reasoned rightly you would not come to that conclusion. I have nothing to do with whether they reason rightly or wrongly. The only question I have to do with is, what is their practice and doctrine? and if I find, as I do find, that a large number—I do not care whether a majority or minority—both of individuals and churches have arrived at the conclusion that it is consistent with Scripture and reason to admit persons to open communion whom they will not admit to membership—that is, "unbaptized" believers—I have nothing to do with the question whether they reason correctly. If I were to go into that question, where should I stop? If I were to try the conclusion at which all Baptists have arrived as to baptism by immersion, I might find they are all wrong. But I will not do it; that is not the function of this Court. The function of this

Court is to decide not what ought to be on the principle of sound reasoning the doctrines of Particular Baptists, but what is in point of fact their doctrine. Therefore, without considering the propriety of the reasoning and logic, I have come to the conclusion that whatever might be the effect of open membership—and I say not a single sentence upon that—open communion is not in any way a violation of the trusts of this deed. I wish it to be understood that with regard to open membership—whether under this particular trust deed the admission of “unbaptized” believers to the membership of this church in the proper sense of the term is allowable—I have not expressed or intimated the slightest opinion that it would be a violation of this trust. I express no opinion either way. I leave it entirely untouched. But assuming that argument to be in favour of the plaintiffs, I must come to the conclusion that whatever you may charge upon the defendants as being bad reasoners and logicians, there really can be such a thing as open communion without open membership. Another argument is, that everything which has been said about strict and open communion is of no consequence if the Court will only take this view of the case, that the trust was for Particular Baptists, and that by admitting to the Lord’s Supper other persons, you would be applying the property for the benefit of persons who were not the objects of the trusts. It would be very convenient if the Court could decide the question upon so short a point as that, but the trust was, not to permit Particular Baptists only to enter the chapel; in fact such a trust would be void, not only by the Church Toleration Act, but by the act of Geo. 3, which removed many of the penalties and disabilities to which Protestant dissenters were liable. All places of worship belonging to dissenters were required to be open—that is, that the doors are not to be fastened—during Divine service, and all persons who behave themselves have a right to be there, so long as there is room; and if a person chooses to be present during the celebration of the Lord’s Supper I know of nothing to prevent him. Why, therefore, is it more wrong to admit persons to the ordinance of the Lord’s Supper than to any other ordi-

nance? The ordinance of baptism is a most important ordinance; is it a violation of the trusts of the deed to admit “unbaptized” persons to be present? I do not know what the custom is, but at all events persons may be present while public worship is going on. How, then, is it a violation of the trusts if the church chooses to admit to their particular manner of celebrating one portion of public religious worship persons who are not “baptized”? Does that admission of those persons make the chapel less a place of public religious worship and service of God by this society? Not in the least. To say so appears to me to imply a total misapprehension of what the trust really is. It was then argued that the act of Mr. Etheridge amounts to the exclusion of some members. That is one way of putting it, no doubt; but how are they excluded? Not by anything done for the purpose of excluding them, but inasmuch as the majority of the congregation choose to have open communion, those who are strict communionists say, “We cannot commune with you.” “Well,” says Mr. Etheridge, “if that is an objection, I am unwilling to hurt your consciences; let us arrange to have two tables, one on the first Sunday for the strict, and one on the third for open communion. I do not find fault with the relator for her conscientious scruples, and I am not called upon to comment upon them, but one would have thought that this suggestion would have been satisfactory. But they say, “No; if you administer the sacrament, not only every Sunday, but every day in the week, and half a dozen times every day, and on one of those occasions choose to admit an ‘unbaptized’ believer, inasmuch as my conscience will not let me attend on that communion you are excluding me from the church.” I am putting an extreme case, but that is what the argument comes to. It is only necessary to state this argument to refute it. It is for the body at large for whose benefit this chapel is given in trust; that body is the *cestui que trust* than the enjoyment of it in the manner in which that body thinks it can best enjoy it. Unfortunately, that body, instead of being a single individual with one mind, consists of many with many minds, who cannot agree; and therefore it is plain that

the majority must decide. I have gone through in great detail—perhaps more so than was necessary—the evidence and arguments relating to this matter. I might, perhaps, have spared myself a great deal of trouble by putting it in this manner: This identical question has very recently been decided by the Master of the Rolls in the suit of *The Attorney General v. Gould*. It has been frankly admitted by the learned counsel for the plaintiffs that substantially no distinction can be drawn between that case and the present, but it is said that the case was not presented to the Master of the Rolls in such a manner as that his decision is satisfactory, and that very likely if it had been presented to him as it now has been to this Court his decision would have been different. Now, I have no reason to doubt, from anything before me, that the case was argued before the Master of the Rolls—I will not say at so much length, but with as much force, as it has been before me. Substantially, the deeds in both cases are the same, and where variations exist they do not seem in the slightest degree to have influenced his judgment. In every material particular the evidence is the same. The information and bill are of the same character, as well as the prayer of the bill, substantially; and the Master of the Rolls having heard the case all through came to the same conclusion at which I have now arrived without any serious doubt. Now, what would be my duty under those circumstances? Although, of course, I should be bound to look most carefully into the matter, as I have done, and if I came to a different conclusion I should be bound to state it with every respect and deference to his opinion; yet if, as the result of investigation, I merely entertain some doubt whether the Master of the Rolls is right, my duty would be to follow his decision. But what have I here? Have I a doubt raised in my mind as to the propriety of that decision? The arguments have been put before me most ably and with great learning, but I confess they have not raised in my mind from beginning to end any doubt whatever. I may make the observation that it was not till the third day of the argument that I became aware that the matter had been decided at all, and in the course of those

three days, it will be recollected, I threw out suggestions and difficulties which turn out to be, I may say, in almost every instance precisely the grounds which the Master of the Rolls took as those on which he came to his conclusion. However, that is not material to this question.

The only remaining matter for consideration is, how the costs of this suit are to be dealt with. I observe that the Master of the Rolls did not give costs on either side. Though I am not at all willing to say that I should not concur in that view, I confess I think it was a very indulgent view to the relator and plaintiffs in that case. Whether, if this case were the first—if *The Attorney General v. Gould* had not been decided—I should have dealt with the costs in the same manner it is unnecessary to say. I should feel considerable difficulty in getting over the rule that if a party comes to this Court and fails, and, as I think, signally fails, the bill should be dismissed with costs. But I must say, when I find that before this suit was instituted the decision of the Master of the Rolls had been come to in *The Attorney General v. Gould*, and was well known to the parties instituting this suit, and that it is almost avowed that this suit was instituted in the hope that although the parties who were before the Master of the Rolls had failed in their application, a different view of the same question might be adopted by a different Judge of co-ordinate authority, I cannot have the smallest hesitation in coming to the conclusion that this information and bill be both dismissed, and dismissed with costs. In the view I have taken I have thought it quite unnecessary to touch any particular question as to the costs of the trustees *quod* trustees, or distinguishing trustees *inter se*. Even if there had been a case against Mr. Etheridge, it appears to me that as there is not the slightest against the trustees, it is not necessary to touch that question, and the information and bill will be simply dismissed with costs.

ROMILLY, M.R. }
 Nov. 13, 24. } VAN GRUTTEN v. DIGBY.

Settlement—Foreign Marriage—Property in England—Conflict of Laws—Domicil.

A Frenchman residing in France married, according to the French law, an English woman who had been for some time domiciled there. The parties at the same time declared, before a notary public, that they married without a marriage contract. They had, however, previously joined in a deed settling the wife's property in England. This being an English deed had no validity in France in consequence of the omission to comply with the French forms. Upon a bill by the husband asking that the deed might be declared void and for payment of the money:—Held, that the settlement was not affected by the domicil of the husband and wife, that the settlement was valid, and that its trusts must be performed.

This bill was filed, by Pierre Joseph Léon Van Grutten, a French subject domiciled in France, asking that a settlement, dated the 9th of August 1856, made on his marriage with Charlotte Hartley, an English woman, might be declared void, and that George Wyatt Digby and Thomas Tilleard, the trustees, might pay and transfer the trust funds, amounting to 847*l.* 17*s.*, to the plaintiff; or otherwise that the trust funds might be secured and the trust carried into effect under the direction of this Court.

The Countess of Scarborough, by her will, directed the trustees thereof to stand possessed of the stocks and securities upon which her residuary personal estate should be invested, upon trust to set apart so much of the same as should be equivalent to the sum of 2,000*l.* for the benefit of the children of Winchcomb Savile Hartley and Louisa his wife, and to transfer or pay the same and the annual produce thereof unto and between, or for all or any one or more exclusively of the others or other of such children, at such ages, in such manner, at such times, and if more than one, in such shares for the maintenance, education, preferment and advancement, or as a marriage portion, or otherwise for the benefit of such children or child, as the said trustees should in their discretion think fit.

The trustees, after paying the legacy duty, invested the remainder of the 2,000*l.* in the purchase of 1,894*l.* 4*s.* 9*d.* 3*l.* per cent. stock.

Leila and Charlotte Hartley had resided for some time in France. They were the only children of W. S. Hartley and Louisa his wife, then deceased.

Upon the proposal of marriage by the plaintiff an application was made to John late Earl of Scarborough and the other trustees of the will of the Countess, and after a meeting of the solicitors of all parties the terms of a settlement were arranged, and it was agreed that a moiety of the trust fund, less 100*l.* for an outfit, should be retained in England, and in the names of English resident trustees.

Upon these terms being settled the trustees of the Countess's will consented to the marriage.

The settlement agreed upon was dated the 9th of August 1856, and was made between the plaintiff of the first part, his wife, then Charlotte Hartley, of the second part, and Messrs. Digby and Tilleard of the third part; and after reciting the facts above stated relating to the claims of the legacy, it witnessed, that in consideration of the marriage C. Hartley, with the consent of the plaintiff, assigned all her share and interest in the 1,894*l.* 4*s.* 9*d.* stock, and in the dividends and annual produce thereof, and also all other her real and personal estate, whether vested or contingent, which she was then or thereafter should be seised or possessed of or entitled to for any estate or interest whatsoever, to Messrs. Digby and Tilleard, their heirs, executors and assigns, upon trust for herself for life for her separate use, and after her decease for the plaintiff for life, and after the decease of the survivor upon trust for all and every the children of the marriage as they should jointly appoint, and, in default of such appointment, upon trust as the survivor should appoint, and in default of any appointment, upon trust for all and every of the children of the marriage in equal shares. The deed contained several other provisions, and lastly it provided that every or any power of appointment authorized by the settlement should be and be deemed well and sufficiently executed if the deed, will or instrument purporting to exercise the

same should be executed, either according to the law of the place where the party should be resident, or according to the English law in case of persons domiciled in England.

The settlement was executed by the plaintiff and C. Hartley and G. W. Digby, at Dunkerque, in the form and manner required by the law of England only. It was not executed in conformity with the law of France applicable to and regulating the executing of marriage contracts in France, which, when they alter or affect the general law of community, are required to be reduced into writing and perfected before marriage by act before a notary public. So far, therefore, as the law of France was concerned the settlement was wholly inoperative and a nullity.

The marriage was duly solemnized at the Mairie of Dunkerque, in France, on the 11th of August 1856, and was duly registered there. The plaintiff and his wife were then required to declare whether any contract of marriage had been entered into, and being advised by a notary that the settlement they had executed was inoperative in France, they declared that they married without a marriage contract.

After the marriage a moiety of the 1,894*l.* 4*s.* 9*d.* stock, less 100*l.* allowed for the wedding outfit, was transferred into the names of Messrs. Digby and Tilleard, and was now represented by 747*l.* 19*s.*

The plaintiff and his wife had been domiciled in France ever since the marriage, and there was issue of the marriage one child.

Mr. Everitt, for the plaintiff, said, that a marriage had been solemnized between a domiciled Frenchman and an English lady, who, by her long residence in France, had made her personal property subject to its laws, she recognized those laws, and was married according to them. Whatever, therefore, had been done affecting her personal estate was contrary to and in conflict with the law of France. In the settlement which had been executed, the forms required by that law had never been observed, the law of England alone had been complied with. The marriage was solemnized upon a declaration that no settlement had been made, and though executed by both parties, it conflicted with their declaration. It must, therefore, be considered

inoperative and void ; and the right to the fund must be decided by the *Code Napoléon*, cap. 2. The property fell within the law of community, which gave an absolute control over the property of the wife to the husband without any concurrence from her in its disposition.

Mr. Pole, for *Mr. Tilleard*.—Lady Scarborough, by her will, gave to her trustees an absolute control over the legacy of 2,000*l.* They could have disposed of it to either of the sisters. It was true they had divided it equally between the sisters, but that division was made in favour of Charlotte Hartley upon a marriage on which the parties themselves, with the approbation of the trustees, consented to settle it, and to secure it in English securities for the benefit of the lady and her family. What, then, had the lady's domicile or the law of France to do with a fund taken out of its control by the contract of the parties themselves? Was the contract also with the trustees to be wholly negated? One specific part of the contract was that the property should be continued, upon English investments, in the names of resident English trustees, and be subject to the jurisdiction of the English Courts. Could they be asked to commit a breach of trust, or to authorize the committal of a breach of trust? It had been argued that the property ought to be governed by the *lex loci contractus*, but *Story* considered that it was subject to the *lex loci rei sitæ*. The husband and wife when they married did not disavow the settlement, and their declaration that they married without a marriage contract could only affect their property in France; it could in no way affect property in England which had been dealt with in accordance to its laws:

Watts v. Shrimpton, 21 Beav. 97.

Westlake on International Law, 72.

Mr. F. Webb, for the only surviving child of the marriage, supported the same view.

Mr. Everitt, in reply.

THE MASTER OF THE ROLLS.—The questions to be determined are whether upon the marriage of the plaintiff and his wife, the settlement of a sum of money belonging to the wife has any validity as regards a sum of 747*l.* 10*s.*, and if not, whether, by reason of any engagement or promise in reliance upon which the marriage took

place, the plaintiff is bound to give the same effect to the provisions of that settlement as if it had been originally valid and effectual. The marriage was solemnized in France, according to the forms prescribed by the French law; it was also entered into in contemplation of a permanent residence in France, and accordingly a French domicile has been ever since adopted. The settlement had no legal operation or effect in France; the evidence in that respect is unquestionable. But that does not dispose of the case; for in England the law is, that if a foreigner and an English woman make an express contract previous to marriage, on the faith of which it is duly solemnized, that contract if it relates to the regulation of property subject to the laws and within the jurisdiction of this country, this Court will apply the law to the circumstances the same as if the whole transaction was to be regulated by the English law. The first consideration is whether the contract is French or English: whichever it may be, the law of that country must govern it. That does not mean the place merely where the contract was made. Englishmen when abroad may undoubtedly contract, and daily do enter into contracts which are to be governed by the laws of this country. So also foreigners here may and do enter into contracts to be governed exclusively by the laws of their own country. Take the converse of this case, to illustrate the meaning. Suppose that an English man and woman, subject to no disability, and both resident here, contract a marriage in this country, intending to change their domicile and to reside permanently in France, which intention they carry into effect; and suppose for that purpose that they enter into a contract in writing before marriage, to the effect that all the property of the wife shall be vested in trustees, to be held and applied by them in conformity with French law, and to be subject to and governed by the laws of France. That document, I assume, would have no validity in France as a marriage contract between French persons; still in the administration of that property for the benefit of the husband, wife and children of the marriage, this Court would follow the rules of the French *Code*, as governing the right under the contract to the enjoyment of the property. The French tribunals it may be

apprehended would also give effect to the same instrument, not as possessing any intrinsic legal validity in France—it being a document wanting the proper guards and formalities—but by the exercise of a species of comity of nations. It would in that way give effect to a contract entered into by English persons, the object of which was to alter the *forum contractus* by reason of the provisions contained in the contract itself. In the case supposed the marriage would be an English marriage, solemnized according to English law, but the contract, though an English contract, would be that the provisions should be governed by the French law. That is a contract not of itself illegal, and it is one which it may be assumed would be enforced both here and abroad. The settlement in this case is not a valid French contract of marriage, but it may be valid and binding on the parties to it as a contract entered into for value relating to and affecting property in England, if the effect of the provisions of that contract be that the subject-matter of it is, as between the husband and wife, to be regulated by English law. It is to be regretted that, in this mode of viewing the question, it has not been submitted to a French jurist, and that the opinions of the French jurists have been confined to the question whether the contract in this case was a valid marriage contract according to the French law, on which point there would have been no doubt. Upon that view, therefore, it becomes necessary to refer to the provisions of the settlement, and to consider the circumstances anterior to and existing at the time of its execution. The settlement was duly executed by the plaintiff and Charlotte Hartley, at Dunkerque, on the 9th of August 1856, in the presence of Mr. Digby. On the following day it was found that, not being made before a notary public in the French form and duly registered, it had no validity in France. The parties, however, determined not to suspend their marriage, to wait for the preparation and execution of any more formal instrument, and they were married on the 11th of August 1856, having solemnly declared before the official persons at the time of their marriage that no contract of marriage had been entered into by them. The whole matter was fully explained to

the mayor, the notary public, and Mr. Digby, the trustee himself, who was present; and in that state of circumstances they made the declaration and were married. But such declaration, it appeared, was only understood to mean that they had entered into no contract according to the French form. After that evidence, and assuming the principles before mentioned to be correct, it is impossible for the arguments on behalf of the plaintiff to prevail. He entered into a solemn engagement, on the faith of which the marriage took place, and on the faith of which the 747*l.* 10*s.* was obtained and vested in the trustees of the settlement, which sum, but for that settlement, might have been given to the wife's sister. Can then the plaintiff now dispute the settlement, or say that he is not bound by it? It has been argued that it has no validity in France; yet he might have made it valid in France by adopting the proper forms, and taking the necessary steps for that purpose previously to the marriage. But assuming that the settlement is not, and never could have been, valid in France, still, the provisions of the settlement itself, and the evidence, establish that the contract was, that this property should not be subject to French law, but that it should be subject to English law and governed accordingly. I am at a loss to understand how, after this contract has made the property situate in England subject to an English settlement, and placed it in the hands of trustees for that purpose, the plaintiff can say that this settlement has no validity in France, and, consequently, that he is not bound by it in England. If he can get it without the intervention of this Court, it may be that the Court would not have the power to interfere with him, or to rescue the fund from him. But the trustees here would then be clearly liable, at the suit of her children, to replace the fund vested in their hands, on trusts solemnly expressed and entered into prior to the marriage of the plaintiff with his wife. It is impossible to say that the plaintiff is entitled to the relief he asks; but if the parties wish it the fund may be paid into court and secured. The costs of the trustees may then be paid out of it; otherwise they must be paid by the plaintiff.

WESTBURY, L.C. }
Jan. 15. } GLEAVES v. PAINE.

Baron and Feme—Wife's Equity to a Settlement—Fee-simple Estates.

Semble—A married woman is not entitled to a settlement out of her fee-simple estates—Sturgis v. Champneys (1) disapproved of.

Ann Gleaves, the plaintiff in this suit, was, at the time of her marriage with the defendant William Gleaves, seized of certain freehold hereditaments of the value of about 800*l.* No settlement was made on the marriage, which took place on the 14th of March 1837, and there were now living seven children, issue thereof.

On the 25th of September 1857, Mr. and Mrs. Gleaves, by deed acknowledged, mortgaged the premises to the defendant Thomas Pyke for 700*l.*, subject to a proviso for reconveyance to the use of Mrs. Gleaves, her heirs and assigns, on repayment of the mortgage-money with interest.

The mortgage-money was not paid, and in February 1862 the defendant William Gleaves became bankrupt. The defendants Paine and Lenton were the creditors' assignees.

The plaintiff thereupon filed her bill, alleging that she had no property or means of support for herself and her children except the mortgaged property; and that she concurred in the mortgage as a surety only for the money borrowed by her husband; and praying, first, that it might be declared that the mortgage debt of 700*l.* and interest was the debt of the husband, and that the security effected by the mortgage upon the property of the plaintiff was only a surety for such debt, and that the property ought to be exonerated from such charge out of the estate in bankruptcy of the husband other than his interest in the mortgaged property, and that such last-mentioned interest, or at least the equity of redemption thereof, ought to be settled for the benefit of the plaintiff; secondly, that the defendant Pyke (the mortgagee) might be directed to prove against the estate in bankruptcy of the defendant W. Gleaves for what was due in respect of the mortgage, and if necessary for that purpose to

(1) 5 Myl. & Cr. 97; s. c. 9 Law J. Rep. (N.S.) Chanc. 10.

relinquish the estate and interest of the defendant W. Gleaves in the mortgaged property; thirdly, that the mortgaged property or the estate and interest therein, which the defendant W. Gleaves acquired by his marriage with the plaintiff, or at least the equity of redemption subject to so much of the mortgage debt as should not be discharged out of the bankrupt's estate, might be settled on the plaintiff; and, fourthly, that the plaintiff might be allowed to redeem the mortgage on payment of so much of the mortgage debt as the dividend from the estate should not suffice to pay.

The case was argued before the Master of the Rolls, upon motion for a decree, on the 7th of July 1862, when His Honour made a decree (with the consent of the mortgagee and the bankrupt) directing the costs of the assignees in bankruptcy to be paid by the next friend of the plaintiff, and also directing that the estate and interest of the bankrupt in the mortgaged premises should be settled upon trust for the plaintiff for her separate use for life, with remainder to her children as she should appoint, and in default equally, and in default of children in trust for the plaintiff in fee.

From this decree the assignees in bankruptcy appealed.

Mr. Cole and *Mr. Kay*, for the plaintiff, supported the decree, and contended that she was entitled to an equity for a settlement.

They cited—

Sturgis v. Champneys, 5 Myl. & Cr. 97; a. c. 9 Law J. Rep. (N.S.) Chanc. 10.

Hanson v. Keating, 4 Hare, 1; s. c. 14 Law J. Rep. (N.S.) Chanc. 13.

Newenham v. Pemberton, 1 De Gex & Sm. 644; s. c. 17 Law J. Rep. (N.S.) Chanc. 99.

Aguilar v. Aguilar, 5 Madd. 414.

Lady Elibank v. Montolieu, 5 Ves. 737; a. c. 1 W. & T. L.C. 341, 2nd ed.

The Earl of Kinnoul v. Money, 3 Swanst. 202 (n.).

Mr. Selwyn and *Mr. E. F. Smith*, for the appellants.—There is no equity for a settlement out of a married woman's fee-simple estates. The equity to a settlement is founded on the rule that those who seek equity must do equity; but here the assignees are not seeking the aid of the Court

at all; the Common Law gives a life estate to the husband and the Bankrupt Law passes it to his assignees.—

Durham v. Crackles, *suprà*, p. 111.

Hill v. Edmonds, 5 De Gex & Sm. 603.

Warden v. Jones, 2 De Gex & Jo. 76; a. c. 27 Law J. Rep. (N.S.) Chanc. 190.

Tidd v. Lister, 3 De Gex, M. & G. 857; a. c. 23 Law J. Rep. (N.S.) Chanc. 249.

Robertson v. Norris, 11 Q.B. Rep. 916; a. c. 17 Law J. Rep. (N.S.) Q.B. 201.

Mr. Rigby, for the other defendants.

[In the course of the argument the Lord Chancellor took occasion to say that if *Sturgis v. Champneys* had not been established so long, he would not have been inclined to follow it. That, however, was a case in which the assignee was plaintiff. If the rule that equity should follow the law and that the analogy between legal and equitable estates should be strictly preserved in this Court had been adverted to, it would probably have been found that *Sturgis v. Champneys* did not admit of the decision that was made in that case. The decision, however, had been made, the doctrine had been established, and it had been too long recognized to be now altered; but he saw no reason to extend it in a single particular.]

Mr. Cole replied.

THE LORD CHANCELLOR.—It is a lamentable thing to observe how much of the litigation in this country and how much of the difficulty in the administration of justice are due to the fact that the jurisdiction is divided between different Courts and conducted upon different principles. We have in this case to refer to the jurisdiction of a Court of law, which is one thing, to the jurisdiction of a Court of equity, which is another thing, and finally to the jurisdiction of a Court of Bankruptcy, which is a third thing. The justice of a Court of law is one thing, the justice of a Court of equity is another, the justice of a Court of Bankruptcy is a third; and it is from that confusion that this very simple case has become complicated and has led to this difficulty by reason of that complication in deciding it.

Now, the facts are exceedingly simple and the law applicable to those facts is equally simple and plain. The plaintiff in

this case previously to her marriage was seised in fee simple of a freehold estate. Upon her marriage there was no settlement; the result therefore was that the husband and wife became seised as tenants by entireties of the fee simple in right of the wife. Being so entitled, by a deed duly acknowledged by the wife under the statute, the fee simple was conveyed to a mortgagee to secure a sum of money. The equity of redemption was given in the form of a trust for reconveyance, and the reconveyance on payment of the mortgage-money is directed to be made to the wife, her heirs and assigns. The interest therefore of the husband and wife, save only so far as it is bound by the mortgage, remained the same; but after this mortgage occurred the bankruptcy of the husband, and the alienation made by law upon that bankruptcy had the same effect as if the husband had by a proper deed of conveyance conveyed his interest in the estate to the assignees. Therefore after the bankruptcy the interest of the husband and wife became divided into the interest of the husband in the estate during his life (there being issue of the marriage), and of course the inheritance remained vested in the wife.

Now, the controversy that arises is, what is the right of the wife and what ought to be done under these circumstances? The wife has filed a bill in which her various rights are strangely confounded. Partly she asserts her right of redemption and partly she asserts her right to a settlement of the property; but the fact which is admitted at the bar, namely, that the amount of the mortgage is much greater than the value of the life interest of the husband, relieves the case of much of the difficulty. Now, the estate of the wife being thus mortgaged for the debt of the husband, unquestionably the wife assumes in the eye of a Court of equity the character of a surety for the husband. Properly speaking, she is not a surety, but she is called a surety by way of metaphor, and unquestionably she has this sort of right recognized in her, that she is entitled to call upon the husband to exonerate her estate from the debt; but the husband having become bankrupt, that exoneration of which I have heard so much is nothing more than a right,

after she has paid the debt, to go in as a creditor upon the husband's estate and receive what dividend she can get in common with his other creditors in respect of this debt which she has so paid. But if she desires to exercise the right of redemption, then I apprehend she is entitled to a declaration that she has that right. Strictly speaking, the first right of redemption would belong to the assignees, because the estate and interest is the estate of the husband; but inasmuch as the assignees tell me that they are not desirous of exercising that right of redemption, I have no difficulty in declaring what will be the first part of the decree that I shall make, viz., "The assignees not desiring to exercise any right of redeeming the estate of the husband, declare that the wife is entitled to redeem the mortgage which is now vested in Pyke."

The contest next brought forward on behalf of the wife is, that she is entitled to have a settlement made of the whole of the equity of redemption; that is to say, she is entitled to have a settlement made for her separate use and for the benefit of her children of that estate and interest which has passed to the assignees under the bankruptcy. Now, if it were not for the evidence that I have already adverted to, namely, that the assignees declare that right and interest to be worth nothing, because they have given up their right to redeem the mortgage, I should think it necessary to examine at large the decisions and the doctrine on which I have heard so much argument, for the purpose of shewing the reason why in my opinion the wife is not entitled as against an adverse party to any such equity. But inasmuch as there is in reality nothing to decide, I abstain from entering into that examination, because it would follow that if the wife chooses to exercise the right of redeeming the mortgage, the assignees stating that the equity of redemption is worth nothing, and therefore not claiming it, the wife will be entitled, having redeemed the mortgage, to foreclose the estate and interest of the husband; and inasmuch as all the rest of the property is her own inheritance, she may if she pleases, with the assent of the husband, have an affirmance of that part of the decree which has directed that there shall be a settlement of the estate. I have not heard whe-

ther the husband appears, but I take it for granted that he would have no objection to that decree being made. I propose therefore to reverse the whole of the decree from and after the first part of it, which directs the costs of the assignees to be taxed and paid by the next friend of the plaintiff, and declare in lieu thereof that the wife was entitled to redeem the mortgage: direct an account to be taken of the principal and interest due upon that mortgage security and tax the mortgagee his costs of this suit: direct that, in the event of that principal and interest and the costs not being paid, the mortgagee will be entitled to a decree of foreclosure; but if the principal, interest and costs are paid by the wife, then declare with the consent of the husband and wife that the estate shall be settled in the manner directed by the decree, that is, for the separate use of the wife for life, with remainder to her children equally, and in the event of her dying without leaving any child, in trust for the wife, her heirs and assigns, absolutely.

With regard to the costs of this appeal, the appellants, the assignees, must take back their deposit, and I make no order with regard to the rest of the costs.

KINDERSLEY, V.C. }
Nov. 14 to Dec. 6. } PATCH v. SHORE.

Will—Execution of Power subsequently given — Revocation by Deed—Voluntary Deed—Assets.

A testator by his will gave all his personal property, except a specific portion, to his wife absolutely, subject to payment of debts; and he gave the specific portion of his property in manner therein mentioned. A few days afterwards he executed a deed, by which he settled a portion of his property upon his wife for life, and after her decease for himself for life, and after the death of the survivor, for such persons as the husband and wife should jointly appoint; and in default of appointment, either jointly by the husband and wife, or by the husband by will, the property was to go to the survivor. Another deed was subsequently executed in December, having only one witness, by which the testator covenanted that his devisees, or heirs, ex-

cutors or administrators, should after his death convey and assign all his realty and personally of or to which he should at his death be seised or entitled for a beneficial interest, or which he should have disposed of by his will, to trustees, in trust to pay debts and transfer the residue to his wife, if living at his death, or to his next-of-kin:—Held, that the specific bequest contained in the will operated in exercise of the power of appointment contained in the subsequent deed; that the instrument of December was a valid deed, and did not operate as a will so as to revoke the former will, and that the property passing under the appointment constituted assets available for the payment of debts provided for by the voluntary deed.

The following are the facts of this case: In July 1855 Mr. Shore married the defendant Mrs. Shore, and a settlement was then executed. Shortly after the marriage, Mr. Shore made his will; at this time he was possessed of considerable property absolutely, and also entitled to certain specific property under the will of his uncle Francis Shore, on the contingency of another uncle, George, dying without leaving issue. At that time his uncle George was still living, and therefore his interest in that property was contingent.

By his will, which was dated the 8th of August 1855, he gave eight legacies, of 100*l.* each, to different individuals, one being the present plaintiff, Mr. Patch; and he gave all his personal estate whatsoever belonging to him, or over which he had any power of appointment or disposition (except the property to which he was contingently entitled on the death of his uncle George Shore without children), to his wife, the present defendant, for her absolute use and benefit, subject only to the payment of his debts and funeral and testamentary expenses. Having excepted from that general bequest the property he was contingently entitled to under his uncle's will, he made, in a subsequent part of his will, a specific bequest of that property, and he dealt with it thus: "And with respect to the stocks, funds, securities and property to which I am entitled under the will of my said uncle Francis Shore, upon the decease of my said uncle George Shore, and the failure of his children, as in the will mentioned, I do,

after the same shall have fallen into possession, and become receivable by me or my executors, give and dispose of the same, and every part thereof, in the manner after mentioned." Then he proceeded to dispose of it thus: he gave 3,000*l.* to the plaintiff, 3,000*l.* to another individual, 10,000*l.* to his wife, the present defendant, and the residue to his sister, Mrs. Elliott. The uncle George Shore died without issue, in November 1858, whereby the testator became entitled to his uncle Francis's property, of which Mr. Patch (the present plaintiff) was the trustee.

In February 1859, by the direction of Mr. Shore, who was then in Germany, Mr. Patch sold out one of the sums of stock constituting that property, namely, 6,411*l.* 14*s.* 3*d.* consols, and remitted the proceeds, amounting to 6,139*l.* 1*s.* 9*d.* cash, by Mr. Shore's specific directions, to Frankfort, to the bank of Messrs. Rothschild, and placed it there to the separate account of Mrs. Shore, the then wife, and now the widow, of Mr. Shore. It seemed that Mr. Shore was a person of dissipated and extravagant habits; and Mr. Patch felt it was for his own protection to pay the other three funds, which constituted the estate of Francis Shore, into the Court of Chancery, under the Trustees' Relief Act, in order that he might be indemnified against any responsibility. Shortly after this, Mr. Shore presented his petition, under the Trustees' Relief Act, to have the three funds paid out to him. Vice Chancellor Stuart, before whom the matter came, referred it to chambers. A few days afterwards, in February 1860, Mr. Shore executed a deed, settling some of these sums of stock in the following manner.—

By indenture, dated the 15th of February 1860, and made between Mr. Shore, of the one part, and certain gentlemen, as trustees, of the other part, after reciting that he was absolutely entitled, amongst other property, to 5,072*l.* 7*s.* 11*d.* consols, standing in the name of the Accountant General, and that he had no children, and that he was desirous of providing for his wife; he transferred to trustees this sum of 5,072*l.* 7*s.* 11*d.* consols, and he appointed them his attorneys to sue for and recover that fund; and the trusts were declared to be upon trust to pay the income of that fund as it should accrue

to Mrs. Shore during her life, or as she should appoint from time to time, for her separate use, without power of anticipation; and after her decease, upon trust for Mr. Shore for life; and after the death of the survivor, for such person or persons as the husband and wife should jointly appoint, which joint appointment was never exercised; and in default of any appointment, either jointly by the husband and wife or by Mr. Shore, by will, it was to go to the survivor of Mr. and Mrs. Shore; and if there was no appointment, either jointly or severally, by his will, Mrs. Shore was to be entitled by survivorship. In accordance with that deed, under the order of Vice Chancellor Stuart, that sum of stock was transferred into the names of the trustees appointed by the deed; and the other two items of property, one a sum of 625*l.* East India stock, and the other a sum of sicca rupees invested upon an Indian government loan, were transferred to Mr. Shore himself.

On the 27th of December 1860 Mr. Shore executed another deed, upon which the question in this case chiefly turned. By that deed, which was made between Mr. Shore, who was described as then of Frankfort-on-the-Maine, of the one part, and three trustees of the other part, the deed of the February preceding was recited, and also that, in addition to the provision made by Mr. Shore for his wife by that deed, he intended to enter into the following covenant. He then covenanted with the trustees that the devisees, heirs-at-law, executors or administrators of him the said John Shore would, with all convenient speed after his decease, on being indemnified against, or on the production to them of sufficient legal discharges for, the debts due by the said John Shore at his decease, and for his funeral and testamentary expenses, well and sufficiently grant and convey, assign, transfer and pay over all and singular the real and personal estate, whatsoever and wheresoever, and of what nature or kind soever, of or to which the said John Shore, or any person or persons in trust for him, should at the time of his decease be seised, possessed or entitled, for any beneficial estate or interest, or which he should then have disposed of by his said will, unto the trustees, who thereby admitted that they would stand possessed of and interested in the property, upon trust to pay

all the debts of Mr. Shore due at his death and his funeral and testamentary expenses, and the costs, charges and expenses of the heirs or devisees, executors or administrators of Mr. Shore, in or about such conveyance, transfer and payment over as aforesaid, and to convey and assign over such part of the real and personal estate as should not have been sold or converted into money, and to pay over such portion of the ready money as should be paid over to them or him; and of the monies to be paid by such sale or conversion, if the said A. M. Shore should be then living, unto and to the use of her, her heirs, executors, administrators and assigns respectively; and if she should be then dead, to such person as at the death of Mr. Shore would be entitled to his personal estate under the Statute of Distributions in case he had died intestate. Then followed a power to appoint new trustees in the event of the trustees dying or becoming incapable of acting, and the deed concluded with these words: "That it shall be lawful for Mr. Shore, if Mrs. Shore shall die in his lifetime, at any time thereafter, by a deed under his hand, to revoke and make void these presents."

This instrument was executed by John Shore and attested by one witness only. Mr. Shore died on the 3rd of June 1861, and his will was proved by his executors, Mrs. Shore and Mr. Patch (the plaintiff).

The questions raised in this case were, whether or not the instrument of December 1860 ought to be treated as merely testamentary, and intended only to affect the property after John Shore's death; whether the will was or was not a due execution of the power of appointment reserved to John Shore by the deed of February 1860; whether the deed of December 1860 was to be construed as a revocation of the will; and whether the property passing under the appointment constituted assets available for the payment of the testator's voluntary debts.

Mr. Bazalgette and *Mr. Haig* appeared for the plaintiff.

Mr. Baile and *Mr. Charles Hall*, for Mrs. Shore.

Mr. Glasse and *Mr. Batten*, for Mr. Lamb; and

Mr. Hawkins, for Mrs. Hildyard.

The following authorities were cited:

Habergham v. Vincent, 2 Ves. jun. 204.

Ward v. Turner, 2 Ves. sen. 431.

Green v. Froud, 3 Keb. 310.

Hixon v. Wytham, 1 Ca. in Chanc. 248.

Dillon v. Coppin, 4 Myl. & Cr. 647; s. c. 9 Law J. Rep. (N.S.) Chanc. 87.

Saltern v. Melluish, Amb. 247.

Jefferys v. Jefferys, Cr. & Ph. 138.

Ward v. Audland, 8 Beav. 201; s. c. 14 Law J. Rep. (N.S.) Chanc. 145.

Stillman v. Weedon, 16 Sim. 26; s. c. 18 Law J. Rep. (N.S.) Chanc. 46.

Kinsman v. Barker, 14 Ves. 579.

Kirk v. Eddowes, 3 Hare, 509; s. c. 13 Law J. Rep. (N.S.) Chanc. 402.

Walsh v. Gladstone, 13 Sim. 261; s. c. 13 Law J. Rep. (N.S.) Chanc. 52.

Jeffries v. Alexander, 8 H.L. Cas. 594.

Durham v. Wharton, 3 Cl. & F. 146; s. c. 31 Law J. Rep. (N.S.) Chanc. 9.

Fleming v. Buchanan, 3 De Gex, M. & G. 976; s. c. 22 Law J. Rep. (N.S.) Chanc. 886.

Garthshore v. Chalie, 10 Ves. 1.

Fletcher v. Fletcher, 4 Hare, 67; s. c. 14 Law J. Rep. (N.S.) Chanc. 66.

The Attorney General v. Jones, 3 Price, 368.

Boughton v. Boughton, 1 Atk. 625.

Barkworth v. Young, 4 Drew. 1; s. c. 26 Law J. Rep. (N.S.) Chanc. 153.

KINDERSLEY, V.C. (Dec. 6.)—The facts of this case are peculiar, and there are questions which present some difficulty and are of no slight general importance. The facts do not appear to be in controversy.—(His Honour stated at length the facts of the case, and then proceeded):—The first question that has been raised is this, whether the instrument of December 1860 is or is not to be treated as a testamentary instrument; that is, as a will, or as a codicil to a will. The plaintiff contends that the instrument is to be treated, not as a deed, but as a will, and dealt with upon that footing. Of course, if the plaintiff is right in that contention, this consequence necessarily follows, that, inasmuch as it can only be valid as a testamentary instrument when it is attested by two witnesses, this instrument is entirely void, because it is only attested by one witness. It is contended, on the other hand,

by Mrs. Shore and by the other parties in the same interest, that this is not a testamentary instrument, but that it is a pure deed, and to be dealt with as such. The next question raised is, supposing this instrument is not to be regarded as testamentary, is it not invalid for the reasons insisted on? It appears to me that the most convenient form for me to deal with the matter is to take the second of these questions first. That is, whether, being in form a deed, and having all the requisites and essentials of a deed, it is for any and what reason invalid, because it would be a very extraordinary reason that would induce a Court either of law or equity to come to the conclusion that such an instrument ought to be regarded as testamentary. Now the instrument is a present covenant with individuals in the character of trustees, in trust for some one else, that the executors of Shore shall, on the trustees being satisfied that all debts are paid, hand over all his residuary personalty to the covenantees. There is nothing illegal or contrary to public policy, or act of parliament, or any rule of law or equity in such a covenant; but it is analogous to the common case of a man, on the marriage of his daughter covenanting that after his death his executors shall pay money for her benefit out of his assets, and that it happens here to be the whole residue instead of a specific sum makes no difference. In *Garthshore v. Charlie* the covenant was to pay an aliquot part, and it was held valid, but it was immaterial what part. It was truly said that the covenant there was for value, but here voluntary; but the element of a voluntary character does not render it illegal, although it might make a difference with respect to other considerations upon the question of specific performance and priority of creditors. Such an instrument is lawful, whether for value or not, not only upon abstract principles, but upon the cases. In *Boughton v. Boughton*, there was a gratuitous gift to daughters, although no doubt of specific sums; also in *Fletcher v. Fletcher*, the instrument was voluntary, and held good. The voluntary element, therefore, does not render it invalid: its being for a sum of money, or for the aliquot part of the personal estate, or for the whole of the residuary personal estate, is an element which makes no differ-

ence in the question of validity or invalidity. It appears to me that, notwithstanding the voluntary character of the instrument, notwithstanding its being a covenant that the executors shall hand over the whole of the residuary estate after paying the debts, the instrument is perfectly lawful and perfectly valid. It is not open to any of those technical rules of law or of equity, such as being void for remoteness, or any principle of that kind. I am not aware of any doctrine that can be adduced as a reason why it should be considered unlawful, and I can only come to the conclusion that the instrument, regarded as a deed, is a perfectly valid instrument, and capable of being enforced. Of course I am at present regarding it simply *per se*. Then we come to the question, supposing that it be valid as a deed taken *per se*, there is this ground of invalidity attending it under the particular circumstances of this case, that the testator had made a will by which he had disposed of his residuary personal estate in a particular manner. This deed covenants that the executors shall dispose of the estate in a manner different from that in which it was intended to be disposed of by the will; you are therefore revoking the will by this instrument; and the 20th section of the Wills Act declaring the only means by which a will or codicil, or any part of a will or codicil, shall be revoked, does not include such an instrument as this; therefore it is contended that, so far as the instrument acts as a revocation of the will, so far the instrument is void. Now, one suggestion in answer to that objection to the validity of the instrument on the part of the defendants is this: what is the meaning of that section when it speaks of the different modes by which only a will may be revoked? It speaks of its being revoked by marriage, it speaks of its being revoked by another will or codicil executed in the manner required by the act itself, and it speaks also of a cancellation and tearing, and so forth. It is contended, on the part of the defendants, that the 20th section was not intended to refer to a deed at all, but that it meant this: that if you mean to revoke by will or codicil, then the will or codicil not revoked must be executed and attested in the same manner as that which was prescribed for the original will

or codicil so revoked. How far that is a satisfactory answer to the argument it is not necessary for me to consider, because it appears to me that the answer to the argument is really this: the plaintiff's objection to the validity of the instrument proceeds upon the assumption that the effect of the instrument is revocation; that the testator is thereby revoking certain gifts which he had made to his wife. Now, I apprehend it is very difficult to imagine a revocation of a gift in a will by a deed. But supposing it were possible, how is this deed a revocation? How does the covenant operate? If there be a breach of it, you bring your action to recover damages against the individual who covenanted, and recover such damages as a jury may think a fair amount for the damnification that has arisen to you by the nonperformance of the thing covenanted to be done. The effect of this instrument is simply to create a debt; it leaves the will entirely untouched. Now that is the answer, I think, to the objection; and I am of opinion that, regarding this instrument as a deed, and not as being, in its character and in its effects, testamentary and capable of being admitted to proof as a will, provided there were a sufficient number of witnesses, and it had been duly executed and attested, I hold first, that it is in itself, independently of all other instruments, perfectly valid and perfectly lawful; and, secondly, that it is not made invalid by reason that there was a will executed by which the residue was disposed of in a certain manner, or certain legacies given. In fact, it would be a strange thing if this instrument were valid in case Mr. Shore happened to die intestate: but that if he happened to leave a will appointing executors and disposing of his residuary personal estate, that then it was invalid.

The next question I have to consider is, whether, as is contended, the instrument ought, although in form a deed, having all the requisites of a deed, and having a present operation by virtue of there being a covenant as a deed, it is to be considered not as a deed, but as if it were a will. No doubt the cases which have been cited have gone a very long way with respect to this principle of the Court, that if an instrument was clearly intended not to operate until

after the death of the person executing it, and to have no effect during his life, so that at any time he could put an end to it by revocation or otherwise, and it could not operate as an instrument *inter vivos*, either as being invalid, or so operating as to be a fraudulent evasion of some act, then it might be testamentary, disregarding the form to work out the substance. Perhaps the strongest case that has been cited is that of *The Attorney General v. Jones*, where the Judges of the Exchequer, against the opinion of Baron Wood, held a deed which was in fact a marriage settlement to be a will; but the Courts subsequently considered that that decision could not be upheld, and that was the universal opinion of the profession. I believe that that case, and possibly some others, have gone to a length which it is extremely difficult to maintain at present. It appears to me that the rule which I ought to act upon is this, that if the instrument be a deed in its form, having all the requisites of a deed, and intended as such, and to operate *inter vivos*, there must be something extremely special to induce the Court to conclude that it was the intention of the party that it should only begin to operate after his death, and to be ambulatory in the mean time, and capable of revocation or destruction at his will and pleasure, and intended so to operate, or that it is so framed as that you find the testator, although he has used the form of indenture, really meant to make a will. In the case in *Keble*, though the form was a deed, there was *animus testandi*. The case of *Jeffries v. Alexander*, in the House of Lords, did not decide an instrument to be a will, but to be valid as a disposition. The purpose of this instrument was obvious. Mr. Shore wished his wife to have his residuary estate, and he wished to take it out of his own power to deprive her of it; but at the same time he wished to retain in his own power the right, as long as he lived, to deal with that residuary estate by spending it. This object was accomplished by this instrument, and it would be strange to treat it as a will, knowing that the intention would be thereby defeated, and that it had none of the requisites of a will. No case approaches this, and I think there is none which would justify any Court in coming to the conclusion

that the instrument now before me should be treated as testamentary. If it be a deed, the operation of it I apprehend to be plain: that it entitles the party, if there be a breach, to recover damages from the assets, but distinguishing between the amount of the obligation of the assets and the amount of assets applicable to the satisfaction. Now, it may be that the amount which the parties have a right to say the assets shall satisfy, may exceed the assets applicable to the satisfaction of it; but, if that be so, the amount of assets are only applicable *pro tanto* as far as they will go, and they will be applied in satisfaction of the debts for value. There is no doubt that there is enough to satisfy them, and the only question is, what are the assets applicable to satisfy this voluntary debt or voluntary obligation?

That raises a very curious and peculiar question as to that 5,000*l.* stock, which was settled by the deed of February, and under which settlement Mr. Shore had a power of appointment by will; whether the will which he has left, which was made before the execution of the deed of February, is or is not to operate as an execution of that power? If it operates as an execution of the power, whether it does so by virtue of the specific bequest under the uncle's will, or whether it operates by virtue of the Wills Act, which says that any general disposition shall operate as a general execution of the power unless there be something in the context to shew a contrary intention? Then comes this question: supposing that the clause in the will which, when framed, was intended to be, and was, a specific bequest of the property under the uncle's will, is that property which has been appointed to a particular individual by the will, although clearly assets to pay debts for value, applicable to the payment of a voluntary debt? That is a question perfectly novel, and I am not aware, and counsel have not been able to suggest on either side, that there is any specific authority on that question. If it be the conclusion to be arrived at that the clause in the will which relates particularly to the property under the uncle's will does operate as an execution of the power under the deed of February, and it should be held that that property is available for satisfying

this voluntary demand, then comes another question which has been raised, whether, if that which was specifically intended for Mrs. Shore has not been in part actually given to her by anticipation by her husband in his lifetime, by selling out some of the specific portions of the uncle's property which he derived, and giving her for her separate use money arising from that? Now, these are questions which I have not had the same opportunity of considering as I have with regard to those I have already disposed of, viz., the validity of the deed as a deed, and that it is to be considered not as testamentary, but as a deed. The other questions which I have now been stating, I propose to take more time to consider.

KINDERSLEY, V.C. (Dec. 6).—The questions which remain are: first, whether the covenant in the deed of the 27th of December 1860 extended to that 5,072*l.* 7*s.* 11*d.* stock, the subject of the deed of the 15th of February 1860, and was a covenant that the executors should pay over that property? Secondly, supposing the covenant extended to that property, would it be assets? Thirdly, supposing the covenant did not extend to the 5,072*l.* 7*s.* 11*d.* stock, whether certain sums which Mrs. Shore had received in the lifetime of the testator were not to be taken in part satisfaction of the 10,000*l.*, bequeathed to her by his will? As to the first question, it appears to me that the covenant does clearly extend to the 5,072*l.* 7*s.* 11*d.* stock; the words are intended to embrace and did embrace it. The deed containing the covenant commences by reciting the deed of the 15th of February 1860, which created the power of appointment, the reservation of that power and the expression that the power is to be exercised by will. The words are, "all the real and personal estate to which John Shore was entitled, or which he should then have disposed of by his will." And the intention was, that if he left a will disposing of that particular fund, the executors were to pay over that fund as well; and the covenant does therefore extend to it.

In the next place, as to the question whether that property constitutes assets to satisfy a voluntary debt? This question does not seem to have ever been brought

specifically before the Court, nor decided in any previous case. The covenant in question is a voluntary covenant, and therefore the obligation which it creates is voluntary. It stands no higher than a voluntary bond, and parties claiming under such a bond cannot claim payment until debts even of simple contract have been paid. The contest arises between the volunteer under the covenant and the volunteers under the appointment, who stand upon the same footing. The title is derived, not from the appointment, but from the instrument creating the power—not from the donee, but the donor of the power. Take the case of a power created by A. in favour of B, in exercise of which B. appoints to C; C. does not take under B, the appointor, but under A, the creator of the power. This being the rule, how is it that appointed property was ever made liable to pay the debts of the appointor? How came this to be the law, and what is the principle involved? At first sight there seems to be a perfect violation of the principle of powers. If A. creates a power in favour of B. by which B. is entitled to appoint, and it is true that C, the appointee, is entitled under A. and not under B, who has only the right to name the person to take, it is strange that the law takes the property of the creator of the power to pay the debts of the donee of the power. It is, however, easy to trace, on looking through the cases, how this rule first came into existence. The earlier cases occur about the beginning of the seventeenth century. The creator of the power reserved it to himself out of his own property, and equity treats the subject-matter of the power as assets of the appointor, who, in the first place, is also the creator of the power. The next step would be those cases in which a person makes a bargain by which he gives another a power of appointment over a portion of his property, in return for some valuable consideration; and soon until the distinction was lost sight of, and it came to this: that it did not matter whether A. reserved a power to himself, or created a power in favour of B; it even went thus far, that the mere existence of a power, although never exercised, made the subject-matter assets of the proprietor of the power, though it was soon felt that the principle could not be carried to that

length. But appointed property, although assets of the appointor, is not to be applied *pari passu* with general assets, but after general assets are exhausted. The nearest approach in principle to the present case is in that of *Lord Townshend v. Windham* (1). There is no case, however, in which the principle is laid down as a general proposition. The principle is, as I have said, to treat the appointed property as if the appointor had appointed to himself, and *quoad* creditors regard it as assets. How, then, does this principle apply to the present case? How is it to be applied between a voluntary creditor and a specific legatee? The creditor under the covenant is a volunteer; still the principle clearly prevails, that as between volunteers, the one who claims by instrument, *inter vivos*, has priority over the one who claims by a testamentary instrument. You must exhaust the assets not specifically bequeathed before you have recourse to the assets specifically bequeathed. The principle also extends to real assets specifically devised. In order to pay general debts, the property must be made applicable after general assets. The same principle applies to an appointor and volunteer, and we cannot say that because the creditor is a volunteer, he is not entitled to be paid. The question of satisfaction does not arise, and upon that I express no opinion.

Wood, V.C.	} <i>Re</i> SIR THOMAS MARYON WILSON'S ESTATES.
1862.	
July 25, 26.	
LORDE JUSTICES.	
1863.	
Jan. 23.	

Lands Clauses Consolidation Act, 1846, sections 95, 96—The Copyhold Acts, 1852 and 1858, 15 & 16 Vict. c. 51, and 21 & 22 Vict. c. 94—Enfranchisement.

Copyhold lands taken under the Lands Clauses Act, 1845, are enfranchised under the 96th section of that act, and no fine is payable to the lord under the 6th section of the Copyhold Act, 1858, as a condition of compulsory enfranchisement. Therefore, where the lord of the manor was tenant for life, it was held that he was not entitled to

(1) 2 Ves. sen. 1.

any part of the money paid into court by a railway company as compensation for the enfranchisement of copyhold land taken by them.

The Hampstead Junction Railway Company under the powers of their act, which was passed in 1853, took for the purposes of their undertaking a quantity of copyhold land held of the manor of Hampstead, of which the petitioner was tenant for life, and by an agreement dated the 9th of March 1860, an arbitrator was appointed, by the petitioner as lord of the manor on the one hand, and the agent of the company on the other, to ascertain the amount of compensation to be paid for enfranchisement; and on the 15th of June following, the arbitrator made his award, fixing 4,698*l.* as the compensation to be paid according to the 96th section of the Lands Clauses Consolidation Act, 1845, and that amount was paid into court accordingly. Of this sum the petitioner claimed to be entitled to 1,016*l.* as being the amount of the fines which would have been payable to him upon admittance previous to enfranchisement under the Copyhold Acts. Upon the hearing of the petition, an inquiry was directed whether any fines would have been due and payable under the Copyhold Act, 1858, section 6, from such of the copyholders as were admitted prior to the 1st of July 1853, to the copyholds purchased by the company, and whether the petitioner as tenant for life was entitled to such fines; and if so, what proportion of the fund in court represented the amount of such fines. The chief clerk certified that there would under the circumstances have been payable under the 6th section of the 21 & 22 Vict. c. 94, from copyholders admitted prior to the 1st of July 1853, the sum of 1,016*l.* as fines, and that the petitioner as tenant for life was entitled to the same.

The matter now came before the Court upon the chief clerk's certificate. The sections of the Copyhold Acts bearing upon the petitioner's right are the following. The Copyhold Act, 1852, (15 & 16 Vict. c. 51.) section 1, enacts that "at any time after the next admittance to any lands which shall take place on or after the 1st of July 1853 it shall be lawful for the tenant so admitted, or for the lord, to

require and compel enfranchisement in manner hereinafter mentioned of the lands to which there shall have been such admittance as aforesaid."

By the Copyhold Act, 1858 (21 & 22 Vict. c. 94.) s. 6, "Notwithstanding the 1st section of the Copyhold Act, 1852, it shall be lawful from and after the passing of this act for any tenant or lord of any copyhold lands, to which the last admittance shall have taken place before the 1st of July 1853 to require and compel enfranchisement of the said lands in the manner herein and in the said act mentioned; provided always, that no such tenant shall be entitled to require such enfranchisement until after payment or tender of such a fine, and of the value of such a heriot as would become due or payable in the event of admittance or death subsequent to the 1st of July 1853; and also of two-thirds of such a sum as the steward would have been entitled to for fees in respect of such admittance."

Mr. Roll and *Mr. Hetherington*, for the petitioner, contended that the above-mentioned sections of the Copyhold Acts applied to the case of land taken by a railway company; and the petitioner, as tenant for life of the manor, was entitled to the 1,016*l.* as the amount payable in respect of fines, inasmuch as he, as lord of the manor, would have been entitled to a fine upon alienation to the company.

Mr. Daniel and *Mr. Hanson*, for the persons interested in remainder.—A lump sum has been paid into court as compensation for the manorial rights, in pursuance of the Lands Clauses Consolidation Act, 1845, ss. 95, 96. The Copyhold Acts have no application, as the enfranchisement did not take place under them. The money can only be applied in one of the modes pointed out by the 69th section of the Lands Clauses Act.

They referred to *The Ecclesiastical Commissioners v. the London and South-Western Railway Company* (1).

Mr. Hetherington replied.

Wood, V.C. (July 26) said the case had been extremely well argued on both sides; but it appeared plain that the petitioner's

claim could not be supported. He could not, as against the company, have compelled payment of any money in respect of fines; and if the arbitrator in making his award had taken the amount of fines into consideration, as he probably had, the result was that a very good bargain had been made for the estate, and those in remainder were entitled to the benefit of it. The tenant for life was not entitled to any portion of the compensation-money paid under the Lands Clauses Act; and unless, therefore, his claim in respect of the fines was sanctioned by law as between him and the railway company, the whole money must go for the benefit of the estate. This was the question to be decided.

Under the 95th and 96th sections of the Lands Clauses Consolidation Act, which was passed before copyholders had the right by law to compel enfranchisement, no fine was payable to the lord for the enfranchisement of land taken by public companies, but the amount of compensation was to include the loss in respect of fines, &c., and was to be dealt with under the 73rd section of the act. By the Copyhold Act, 1852, copyholders admitted subsequently to the 1st of July 1853 were enabled to demand enfranchisement, subject to certain terms, one of which was the payment of the fines and fees consequent on such admittance. The railway company, however, were not in the position of copyholders coming in under this act, but they came in under a totally different act of parliament, which not only gave them the right to insist on enfranchisement, but by the 96th section made it compulsory upon them to procure their lands to be enfranchised. The two modes were entirely distinct; nor could the Copyhold Act, 1858, affect the question. That act was passed after the reference to arbitration, but before the award was made. But even if the reference had been made after the act had come into operation, the question must still depend upon the Lands Clauses Act. Under the 95th section of that act, until the lands taken should have been enfranchised, they were to continue subject to the same fines, rents, heriots and services as were theretofore payable and of right accustomed. So far it was plain that no fines were made payable as a premium for exercising the privi-

lege of enfranchising the land, as was the case under the Copyhold Acts. By the 96th section of the Lands Clauses Act the promoters of the undertaking were directed to procure the lands taken by them to be enfranchised, and for that purpose to apply to the lord to enfranchise the same. These words might be thought to imply that the company were to be put in the same position as any other copyholder as to the terms on which enfranchisement was to be procured; but it had been held in the case of *The Ecclesiastical Commissioners v. the London and South-Western Railway Company*, that no fine was payable by the company upon a conveyance under the 95th section. Even if the company had submitted to the demand, and paid these fines *eo nomine* into court, the tenant for life would not have been entitled to the benefit thus obtained; but it must enure for the benefit of the inheritance. There was nothing, however, in the evidence to bring the case up so high as that; because a simple lump sum was paid, and no part of it was specially appropriated as being paid in respect of fines. The certificate must be varied by declaring that the tenant for life, Sir T. M. Wilson, was not entitled to the sum of 1,016*l.* in respect of fines.

From the above decision the lord of the manor appealed to the Lords Justices.

Mr. Rolt and *Mr. Hetherington* (Jan. 23) supported the appeal.

Mr. Daniel and *Mr. Hanson*, for the respondent, were not called on.

LORD JUSTICE KNIGHT BRUCE.—If the question were whether the interest of the tenant for life should be severed from the fund, and the residue free from that interest should be given over to the remainderman, I should have allowed more weight to the argument; but here the claim is to assume a certain benefit of a particular character to have fallen in to the tenant for life which did not fall in at that time; and that the tenant for life is not only to take out of the fund the particular benefit assumed to have fallen in to him, but also to have the income of the residue as well. There is no justice or reason in this claim. The possible benefits which may be derived from the tenancy for life are to be con-

sidered in estimating the whole value so far as they affect the particular land taken. The fee simple of the manor is to be valued, and in estimating the value to the lord of the manor for the time being, the possibility of fines is to be taken into consideration; but upon what principle the interest of the tenant for life is to be severed from the reversion I do not understand. It appears to me that the Vice Chancellor has taken a correct view of the case. He gives to the tenant for life damages in respect of the immediate injury to the life estate, making the residue to represent the inheritance, and giving to the tenant for life the interest of the fund. I do not see how the Vice Chancellor could have taken any other course.

LORD JUSTICE TURNER.—I also agree with the conclusion of the Vice Chancellor. It is true that the Lands Clauses Act only came into operation with the special act; but in considering the construction of the Lands Clauses Act, we must look at the circumstances which existed at the time it was passed. The Lands Clauses Act provides for a conveyance to the company, which, until enrolment, leaves matters as they existed before its execution. The property still retains its copyhold tenure, and is subject to copyhold liabilities. Then, the conveyance is to be enrolled within three months, on which the land is enfranchised, and compensation is to be estimated in the manner prescribed by the act. Nothing can be more clear than the continuation of this part of the act. The fines, heriots and other services are to be estimated, and to be taken as an aggregate, and all fines are to be taken into consideration which would have become due at any time but for the extinction of the copyhold tenure. It is said that the tenant for life would be entitled to fines which might become due between the conveyance and the enrolment, but in that case such fines would be taken into consideration in the estimate. However, I give no opinion on that question, which does not arise in the present case. In this case no fines accrued between the vesting of the property in the company and the period of enrolment. The undoubted construction of the act must be, to put the company purchasing copyhold land under the obligation of paying for all fines, heriots

or other services which may at any time hereafter become due, but there is nothing in the act which confers on the tenant for life any particular interest in respect of any particular fines that may accrue at any particular time. According to the law as it existed from 1845 to 1852, there was to be a general assessment of all fines, on death, descent or alienation; and that being so from 1845 to 1852, can it be said that the Copyhold Acts of 1852 and 1858 created a totally different interest? An act passed for the purpose of enabling copyholders to obtain a compulsory enfranchisement cannot alter the provisions of the act of 1845, passed with a totally different object. The injury which would be done to the tenant for life is fully compensated by the provisions of the act. The tenant for life gets a benefit which he never could have got by himself. He gets no fines during his lifetime, but he gets the interest of all future fines which may accrue after his death. That is the principle on which the Lands Clauses Act is framed. I think, therefore, that the view which Mr. Rolt took of the act, that there was a fine to be paid to the tenant for life on alienation to the company, cannot be sustained.

After some discussion it was agreed that the costs of all parties should be paid out of the fund.

ROMILLY, M.R. }
Nov. 24. } WATNEY v. WELLS.

Partnership—Dissolution—Taking Accounts—Capital—Interest.

If a partnership is dissolved by decree, and accounts are directed, it means according to any existing articles of partnership, or system on which the accounts have been taken up to the time of the dissolution, no settled accounts being disturbed.

A decree dissolving a partnership terminates any existing articles, and if thenceforward the business is carried on for the purpose of winding up the affairs, the accounts must be taken in the ordinary form, allowing simple interest on the capital.

The plaintiff and defendant carried on the business of millers and mealmen in

partnership from the 1st of July 1840. Differences arose between them some time previous to 1859 as to the mode of writing off allowances for bad debts from the balance of September 1858. This ultimately caused a breach, and the ill-feeling that arose made it impossible to carry on the business beneficially for either. This suit was then instituted, and on the 20th of June 1861, a decree was made dissolving the partnership from that date, and without disturbing settled accounts; it at the same time directed an account of all dealings and transactions between the plaintiff and defendant as co-partners, and of the property, stock and effects of the partnership, and it gave directions for their sale—*Watney v. Wells* (1).

The last settlement of accounts between the parties at the time of the decree was on the 31st of March 1858. After the decree the business was carried on for the purpose of being wound up, but it was not finally stopped until August 1862.

The articles of partnership provided that the capital of the firm should be 100,000*l*. The plaintiff was to bring in 75,000*l*., and the defendant 25,000*l*.; but this provision was disregarded, and each partner was from the first credited in the partnership-books with the amount belonging to him in the concern; and when the last balance-sheet was made the capital of the plaintiff amounted to about 74,507*l*. 14*s*. 8*d*., and that of the defendant to about 9,470*l*. 2*s*. 5*d*. The articles also provided that out of the net profits of the business the plaintiff and the defendant should in the first instance be entitled to interest at 5*l*. per cent. on their respective shares of the joint capital, and that they might draw for such interest half yearly, on the 31st of March and the 30th of September in every year, and that the gains and profits, after deducting the interest upon the capital should be divided into four equal parts, and that the plaintiff should be entitled to three of such parts, and the defendant to the remaining fourth part, and also that a general account and rest of dealings and transactions should be taken half-yearly, on the 30th of September and the 31st of March, during the continuance of the partnership. From 1855, however, the

shares of the partners were altered, and it was agreed that each of the partners should be entitled to half of the assets, and credited or debited with one-half of the profit or loss.

The manner in which the accounts had been taken between the plaintiff and defendant was by debiting each partner with any loss and with all sums drawn out by him during each half-year, with interest thereon, and crediting him with the amount of his capital, with interest thereon, and with all sums paid in, and interest thereon, and also with profit.

This was the mode adopted by the defendant for taking the accounts previous to the decree; but after the decree he insisted that the principle of taking the accounts no longer applied, and that no interest ought to be allowed on the capital of either, as from that time the business was terminated and was continued merely for winding up the affairs of the partnership.

The plaintiff made up the accounts with half-yearly rests, except that he did not credit either partner with profit or debit him with loss. He also considered that he was entitled to compound interest upon his capital up to the stopping of the business in August 1862, upon the principle of its being capital borrowed by the firm.

In both the preceding accounts, therefore, interest was calculated every half-year on the balance standing to the credit of each partner during the previous half-year, which balance of course included interest on the capital for the half-year preceding, so that compound interest was charged on capital.

The chief clerk, however, in the absence of any special directions in the decree, proposed to take the accounts according to the usual practice, without annual rests, viz., to commence the account of each partner, with the amount standing to his credit as capital on the 31st of March 1858, to credit him with all amounts paid in, and debit him with all amounts paid out, crediting him with simple interest at 5*l*. per cent. on the capital and amounts paid in, and debiting him with interest on sums drawn out.

The case was brought on by adjournment from chambers.

The Solicitor General, Mr. Baggallay and Mr. Wickens, for the plaintiff, James Watney.

(1) 30 Beav. 56.

Mr. Selwyn and Mr. W. W. Cooper, for the defendant, William Henry Wells.

ROMILLY, M.R. }
Nov. 25. }

ASHWIN v. BURTON.

Vendor and Purchaser—Fictitious Contract—Deposit—Right to recover.

THE MASTER OF THE ROLLS.—When the Court dissolves a partnership, and directs an account of the dealings and transactions, it means that such accounts should be taken on the footing of the partnership articles up to the time of the dissolution, and assuming that there were no articles, then that they should be taken upon the principle on which the partners, as shewn by the books of account, had been accustomed to take them. Such accounts as these are quite distinct from the accounts taken in suits which relate to mortgages; no rests are there made unless the decree specially directs them. In partnership suits the accounts are taken on the principle adopted by the partners themselves in carrying on the business, and that principle must always be gathered from the articles of partnership, or from the books of account, no settled accounts being disturbed. It is not necessary that the decree should state that the accounts were to be taken on the terms of the articles of partnership; the usual decree directing the accounts to be taken implies as much. But after a decree dissolving a partnership the circumstances are altered: the articles are at an end, and the business is continued simply for the purpose of winding up its affairs. The accounts from that time are taken as if two persons brought in a capital in unequal sums, and carried on a business without any articles of partnership. In such a case simple interest only is allowed on the capital, and the profits are divided equally between them. The accounts in this case must therefore be taken from the 31st of March 1858, the last settlement of account, up to the 20th of June 1861, the date of the decree, in accordance with the partnership articles and the books of account. Having then ascertained the amount of capital due to each partner on the 20th of June 1861, interest from that time at 5l. per cent. must be allowed on those balances up to August 1862, and subject to that the profits must be divided equally between the partners. Interest, however, must be stopped on such sums of money as have been paid into court, or received by either party beneficially.

A purchaser of real estate upon signing the contract assigned and delivered a negotiable bond, as a deposit, to G. T., who (though never admitted) alleged himself to be a solicitor and the solicitor for the vendor. G. T. transferred the bond to the defendant, as a security for his own debt. The vendor of the real estate was a fictitious person, and the contract a fraud. The purchaser filed his bill to get back the bond from the defendant; and upon an application for an injunction to restrain him from disposing of it,—Held, that the deposit did not make G. T. a trustee for the plaintiff; and that the defendant, being a purchaser for value, without notice, could not be restrained from dealing with the bond.

This bill was filed, by Thomas Smith Ashwin, on the 17th of November 1862, against Frederick Burton, to obtain a declaration of title, and asking for the delivery up of a bond of the Carmarthen and Cardigan Railway Company for 1,000l. to the plaintiff, and for an injunction to restrain the defendant from assigning or disposing of the bond, or presenting the warrants or certificates for payment of the interest.

By a contract dated the 12th of September 1862, Alexander Russell, described as of Clifton, in the county of Gloucester, agreed to sell to Mr. Ashwin a freehold estate, in the parish of Bardfield Saling, in the county of Essex, for 9,250l., which was to be paid by nine bonds or debentures called Lloyd's bonds, of the Carmarthen and Cardigan Railway Company, for 1,000l. each, and one like bond of 250l., bearing interest half-yearly at the rate of 5l. per cent. per annum, and that such bonds should be transferred by Mr. Ashwin to A. Russell, under and subject to the conditions therein mentioned; the first of which was, that one of the bonds for 1,000l. should be transferred into the name of, and placed in the hands of, George Turner, of 44, Chancery Lane, solicitor for the vendor, as a deposit, and the remaining nine bonds were to be transferred to A. Russell on the completion

of the purchase, which was to be on the 3rd of November 1862.

The agreement was signed, George Turner, solicitor for the vendor.

The plaintiff, in compliance with the condition, delivered one of the bonds for 1,000*l.* to G. Turner, and also a deed-poll executed by Howard Ashton Holden (the original obligee of the bond), assigning it to G. Turner.

In consequence of the omission of G. Turner to deliver the abstract within the twenty-one days after the execution of the agreement, the plaintiff, on his return to town late in October, made various inquiries, from which he ascertained that there was no such person as Alexander Russell at Clifton; and on the 3rd of November 1862, George Turner himself informed the plaintiff that he had never been admitted a solicitor, and that he had delivered the bond, with the interest warrants and the deed-poll, to Messrs. Stuart & Massey, as a security for a debt due to the defendant, who was one of their clients.

The plaintiff immediately informed Messrs. Stuart & Massey of the circumstances under which the bond had been obtained; he also, on the 12th of November 1862, gave them notice not to part with the bond, the interest warrants, or the deed-poll.

Subsequently, however, he ascertained that the bond and deed-poll had been delivered to Messrs. Massey & Stuart by G. Turner on the 1st of November 1862, as a collateral security for payment by G. Turner to the defendant of 130*l.*, secured by his cheque drawn about that time, but post-dated the 17th of November 1862; and that on the same 1st of November G. Turner executed a deed-poll, by which, without consideration, he assigned the bond to the defendant.

On the 7th of November 1862 the defendant caused the assignment to be registered in the books of the company.

The bill alleged that, notwithstanding the agreement, the bond, debt and interest continued the property of the plaintiff, and that the bond, interest warrants and deed-poll were delivered to G. Turner, and were held by him upon trust for the purposes of the agreement, and, subject thereto, upon trust for the plaintiff.

It further alleged, that Mr. Massey, on the execution of the agreement, promised G. Turner that he would not register the assignment of the bond with the company, or give them any notice thereof. This last allegation was denied by the defendant, the fact being that Messrs. Stuart & Massey were not aware of the interest which G. Turner had in the bond. It was also insisted that the defendant was a purchaser for value, without notice that the plaintiff had any interest in the bond.

Mr. A. G. Marten.—The bond was obtained from the plaintiff by fraud; it was a *chose in action*, which was delivered to G. Turner as bailee, to be applied only for a limited purpose. He held it, therefore, as a trustee, and he could not part with it without the consent of the plaintiff. No act of the bailee, therefore, could confer a better right than that which he possessed. The bond was not assignable at law; the legal right therefore had not been parted with. Even in this court the transfer of a *chose in action* gave no legal right. The defendant, therefore, could obtain in equity only such an interest as the bailee possessed, notwithstanding the registration of the assignment made by G. Turner; the claim set up of being purchaser for value without notice was not without exception when applied to equitable interests. In the present case no valuable consideration passed between the defendant and G. Turner; it was a mere voluntary and collateral deposit to secure an existing debt, and no notice of the equitable interest of the plaintiff was necessary to complete it—

The Athenæum Assurance Society v. Pooley, 3 De Gex & J. 294; s. c. 28 Law J. Rep. (N.S.) Chanc. 119.

Pinkett v. Wright, 2 Hare, 120; s. c. 12 Law J. Rep. (N.S.) Chanc. 119; nom. *Murray v. Pinkett*, 12 Cl. & F. 764, 773, 785.

Dearle v. Hall, 3 Russ. 1.

Stackhouse v. the Countess of Jersey, 1 J. & H. 721; s. c. 30 Law J. Rep. (N.S.) Chanc. 421.

Phillips v. Phillips, 31 Law J. Rep. (N.S.) Chanc. 321.

Frazer v. Jones, 5 Hare, 475; s. c. 17 Law J. Rep. (N.S.) Chanc. 353.

The Attorney General v. Wilkins, 17 Beav. 285, 293; s. c. 22 Law J. Rep. (N.S.) Chanc. 830.

Colyer v. Finch, 19 Beav. 500; s. c. 5 H.L. Cas. 905; 26 Law J. Rep. (N.S.) Chanc. 65.

Clack v. Holland, 19 Beav. 262; s. c. 24 Law J. Rep. (N.S.) Chanc. 13.

Martin v. Sedgwick, 9 Beav. 333.

Mr. Jessel, for the defendant, was not called on.

THE MASTER OF THE ROLLS.—It is impossible to grant the injunction asked for in this case. Without, therefore, considering the fraud, it is clear that if a deposit was made with the solicitor of the vendor only this would give a right of action against him; and in case the purchase went off the purchaser would have a right of action to recover the deposit. How can a deposit be said to be a trustee? he was subject to an obligation which he was bound to perform to another, which gave a right of action to recover what had been deposited, but it never constituted him a trustee. *Pinkett v. Wright* and *Clack v. Holland* decided that if a person proposed to assign property in which he had no interest, nothing could pass. In this case the plaintiff not only gave one of the bonds to G. Turner in part payment of the purchase-money and in part performance of the contract, but he also assigned it to him absolutely. He subsequently ascertained that the contract could never be carried into effect, and he now asked the Court to restore the bond he had assigned to him, and he asked this against the defendant to whom it had been assigned by G. Turner for value and without notice; but no such equity arose, and the plaintiff was not entitled to such relief as the assignment to G. Turner was made by the plaintiff who had the beneficial ownership of the property. It was true he said he would not have parted with the bond or executed the assignment if he had known of the circumstances: but how could he change the contract, or say that what was given in part payment of purchase-money had been converted into a trust for his benefit? This Court had no power to substitute one purpose for the other, and it could not prevent the defendant from dealing with the bond;

and unless some reason is assigned to the contrary the costs must be costs in the cause.

Mr. Jessel, for the defendant, said that the plaintiff in his bill had alleged that the defendant had agreed not to register the shares. He then came to this Court, and upon an affidavit, which the plaintiff did not now rely upon, he obtained an *ex parte* injunction. Now, this allegation contained the whole equity of the bill; it prevented the defendant from demurring. It was, however, erroneous. It was now denied, and the suit failed; the plaintiff, therefore, ought to pay the costs of this application.

Mr. Marten said that the charge in the bill formed a part of the instructions, and it was inserted under the impression that it was correct.

THE MASTER OF THE ROLLS.—The view taken on behalf of the defendant seems correct. The plaintiff, therefore, must pay the costs of the motion.

KINDERSLEY, V.C. } BANKS v. BRAITHWAITE.
Jan. 23.

Annuity—Dividends of a Sum set apart to Answer—Cesser on Bankruptcy or Assignment—Interest for Life.

A testator directed his trustees to set apart out of his personal estate 10,000l. consols, and to pay the dividends thereof to his sister for life, and after her decease to retain so much of the 10,000l. as should be sufficient to realize the yearly income of 150l., and to pay the dividends of the trust fund so retained to his nephew until he should become bankrupt, or assign away or encumber his interest, in which cases the trust declared for the benefit of his nephew was to cease and determine, and the said sum of 10,000l. was to fall into the testator's residuary estate. The nephew died without having become bankrupt or incumbered his interest:—Held, that the interest given to the nephew was not an absolute interest, but one only for his life.

Edward Coates, by his will, dated the 3rd of September 1846, after giving his residuary personal estate to trustees upon trust to sell and convert, and to pay his debts, funeral and testamentary expenses

and pecuniary legacies, continued as follows: "Upon further trust, and I hereby direct my trustees or trustee for the time being of this my will, to set apart and invest out of my personal estate within one month after my decease the sum of 10,000*l.* 3*l.* per cent. consolidated Bank annuities, and I direct my said trustees or trustee to pay the dividends of the said 10,000*l.* 3*l.* per cent. consolidated Bank annuities when so set apart or invested, as and when the same shall be received, unto my said sister Margaret Holman, during her life, to be enjoyed by her as her separate property, free from the control of any husband she may have at the time of my decease, or at any time thereafter may be married to; and after the decease of the said Margaret Holman, I direct the trustees and trustee for the time being of this my will to retain so much of the said sum of 10,000*l.* 3*l.* per cent. consolidated bank annuities as shall be sufficient to realize the clear yearly income of 150*l.*, and I direct the trustees and trustee for the time being of this my will to pay the dividends and other income of the trust stock so as aforesaid lastly directed to be retained by them to my nephew John Coates Holman, son of the said Margaret Holman, until he shall be found and declared a bankrupt, or shall take the benefit of any act passed for the relief of insolvent debtors, or the interest of the said John Coates Holman shall, or, but for this present provision, would by reason of any assignment, charge, incumbrance or other act or means whatsoever, become vested in any other person or persons, in any or either of which cases the trust hereinbefore declared for the benefit of the said John Coates Holman shall immediately cease and determine; and subject to the trusts hereinbefore declared for the benefit of the said Margaret Holman and John Coates Holman, I direct that the said sum of 10,000*l.* 3*l.* per cent. consolidated Bank annuities shall sink into and form part of the residue of my personal estate and effects."

And the will contained certain trusts as to the residue for the benefit of his other sister Elizabeth Braithwaite and her children, upon which no question turned.

Margaret Holman died in 1861, and John Coates Holman died in 1862, never having been bankrupt or made any disposition of his interest under the will.

Under these circumstances, a petition was presented, praying that the sum of 10,000*l.* consols. might be paid to the persons entitled to the residue of the testator's estate under the will.

This petition was opposed by the widow and personal representative of John Coates Holman, who claimed the capital from which the annuity of 150*l.* was derived, as an absolute gift to him, subject only to cesser on bankruptcy or alienation.

Mr. Hallett, in support of the petition, argued that the words of the gift being very ambiguous, on the true construction of the will a life interest only was given in the income of the 10,000*l.* consols—*Hill v. Potts* (1).

Mr. Ware opposed the petition, on behalf of the representative of John Coates Holman, contending that, upon the established rule, that where the income of a specific fund is given without words of limitation the whole interest passes. The words "should by any means whatsoever become vested in any other person" referred to alienation *inter vivos*, and could not be construed as applying to the cesser of interest by death. In other parts of the will the testator had given annual income, and had there expressed that it was to be for life only—*Gower v. Towers* (2).

KINDERSLEY, V.C.—The question arising on this will is entirely one of intention, to be deduced from the words of the whole instrument. The question is, did the testator intend to give J. C. Holman 5,000*l.* stock, part of 10,000*l.* consols, absolutely? or did he mean the 5,000*l.* stock, or so much as would produce 150*l.* a year, to be set apart, and the dividends paid to him for life, or until he should be bankrupt, or his interest become vested, by any act of his, in some other person, and, subject to that, that the whole 10,000*l.* should sink into the residue? If J. C. Holman had an absolute interest, the moment the widow died he would have been entitled to have the stock transferred to him absolutely; but such a construction is absolutely repugnant to the language, for even supposing he never parted with any of the stock in his lifetime, if he gave it by will specifically, assuming

(1) 31 *Law J. Rep.* (n.s.) *Chanc.* 380.

(2) 26 *Beav.* 81.

him to be the absolute owner, that would be vesting it in some other person. The testator could not have meant to give an absolute interest to J. C. Holman, and then to say he should not part with it. Such an idea would be repugnant to the gift. He, therefore, took only a life interest. His representative must have her costs.

LOKDS JUSTICES. }
March 3. }

BLAKE v. PETERS.

Waste—Estate in Fee Simple with Executory Devise over—Restraint on cutting Timber by Tenant of.

Lands were devised to J. W. P. in fee simple, with an executory devise over if he died without issue male, and the testator prohibited on pain of forfeiture the cutting of timber except for necessary repairs. J. W. P. cut down timber for other purposes:—Held, affirming a decision of one of the Vice Chancellors, that forfeiture was not the only remedy, but that the estate of J. W. P. was liable to make good for the benefit of the executory devisee the value of the timber cut, and that this additional remedy did not take away the former remedy.

This was an appeal, presented by the personal representatives of Mr. John Weston Peters, against a decree made by Vice Chancellor Kindersley.

The facts of the case are very fully reported in vol. 31 of the *Law Journal Reports*, Chanc. p. 884, and do not need to be recapitulated here, the following epitome raising the chief point decided by the Lords Justices being sufficient.

Elizabeth Eason, by will, dated the 16th of October 1828, devised and bequeathed freehold, copyhold and leasehold estates to John Weston Peters, his heirs, executors and administrators, subject to a limitation over by way of executory devise in the event of J. W. Peters dying without leaving issue male living at his death, with a prohibition against his cutting timber, except for necessary repairs, and if he did so the estate and interest given him was to cease. There were directions as to copyhold and leasehold estates (held upon leases determinable upon lives) that such property

should be kept "fully estated" with three lives. J. W. Peters died without issue male, and during his life committed various acts of waste by cutting down timber and allowing the property to become dilapidated. He also omitted to keep the copyhold and leasehold estates "fully estated." On a bill filed by a tenant for life in remainder, one of the Vice Chancellors held that it was competent for the testatrix to impose upon J. W. Peters the obligation not to cut timber, although without such prohibition he could have done so; and as to other parts of the case, decided that J. W. Peters was under no obligation to repair, and was not liable for permissive waste, but that all losses consequent upon his omission to keep the property "fully estated" with three lives must be borne by his estate, and inquiries were directed as to these points, and it was from the whole of this decree that the representatives of J. W. Peters appealed.

This report is confined to the point of the restraint on the cutting of timber.

Mr. Glasse and Mr. Sandys, for the plaintiffs, in support of the Vice Chancellor's judgment, argued that the restriction was not illegal; and that even if there had been no words the Court would interpose to restrain equitable waste, and beyond this would compel restitution of the value from the estate of the tenant in fee. In addition to the cases cited in the Court below, they quoted the following:

Turner v. Wright, Johns. 740, 748; 2 De Gex, F. & J. 234; s.c. 29 Law J. Rep. (N.S.) Chanc. 470, 598.

Robinson v. Litton, 3 Atk. 209.

Stansfield v. Habersham, 10 Ves. 272, 277.

Wright v. Atkins, Sug. Law of Prop. 376.

Langdale v. Briggs, 8 De Gex, M. & G. 391, 420; s.c. 3 Dm. & Gif. 255; 25 Law J. Rep. (N.S.) Chanc. 100; 26 Ibid. 27.

Warren v. Rudall, 1 J. & H. 1; s.c. 29 Law J. Rep. (N.S.) Chanc. 543.

Mr. Martindale, for other parties in the same interest.

Mr. Bailey and Mr. Karlake, for the appellants, insisted that the restriction was an attempt to fetter the free action of the tenant in fee simple, and therefore illegal; and the contemplation in the view of the tes-

tator, of the succession of another person, made no difference. In the ordinary limitation of an estate tail to one party, with a remainder over, such a restriction would be invalid; and when, as here, the gift over was by way of executory devise, the same rule was applicable. If this were not so, the testatrix had herself provided a clause of forfeiture, which had been waived by not having been enforced against John Weston Peters in his lifetime. The learned counsel commented on the cases before referred to.

Mr. Glasse, in reply.

LORD JUSTICE KNIGHT BRUCE expressed his opinion to be that forfeiture was not the only remedy for breach of the condition, and that the executory devisee was entitled to be repaid the value of the timber cut by Mr. Peters beyond that timber which by the words of the will he was entitled to cut. Although technically the devisee was tenant in fee, still the intention of the testatrix was sufficiently expressed to restrain him as much as if he was a tenant for life impeachable of waste.

LORD JUSTICE TURNER concurred, and said he thought the forfeiture provided by the words of the will was intended only as a security for the performance of the condition, which condition it was the duty of the devisee to perform, although no forfeiture had been provided; and that the testatrix, by having given such an additional remedy, did not remove the remedy which would legally follow from the condition itself.

WOOD, V.C. }
Feb. 14, 16, } TOTTENHAM v. GREEN.
18, 20. }

Mortgage—Expectant Heir—Post-obit Security—Settled Account—Sub-mortgagees—Notice—Costs.

An account settled and signed by an expectant heir for the purpose of a post-obit security is not conclusive as between him and the person dealing with him; but the right of such heir to re-open the accounts does not extend to transactions not of a post-obit character forming items in the account.

NEW SERIES, 32.—CHANC.

A person giving a voluntary bond to an agent, in order that money may be raised upon it, is bound by his agent's acts, although he may receive no part of the money raised; but an assignee of the bond can only hold it as security for the actual amount advanced by him upon it.

The assignee of a post-obit security takes it with notice of all its legal incidents, including the right of the reversioner to open settled accounts between himself and the original mortgagor. Recitals in the mortgage deed of an account settled are not binding on the reversioner even as against sub-mortgagees.

Where a security is set aside on the ground of undervalue, costs are not given against the mortgagee; otherwise, where there has been misconduct.

The bill in this suit prayed that the lands comprised in certain *post obit* securities might be reconveyed to the plaintiff, and that certain bonds and promissory notes might be delivered up to be cancelled, upon payment by the plaintiff of such principal and interest as the Court should consider due to the mortgagees.

In 1852 the plaintiff, L. A. Tottenham, was entitled in fee-simple to certain real and leasehold estates in Ireland, subject as to the freeholds to the life estate therein of his father, and subject also, as to the whole, to certain charges, and to a power of appointment vested in the plaintiff's father, who was then an incurable lunatic, upwards of seventy years of age. The legal estate was vested in trustees.

The plaintiff, being in want of money, applied, by his solicitor, E. Flower, to the defendant, F. W. Green, and on the 17th of August 1852 the plaintiff executed a bond to F. W. Green to secure 516*l.* and interest at 6*l.* per cent., and an agreement of even date charging that amount on the plaintiff's interest in the above-mentioned property. The bond was further secured by a warrant of attorney, on which judgment was, on the 5th of October 1852, entered up in the Court of Queen's Bench in Ireland against the plaintiff. The sum of 516*l.* was made up, as F. W. Green averred, of thirty-three dozen of port wine, and of two bills drawn on F. W. Green by Flower for two sums of 200*l.*; but it

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appeared that the plaintiff had only received in respect of this transaction eight dozen of wine and about 25*l.* cash.

On the 7th of December 1852 the plaintiff executed a bond to F. W. Green, to secure 250*l.* and interest at 6*l.* per cent., and on the 31st of December 1852 a bond to secure 120*l.* and interest at 6*l.* per cent.

About the same time the plaintiff executed a bond and warrant of attorney to W. R. Windsor, clerk to E. Flower, to secure payment by the plaintiff of 400*l.* on the 1st of January 1853. No consideration was given for this bond, but the plaintiff stated that Windsor obtained the bond on the representation that he was about to obtain an advance of money thereon for the plaintiff. By an indenture dated the 8th of November 1853, Windsor, in consideration of 150*l.*, assigned the last-mentioned bond and warrant of attorney to F. W. Green absolutely, and, on the 9th of June 1854, F. W. Green entered judgment against the plaintiff in the Court of Queen's Bench, in Ireland, for the amount secured by this bond.

In 1856 the plaintiff again applied to F. W. Green for money, who agreed to make a further advance upon having a proper sum, to be paid on the death of the plaintiff's father, secured by a mortgage of the plaintiff's reversionary interest in the estates in Ireland.

During the negotiations for this advance F. W. Green produced to the plaintiff an account of the money alleged to be due from the plaintiff for principal and interest on the above-mentioned bonds and certain bills; and in such account the bonds were all charged at their full amount, and there was a charge of 86*l.* for insurance on the life of the plaintiff; the total amount by such account appearing due from the plaintiff to F. W. Green was 2,008*l.* 19*s.* 8*d.* F. W. Green told the plaintiff that such account was accurate, and refused to make the plaintiff any further advance unless he signed the account, and the plaintiff under these circumstances signed the account. On the same occasion, and under the same circumstances, the plaintiff signed a case for the opinion of an actuary as to the sum to be secured on the death of the plaintiff's father in respect of the money already

advanced by F. W. Green, and a further loan of 500*l.*

In the opinion of the actuary the proper sum to be secured on the death of the plaintiff's father, in respect of the above transaction, was 6,013*l.*, and the plaintiff agreed to such valuation.

By an indenture dated the 19th of September 1856, in consideration of the amount by the above-mentioned account found to be owing to F. W. Green, and of the further sum of 500*l.*, the plaintiff mortgaged his estates in Ireland to F. W. Green to secure the repayment of 6,013*l.* on the death of the plaintiff's father, with interest from such death at 6*l.* per cent. The plaintiff subsequently on several occasions applied to F. W. Green for further advances, for which he gave his promissory notes, receiving in return one-third of the amount expressed in such notes; and in 1859 F. W. Green refused to lend the plaintiff any more money without a further security. The plaintiff was then called upon to sign, and did sign, an account, by which it appeared that, apart from the secured debt, there was owing from the plaintiff to F. W. Green 3,363*l.* 19*s.* 6*d.*, being the amount appearing on the promissory notes above mentioned and interest. A case for the opinion of an actuary as to the amount to be secured on the death of the plaintiff's father, in respect of this sum, was signed by the plaintiff; and such amount was valued by the actuary at 4,696*l.* 17*s.* 2*d.* By an indenture dated the 17th of January 1860, the plaintiff mortgaged the same estates in Ireland to F. W. Green to secure the payment of 4,696*l.* 17*s.* 2*d.* six months after the death of the plaintiff's father.

F. W. Green subsequently mortgaged the principal monies and interest alleged to be due to him from the plaintiff, and the securities for the same, to various persons who were defendants in this suit. No inquiries were made on behalf of the sub-mortgagees of the plaintiff or his solicitor.

Mr. Daniel, Mr. Southgate and Mr. F. H. Colt, for the plaintiff, contended that under the circumstances these mortgages would not be upheld by the Court as against an expectant heir, and on this point cited the following cases:

Bromley v. Smith, 26 Beav. 644; s. c. 29 Law J. Rep. (N.S.) Chanc. 18.

Talbot v. Staniforth, 1 J. & H. 484;
s.c. 31 Law J. Rep. (N.S.) Chanc. 197.

St. Albyn v. Harding, 27 Beav. 11.

That the plaintiff was not bound by the accounts signed by him under pressure, for if such an account was held to be binding, the protection extended by the Court to expectant heirs might be readily evaded—*Chambers v. Goldwin* (1); that as between himself and the sub-mortgagees the plaintiff was not bound by the recitals in the mortgage deeds; and that the sub-mortgagees were not, in fact, purchasers for value without notice, and could not avail themselves of that defence, for it appeared on the deed that they were dealing with a reversion. On these points the following cases were cited:

Cockell v. Taylor, 15 Beav. 103; s.c. 21 Law J. Rep. (N.S.) Chanc. 545.

Parker v. Clarke, 30 Beav. 54; s.c. 6 De Gex, M. & G. 104.

Mangles v. Dixon, 3 H.L. Cas. 702.

Eyre v. Burmester, 8 Jur. N.S. 1019.

Williams v. Sorrell, 4 Ves. 389.

Norrish v. Marshall, 5 Madd. 475.

Bradwell v. Catchpole, 3 Swanst. 78.

The Solicitor General and Mr. Druce, for the defendant F. W. Green, submitted that the cases as to the first and second securities were quite distinct; that at any rate the first mortgage was valid; that there was no rule with regard to dealings with reversioners imposing on a purchaser the onus of proving that there was no fraud; that the purchaser had shewn that a fair consideration was given, and more could not be required of him. As to Windsor's bond and the amount for which it could be held as security, the following cases were cited:

Perry Herrick v. Attwood, 25 Beav. 205; s.c. 27 Law J. Rep. (N.S.) Chanc. 121.

Payne v. Mortimer, 1 Giff. 118; s.c. 4 De Gex & Jo. 447; 28 Law J. Rep. (N.S.) Chanc. 716.

Lord Aldborough v. Trye, 7 Cl. & F. 457.

Mr. Giffard and Mr. Eddis, for one set of sub-mortgagees, and *Mr. Rolt and Mr. Lindsey*, for the others, contended that in this case the legal estate was outstanding; that

this was not a chose in action, and therefore differed from *Cockell v. Taylor*. That if the sub-mortgagees shewed that they had given a fair value for the reversion more could not be required of them. And the following authorities were cited:

Cory v. Eyre, not reported.

Phillips v. Phillips, 31 Law J. Rep. (N.S.) Chanc. 321.

Bowen v. Evans, 1 Jo. & Lat. 263.

Joyce v. De Moleyns, 2 Ibid. 374.

Penny v. Watts, 2 De Gex & Sm. 501; s.c. 1 Mac. & G. 150; 19 Law J. Rep. (N.S.) Chanc. 212.

Rice v. Rice, 2 Drew. 73; s.c. 23 Law J. Rep. (N.S.) Chanc. 289.

The Attorney General v. Wilkins, 17 Beav. 285; s.c. 22 Law J. Rep. (N.S.) Chanc. 830.

Jones v. Smith, 1 Hare, 43; s.c. 12 Law J. Rep. (N.S.) Chanc. 381.

West v. Reid, 2 Ibid. 249; s.c. 12 Law J. Rep. (N.S.) Chanc. 245.

Wallwyn v. Lee, 9 Ves. 24.

Colyer v. Finch, 5 H.L. Cas. 920; s.c. 26 Law J. Rep. (N.S.) Chanc. 65.

Garrard v. Frankel, 30 Beav. 445; s.c. 31 Law J. Rep. (N.S.) Chanc. 604.

Mitford on Pleading, 274.

Wood, V.C. (Feb. 20).—In this case the bill is filed for the purpose of setting aside certain *post-obit* securities, one of which was executed in 1856 and the other in 1860, whereby there was secured to the first defendant on the record, F. W. Green, a considerable sum of money by way of mortgage and charge on the reversionary interest of the plaintiff in certain estates, to which he was entitled in fee, subject to the life interest of his father, and subject to a power of disposition which his father had, but which, at the date of the transactions in question, it was clear could never be exercised. The bill also brings before the Court as defendants those who have acquired interests in these mortgages through F. W. Green.

The first question as between the plaintiff and the defendant, F. W. Green, is, how far those securities can or cannot be supported?

As regards the second transaction, it is quite clear that it cannot be supported upon the principles which have been established in this Court between those who deal with expectant heirs and the expectant

(1) 9 Ves. 254.

heirs themselves, or, independently of that, on any contention whatsoever, the case being one, if not of gross misrepresentation, to say the least of it, of extraordinary errors; dealings took place subsequently to the first security on the express footing that the different notes and bills, given from time to time by the defendant Green to the plaintiff Tottenham, should be given as if they were on *post-obit* security in point of amount, that is, of *post-obit* value, if I may use such an expression. Then, when the security was given, of course all that had to be done was at once to convert the sums for which the notes and bills were drawn into a capital sum to be charged upon the estate; instead of which they, being already taken at *post-obit* value, were treated as a capital sum, and had a further *post-obit* value put upon them in order to create the security. Under the circumstances, it is impossible that that transaction can stand.

The whole question, then, arises upon the first security, given in 1856. With regard to that the case stands as follows. On the face of the security itself it appeared that an account was stated between the plaintiff and the defendant F. W. Green, by which it was found that a certain sum was due at the date of the security; 500*l.* more was to be advanced; and those two sums, making together about 2,500*l.*, were to constitute the debt in respect of which the postponed security was to be given, which postponed security was valued by an actuary upon a case then stated to him. The plaintiff agreed to the valuation so made, and the deed recited these facts. The draft was submitted to the plaintiff's solicitor, and the security was taken for the value thus put upon the debt, together with a sum of 94*l.* for costs. The question then arises, how far it was competent for F. W. Green to set up the account that was signed by the plaintiff at the time when or immediately before the security was given. If the Court were to hold that an account stated for the purpose of a *post-obit* security was to be conclusive upon the party signing it, the whole protection given to expectant heirs would be at once swept away, and the whole policy of the law on this subject could be readily evaded.

The next question arises on the different bonds and promissory notes which had been

given before the transaction in question. This is a totally distinct matter: the plaintiff is not in the same position as to setting aside the bonds, which were given without reference to the *post-obit* transaction. The protection extended by the Court to expectant heirs dealing with reversions does not extend in the least to the consideration which every person of full age may give *bonâ fide* for the purpose of securing monies advanced, and such transactions can only be impeached on the ground of fraud, alleged and proved; in the absence of such allegation and proof, the securities themselves must stand in the form and manner in which they have been given. Looking to the account, then, from this point of view, I must consider how far it was justified by the position of the plaintiff and F. W. Green, and the dealings between them. Of the securities mentioned in the account the one most objected to was the bond of the 17th of August 1852, which was a bond for 1,032*l.* to secure 536*l.* I do not think that at this distance of time F. W. Green can be called upon to prove the consideration for transactions which were not *post-obit* transactions; and it appears to me that with regard to all except Windsor's bond, sufficient consideration has been proved to justify the different securities that were given. As regards Windsor's bond, it appears to me clear that F. W. Green could not charge more than 150*l.* A man who trusts another with a security, especially if he trusts him with it for the express purpose of raising money, cannot complain if the security is so used. F. W. Green's own case is, that he purchased this bond for 150*l.* from Windsor, and although none of that money came into the plaintiff's hands, F. W. Green could not be held responsible for the acts of Windsor, the plaintiff's agent. The items in F. W. Green's account with Windsor do not appear to have been advanced on the security of this bond, and on the whole circumstances it seems clear that Green could not charge more than 150*l.*; that is material as to setting aside the mortgage security.

Then, as regards the 86*l.* charged for insurance on the life of the plaintiff, there appears to be no antecedent agreement as to that, and without such agreement it by no means follows as a matter of course that

there should be such an insurance. This statement of account cannot be relied upon under the circumstances; the plaintiff was in want of 500*l.*, and there is an addition of 86*l.* charged as a sum due *in presenti* from the borrower: then as regards the interest, there are overcharges of a nature which give a character to the whole transaction, and which alone have in several instances had great weight with the Court in setting aside securities of this nature independently of the question of value. The interest is charged upon several securities for four years, some of which had only three and a half and others three years to run, and although I should hesitate to say that the security must be set aside having regard to this fact alone, still when I look to the other circumstances and what afterwards took place, there appears to me to be great reason, as between the plaintiff and F. W. Green, independently of the question of value, for setting aside this security. But as regards F. W. Green, when once I am satisfied that 150*l.* only is to be allowed on Windsor's bond, then there is 250*l.* and a considerable sum for interest struck off the account, and that taken at the value the actuary puts upon it would be over 500*l.* off the amount secured. On the whole evidence, it is quite clear to me that the security was taken for an overvalue, and must be set aside. As between the plaintiff and F. W. Green the securities were good only for the sums actually advanced, with interest at 6*l.* per cent. on the amount secured by the judgments in Ireland and 5*l.* per cent. on the rest.

As regards the sub-mortgagees, the question is whether this Court can, as against a purchaser for value without notice, set aside a security at the instance of the person who has given that security. Where a purchaser takes an equitable estate, relief cannot be given by the Court against him because he has a superior equity to the person who seeks to set aside the transaction, but the meaning of this expression "without notice" must be considered. These sub-mortgagees had notice of the *post-obit* deed; and of course that gave them full notice of all that the law imports as to *post-obit* transactions; they are not therefore strictly purchasers without notice, but must be taken to have known all the

consequences of its being a *post-obit* security.

The Court, in dealing with *post-obit* securities, treats the expectant heir as incompetent, and the whole matter must be unravelled to ascertain what is the equity between the heir and the grantee as to the security. In *Peacock v. Evans* (2), the Master of the Rolls states it thus: "No difficulty would have arisen upon this case if it had not been that of an expectant heir dealing for his expectancy during his father's life. To that class of persons this Court seems to have extended a degree of protection approaching nearly to an incapacity to bind themselves by contract." In *Gwynne v. Heaton* (3) Lord Thurlow says, "There is a policy in justice protecting the person who has the expectancy, and reducing him to the situation of an infant against the effects of his own conduct." And in *Coles v. Trecothick* (4), where inadequacy was not in question, the present Lord Chancellor says, "The cases of reversions and interests of that sort go upon a very different principle." The principle he was then observing upon was inadequacy of price. "In some the whole duty of making good the bargain upon the principles of this Court is upon the vendee, as in the instance of heirs expectant." He called it the whole duty of making good the bargain. Then he says, "The tendency of this doctrine to render all bargains with such persons very insecure, if not altogether impracticable, seems not to have been considered as operating to prevent its adoption and establishment; but, on the contrary, some Judges have avowed that probable consequence as being to them the recommendation of the doctrine." Evidently Sir William Grant did not approve—if I may so say—of some of the doctrines laid down by Sir John Leech in *Shelly v. Nash* (5), and of the learned Judges who had the case of *Lord Aldborough v. Trye* before them. It is possible that the doctrine as to usury may happen to be modified by the legislature; but that is at present the law of the Court. He says (2), "In this case I think there is nothing approaching to fraud or imposition, yet it will not bear the test

(2) 16 Ves. 512.

(3) 1 Bro. C.C. 1.

(4) 9 Ves. 234.

(5) 3 Madd. 232.

of that severe scrutiny to which it must upon these principles be brought; as upon the whole of the evidence it is clear that Mr. Peacock has obtained a very advantageous bargain." In a subsequent part of that same case, I have noticed one thing which is not wholly irrelevant to the present case. Sir William Grant says, "Another circumstance appearing upon the face of the agreement is, that Evans intended to have and Peacock consented to give, thirty years' purchase abating the father's life interest valued at five years' purchase. That abatement being made, it was just the same as if the father had been dead; and the amount of twenty-five years' purchase ought to have been immediately paid down. Instead of that the payment was to be made by instalments, the last at the distance of two years and a quarter." That is much longer than in the case before me. In this case I noticed that bills were given instead of a cash payment, which, according to the original agreement, was to be the mode of payment. Then, Sir William Grant says, "This is material;—first, with reference to the accommodation which was the object of Evans; secondly, in point of interest: this distressed man was obliged immediately to raise money upon the bond, when, according to the true spirit of the agreement, he ought to have had the money in his possession immediately upon the conveyance." So it appears to have been the case here.

The protection which the Court affects to extend to heirs and other persons dealing with reversionary interests would be shaken to its foundations if the Court allowed those who take these *post-obit* securities to deal with them on the next day in the manner contended for by the defendants. I think that persons who take these securities as sub-mortgagees must take them with notice that they are *post-obit* securities, that they are liable to be unravelled in this Court, and can stand only as a security for the money actually advanced on them. The first transaction between the plaintiff and F. W. Green appears to have been a security in the common form for money advanced, bearing such interest as the security would properly bear; therefore F. W. Green ought not to be fixed with any costs of that transaction, and I think he ought not to be

allowed any; there has been evidently a grasping at too much in the account stated, and as regards Windsor's bond, looking at the manner in which the security was obtained and the mode in which interest was charged, F. W. Green's conduct cannot be approved of. I see no evidence approximating to fraud as regards the monies originally held; they were held on different securities, because there were prior charges, and any one of the prior incumbrancers could have sold the reversion and reduced F. W. Green's security to nothing; still there was such a pressure on the plaintiff, particularly as regards Windsor's bond, and the manner in which interest was charged, that I cannot allow any costs. As regards the other transaction, there seems to me to be no excuse. It appears from the authorities, that where a security is set aside on the ground of undervalue, costs are not given against the party; but where there has been misconduct, as in this case, they are rarely withheld. F. W. Green must, therefore, pay the costs of this transaction, but this does not affect the other defendants; as regards these sub-mortgagees they will have their costs, and are I think entitled to add them to their security.

Wood, V.C.
1862.

June 24;
July 9.

LORDS JUSTICES.
Nov. 6, 8, 21.

Wood, V.C.
Dec. 11, 12.

LORDS JUSTICES.
1863.
Jan. 31.

Re THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848.

Re THE SAXON LIFE ASSURANCE SOCIETY.

THE ANCHOR ASSURANCE COMPANY'S CASE.

THE ERA ASSURANCE SOCIETY'S CASE.

Re THE ERA ASSURANCE SOCIETY, WILLIAMS'S CASE.

THE ANCHOR ASSURANCE COMPANY'S CASE.

Joint-Stock Company—Power of Directors—Contract ultra Vires—Acquiescence—Mistake in Law—Cost of Creditors' Representative.

A clause in the deed of settlement of a joint-stock company gave power to the directors "generally, where these presents are silent or do not otherwise provide, to act in the

direction of the concerns of the society in such manner as at their absolute discretion they shall think most conducive to the interests of the society." Whether under such a clause it is competent to the directors to purchase the business and take the assets and liabilities of another company—*quære*.

Where, however, the shareholders had acquiesced in the amalgamation, and the dealings had been such that it was impossible to replace the companies in their original position, it was held to be too late to disturb the arrangement which had been made, whether within the power of the directors or not.

Semble—the Court has power to relieve against mistakes in law, as well as mistakes in fact.

Observations (*per* Wood, V.C.) as to the costs of the creditors' representative, and rule laid down (*per* Turner, L.J.) as to cases in which costs of the appearance of creditors' representative will be allowed.

The circumstances under which an amalgamation of the business of the Saxon Life Assurance Society with that of the Era Life and Fire Assurance Society was attempted to be effected will be found reported in 30 *Law J. Rep.* (N.S.) Chanc. 137. The Vice Chancellor there held that the 38th clause in the deed of settlement of the Era Society, by which the directors were authorized "generally, where these presents are silent or do not otherwise provide, to act in the direction of the concerns of the society in such manner as at their absolute discretion they shall think most conducive to the interests of the society," did not confer upon the directors the power to assume on behalf of their own company the debts and responsibilities of the Saxon Society; and consequently the claims of Mr. Williams and the Anchor Assurance Company, as creditors of the Saxon Society, now in course of winding up, could not be allowed against the Era Society under the winding up of the latter. The Anchor Company now sought to establish their claim against the assets of the Saxon Society on the ground that the amalgamation having been held to be void, they were remitted to their original rights as creditors of that company. The Era Society also carried in a claim against the Saxon for the sums paid by them in discharge of

the liabilities of the Saxon, so far as the same were in excess of the assets received.

Mr. Roll and Mr. Rodwell appeared for the Anchor Company.

Mr. Giffard and Mr. Reilly, for the official manager; and

Mr. Wilcock and Mr. Roxburgh, for the creditors' representative of the Era Society.

Mr. Daniel and Mr. W. Morris, for the official manager of the Saxon Society.

Scholefield v. Templer, 1 Johns. 155;

s. c. 28 *Law J. Rep.* (N.S.) Chanc. 452; 4 *De Gex & J.* 429.

Balfour v. Ernest, 5 *Com. B. Rep.* N.S.

601; s. c. 28 *Law J. Rep.* (N.S.) C.P. 170,

were cited.

WOOD, V.C. (July 9.)—In this matter of the winding up of the Saxon Life Assurance Society there are two claims, both of which arose in chambers. The first which was argued is a claim of the Anchor Assurance Company in respect of a sum of 1,312*l.* with interest, claimed from the Era Society under these circumstances. The Anchor Company originally held a bond or debenture to this amount from the Saxon Society. The Saxon Society afterwards came to an arrangement (which in a certain sense was so far sanctioned at chambers that the Court did not interfere to prevent it) for an amalgamation, as it is now termed, between themselves and the Era Society, a part of which arrangement was, that the Era should take all the liabilities and all the assets of the Saxon Society, and should give bonds for the debts of the Saxon Society, in lieu of the bonds which the creditors held from the Saxon Society. The Anchor Company, or those who represented them, were no doubt aware of the arrangement, and they yielded up the bonds which they held of the Saxon Society to that company, and in return took a bond from the Era as a distinct assurance altogether. In effect, it has been held by the Court, according to the class of cases of which *Ernest v. Nicholls* (1) is a leading type, that no demand could be made against the assets of the Era in respect of this debenture, inasmuch as the debenture was given for a transaction which the Era was

(1) 6 H.L. Cas. 401.

not competent to bind its shareholders by entering into, and accordingly the claim as against the Era failed entirely. It has been held, that the bond, which was given in substitution for the bond which the Anchor held of the Saxon, and in which the whole transaction originated, was an entire nullity. That, of course, makes the case differ very largely from the class of cases where, from some subsequent cause or other the bond may fail. It is not a failure of the consideration in consequence of subsequent circumstances, such as the insolvency or otherwise of the person whose bond has been given; but it is a transaction which was originally absolutely void, no consideration whatever having passed between the Anchor Company as creditors and the Era Society as debtors. That which purported to be the consideration was the bond of the Era Society, and that bond was *ab initio* an utter nullity. But difficulties no doubt arise, which occurred in a different form in the case which I have next to decide. It was said that the Saxon Society altered their position: in consequence of this dealing with the Era Society they have supposed themselves to be entirely free from the liability of the engagement which they had entered into with the Anchor. They have supposed that that had been transferred to the Era, and that in truth it was part of the consideration for entering into the dealing which they did enter into with the Era, and which dealing cannot now be unravelled: consequently, the position of the company has been so changed that the Anchor Company cannot now insist upon being replaced in the situation which it originally occupied. Now I do not think that that in point of fact has occurred, because, although it is quite true that the Anchor Company were aware of the arrangement, and knew all that was about to be done, it is impossible, I think, upon the evidence before me, to hold that the circumstance of the Anchor simply releasing their debt from the Saxon, and taking the debt of the Era, was that which led to the dealing between the two companies. The dealing between the two companies was absolute. The Era and the Saxon dealt for their own benefit, as they each considered it to be at the time, with each other. Those who represented the

Anchor obtained in truth no consideration, unless, possibly, they thought the bond of the Era a better security; but, if they thought that, they were under a mistake, inasmuch as the whole thing is a nullity. At the same time, it does not appear in any way that those who represented the Anchor procured the arrangement, or that this was done for any other purpose than to accommodate those who were anxious to make that arrangement. Two parties being anxious to make an arrangement of this description, both sides assuming, as of course they did, that the bond of one was as valid in law as the bond of the other, the creditor says, he is quite content to take the bond of the one for the bond of the other. It comes to no more than that, and it seems to me a simple transaction founded upon a common mistake, and one in which the position of neither party has in the slightest degree been altered or damaged by any act of the creditor or on his account.

Now, some little difficulty crossed my mind, because I was aware that the matter had been a good deal discussed at different times, as to how far this Court will interfere where a common mistake is simply one of law, and not a mistake in fact. I have been looking over the settled authorities on the subject, and I find one of the latest, in which all the different authorities were cited, is a case of *Stone v. Godfrey* (2). There a person had taken advice and was advised that he was not tenant by the courtesy, and in consequence of that advice he had done certain acts, believing that he had not the rights of a tenant by the courtesy, and he filed a bill to set those transactions aside; a variety of dealings and transactions having taken place subsequently, it was held both by the Vice Chancellor and by the Lords Justices that he was too late. In *Saunders v. Lord Annesley* (3), Lord Redesdale expresses a doubt as to how far the Court will interfere in cases of mere ignorance; but Lord Justice Turner said, in *Stone v. Godfrey*, that he had no doubt of the power of the Court to relieve against mistakes in law as well as against mistakes in fact. Therefore, it appears to me in this case that the Anchor Company

(2) 1 Sm. & G. 590; s. c. 5 De Gex, M. & G. 76; 23 Law J. Rep. (N.S.) Chanc. 769.

(3) 2 Sch. & Lef. 73, 101.

are entitled to be replaced in the position of creditors of the Saxon Society from the time the bond was taken.

Now, the case of the Era Society, which took upon itself these liabilities in the character of one of the principals to the engagement between the two companies, is of a different complexion. They, just as much as the Anchor Company, no doubt, were fully satisfied that the transaction was a legal one. Both parties thought there could be no question of that; and in a certain sense, no doubt, it may be said to have had the sanction of the Court, inasmuch as there was an order in chambers staying the winding up of the Saxon, in consequence of this treaty for amalgamation. The arrangement was for one company to hand over all their assets and for the other to take all the liabilities; accordingly, all the assets of the Saxon are handed over and the Era takes them. It now finds that the assets as far as they admitted of realization were less than the debts paid by an amount exceeding 3,000*l.*, and now the claim of the Era is to be allowed to prove that as a debt against the Saxon. The position of things here is very different. This is a treaty between the two companies in which for a consideration the Saxon Society gave up the whole of their property, including their policies, and of course the goodwill of those policies, and the place of carrying on business and all the possibility of obtaining from that goodwill the increased custom which they might have the benefit of. All that has been handed over and passed away and been wholly taken out of their hands. That was a consideration which the Era Society evidently thought of value. They say they have been misled as to the debts of the Saxon. I do not think that any case of fraud, or anything approaching to it, has been made out. There may have been some miscalculation; but it does not appear to me that there was anything in the shape of fraud or misrepresentation of that character which would justify the Era Society in saying the transaction should be set aside as fraudulent. It can only stand, like the other transaction, on the ground of its being founded on a common mistake. But then the question arises whether the two parties can be replaced; and it appears

to me that the difficulty that exists is extremely great. I cannot put the assets of the Saxon Society back into their hands, or start it again as a new company with all the subscribers and insurers; and when I come to the substantial justice of the case, I have the gratification of finding that substantial justice is done, and more than done, because the contract was to take all the assets and pay all the debts; they have had all the assets and not paid all the debts, because there are many, like this of the Anchor, which have been held not to be provable against them. It appears to me, therefore, that they really have had every benefit which they contemplated when they entered into the new engagement, although the bargain, no doubt, has proved to be a bad one. The case of *Balfour v. Ernest*, cited by Mr. Giffard, did not decide the point for which he cited it, namely, that a company in this position entering into a void engagement with another to take all their assets is, after taking all their liabilities, bound even at law to refund that property which it has held, even upon a contract which cannot be sustained at law. I am quite willing to assume that it is so; but I do not find it to be decided in the case which has been cited. But even if that be so, it does not follow that the corresponding equity will arise of their being replaced so as to bring in against that original company those debts which have been paid in pursuance of the contract, because it may very well be that by placing both parties in exactly the same position as they were in, where you can do it, you do complete justice and are entitled to relieve either party from the mistake which has been made; but it is entirely different where the assets cannot be handed back and the goodwill cannot be returned. It appears to me, therefore, that I must allow the claim of the Anchor Company, and disallow that of the Era. As to the costs of the creditors' representative of the Era Society, His Honour said it had been decided by the superior Court that he was entitled to appear on all occasions where the assets were concerned; he did not know why it had been so decided, though, no doubt, there were good reasons. He would have been entitled to appear at chambers to know whether a bill should be filed,

and then, when directions were given for a suit he would not appear, because the official manager would be the plaintiff. This was more in the nature of a claim made at chambers and the creditors' representative must have his costs.

Nov. 6 and 8.—The official manager of the Era Assurance Society appealed, as did also the official manager of the Anchor Assurance Company. The latter appeal was, after some discussion, ordered to stand over until their Lordships had disposed of the Era appeal (4).

Mr. Giffard and *Mr. F. S. Reilly* supported the appeal.

Mr. Roxburgh appeared for the creditors' representative of the Era Company.

Mr. Daniel and *Mr. W. Morris*, for the official manager of the Saxon Company.

Mr. Giffard, in reply.

The additional cases cited on the appeal were :

Ernest v. Nichols, ubi *suprà*.

Re the Era Assurance Company, 2 Johns. & Hem. 400 (the present case).

Bryson v. the Warwick and Birmingham Canal Company, 4 De Gex, M. & G. 711; s. c. 23 Law J. Rep. (N.S.) Chanc. 133.

Stone v. Godfrey, ubi *suprà*.

LORD JUSTICE KNIGHT BRUCE (Nov. 21).—This is an appeal from an order of Vice Chancellor Wood, refusing to accede to an application to treat the deed of August 1857 as not binding upon the Era Society. The appeal has been fully and ably argued before us; and it remains for us to say whether, in our opinion, that original application ought or ought not to have been successful. To myself it appears, however, that the deed in question bound, and continues to bind, both the Era Society and the Saxon Society and their members and estates respectively; and that even if it had not been binding originally it has become so before the year 1859 by acquiescence and conduct. It is impossible for the Court now to act against the deed, or to disturb the arrangements made by it, and he thought that the appeal had wholly failed.

(4) Ultimately, after the Era case had been disposed of, their Lordships a few days after remitted the Anchor case back to the Vice Chancellor.

LORD JUSTICE TURNER.—The Era Society was registered under the statute 7 & 8 Vict. c. 120, and the Saxon Society was also registered under the same act. The agreement of July 1856 was to some extent modified by the subsequent deed in August 1857. After the agreement of July 1856, but before the deed of August 1857, an order was made to wind up the Saxon Company, and that order was dated in January 1857. Upon this certain fresh arrangements were made, which led to the deed of August of that year. In pursuance of this deed the Era took possession of the Saxon Society's business, and removed it to their own premises, got in various credits, paid various debts, and granted various new policies in the place of policies which had been granted by the Saxon, and acted, in short, as owners of the purchased property. By an order, dated the 29th of May 1858, the Era Society was also ordered to be wound up, and an official manager was duly appointed. After the winding-up order, the creditors of the Saxon Society applied for leave to prove their debts against the estate of the Era Society. Their right to do so was disputed, and the application was ultimately refused by the Vice Chancellor, on the ground that the agreement was void. The Era Society had paid on the account of the Saxon Society a larger sum than had been received on account of its assets, and the Era, by its official manager, applied to prove for the excess of payments over receipts. That application was also refused by his Honour, and thence arose the present appeal. I agree with the Vice Chancellor's conclusions. The case of the appellants cannot be maintained on any other ground than that the deed of August 1857 was absolutely void, so far as the Era Society was concerned. If that deed were not absolutely void, it must prevail, so long as it was not set aside; and upon the evidence before the Court there appears to be nothing to impeach it. It was contended that it was absolutely void, as being *ultra vires* as to both of these companies. Whether it was so as to the Saxon, I will say nothing; but, looking to the deed of settlement of the Era Society, I think that it was within the power of that company, with the consent of a general meeting, to enter into the agreement, and to bind themselves by it. It

was said that the Era had no power to take to the assets, and to subject themselves to the liabilities of the Saxon Society. But those were the terms of the agreement itself; and if they had power to purchase the business, they must have the power to carry into effect the terms of the purchase. To say that the Saxon Society had no power does not affect the case. The only effect of that would be, that the Era had bought a property with a bad title; but that title, assuming it to be bad, had never been disturbed. The remedy of the Era Society would be on the covenants of their deed, and on examining the deed of purchase I find that it contains no covenants whatever on the part of the Saxon Society. The covenants which it contains were entered into by certain shareholders of that company, who were evidently made parties for that purpose. This circumstance has a material bearing upon the question. If, according to the terms of the deed, the Saxon Society was not made liable to the Era under those covenants, it is difficult to see how it could be made liable to the official manager of the Era Society under the winding-up order. Upon these grounds, then, without entering into the question upon which his Honour so much relied, namely, the effect of the change of the position of the Saxon Society (as to which, however, I agree with that learned Judge) I think that this appeal has failed, and that it must be dismissed, with costs.

Mr. Daniel and Mr. W. Morris (Dec. 11) appeared before his Honour Vice Chancellor Wood, and on behalf of Mr. Williams supported the validity of the amalgamation.—If it was not within the original powers of the directors, it had been rendered valid by acquiescence; and it would be impossible now to replace the parties in the position in which they stood before the amalgamation.—

Simpson v. the Westminster Palace Hotel Company, 2 De Gex, F. & J. 141; s.c. 29 Law J. Rep. (N.S.) Chanc. 561.

Ex parte Brotherhood, re the Agricultural Cattle Insurance Company, 31 Law J. Rep. (N.S.) Chanc. 861.

Ernest v. Nichols, ubi supra.

Mr. Rolt and Mr. Rodwell, for the Anchor Company, supported the same view.

Mr. Giffard and Mr. Reilly, for the official manager; and—

Mr. Willcock and Mr. Roxburgh, for the creditors' representative of the Era Society.

Kirk v. the Bromley Union, 2 Phill. 640; s.c. 17 Law J. Rep. (N.S.) Chanc. 127: reversing s.c. 16 Ibid. 114.

Re the Phoenix Life Assurance Company, 2 Jo. & H. 441; s.c. 31 Law J. Rep. (N.S.) Chanc. 749.

Clay v. Rufford, 5 De Gex & Sm. 768.

WOOD, V.C. (Dec. 12).—In this case the two cases of Mr. Williams, and the Anchor Assurance Company, claiming to be creditors of the Era Assurance Society, have been brought before me for rehearing under the following circumstances. On a former occasion, the case appearing to be this, that both in Mr. Williams's case and the Anchor case all the debts were originally the debts of the Saxon Assurance Society, and became, if not all, nearly all, the debts of the Era Society, owing to the Era Society having purchased the whole business of the Saxon, and having, in consideration of such purchase, agreed to pay the debts of the Saxon, and not only having agreed to pay those debts, but having entered into a specific contract with the particular creditors, both Williams and the Anchor Company, to pay their particular debts, that being part of the consideration for the purchase of the Saxon business, I came to the conclusion that the purchase of the Saxon business by the Era Society was not within the powers of the directors of the Era Society, even though sanctioned by a meeting of the general body of the shareholders; but that it was altogether a matter not authorized by the deed, and not one, therefore, by which the other shareholders could be bound; and accordingly the debts could not now be established as against the Era Society. The question of acquiescence was also urged on the former occasion; and it was said that although it might not be considered to be within the original power of the deed that such a purchase should be made and such a consideration given, there had been such dealings and such transactions between the two companies, that it must be taken to

have been known to the general body of the shareholders; the shareholders, in fact, being aware, as far as public meetings and resolutions at meetings of shareholders could give them information, of what had been done; and it was questioned whether matters had not proceeded to such an extent that it was impossible now for the shareholders of the Era to complain of that which had been done; whether, in fact, they must not be taken to have assented to that which had been done, although it might not have been originally within the power of the directors to bind them. Those were the two points discussed; and I came to the conclusion, that it was not within the original power, and that there was not such a degree of acquiescence as could bind the shareholders, and accordingly the debts could not be proved. Upon a subsequent application by the Era Society to prove the amount of debts which, by virtue of that agreement which I had, in effect, held not to be valid, they alleged they had paid over and beyond the amount of the assets which they had received from the Saxon as part of the consideration for which they had undertaken to pay the debts, I was of opinion that matters had proceeded much too far between the societies for me to allow the Era now actively to resort, by application to this Court, to a remedy against the Saxon after they had taken possession of their assets, and put themselves in such a position that it was impossible for the two companies to be replaced in their former state, the whole of the business, not only the policies, but the goodwill, having been transferred, and there being, therefore, a state of things in which justice could not be done by allowing one party, who had had the full consideration for the agreement, now to say, upon the agreement itself being considered to be invalid, that he must be recouped certain monies which he had paid upon the faith of that agreement being carried into full effect. That was the view I took of the case at the time.

Now, when that latter case came on appeal before the Lords Justices, the whole matter being before them for consideration, they, agreeing in the conclusion I had come to, and therefore affirming the decision, did

not concur in the grounds upon which I arrived at that conclusion. They expressed no opinion against my decision, upon the ground that matters had gone too far to be recalled; in fact, that might be considered as falling within the doctrine of acquiescence; but they rested it upon a much higher ground. Lord Justice Knight Bruce distinctly rested it upon the acquiescence of the two companies, so that the agreement was put in a position in which neither party could refile from it. That was distinctly the ground of his decision; though he also threw out an intimation of opinion, if I may say so, that the original contract might be binding, though he did not say so positively. Lord Justice Turner, who went more minutely into that part of the case, undoubtedly arrived at a clear and distinct opinion that the agreement was within—I will not say the original scope and object of the company's deed—but within the power of the directors, sanctioned by a committee of shareholders, as connected with the original scope of the business to be conducted by the society.

There are two points which now arise upon this rehearing, from the new light which I have derived from the judgment of the Court above, upon the other case: first, whether or not I ought now to hold that this amalgamation, as it is termed, is within the power of the deed, regard being had to the original scope of the society, and to the powers with which they have invested their directors, for carrying on the business in such a manner as should best conduce to the attainment of the objects of the society, and the power of sanctioning the resolutions of the directors by the vote of the society in general so as to bind all parties; and, secondly, if I should not be of that opinion, whether there has been a degree of acquiescence which prohibits either company from now saying that the arrangement is not to be carried into full and complete effect; and if on either of those two grounds I consider that the arrangement is now one that cannot be disputed, then Mr. Williams and the Anchor Company ought to be admitted to prove.

I should notice, of course, that I felt at the time, and still feel, that there is a considerable difference between the case of

the Era Society asking to be recouped after having possessed themselves of the whole of the assets, and the case of the members of the Era Society, as to their liability to debts which have not yet been paid, and engagements and transactions not yet completed, and which they are now for the first time called upon to pay and complete. There is that distinction undoubtedly; but if I come to a clear conclusion on either of the two points I have mentioned, Mr. Williams and the Anchor Company should be admitted to prove.

Now, notwithstanding all that I have heard, with the assistance, I confess, of Lord Justice Turner's judgment, the doubt, or rather the opinion, which I decidedly then entertained that the amalgamation, as it is called, was not within the scope of the original contract (and which, I think, the Lord Justice scarcely seems to differ from) as to the character of the business, but further, that it was not within the power of the directors or of the society to enter into any such engagement as that for the so-called amalgamation; I say that opinion I then formed, though unquestionably shaken by such a difference of opinion as that expressed by Lord Justice Turner, and to which, though a dictum only, I am bound to give implicit obedience, I confess is not changed. I cannot myself conceive at present, notwithstanding that assistance, either that it was within the original scope of a society forming itself to carry on insurance in a given mode known to all insurance companies, trusting to the skill and judgment of its directors for carrying on that business, or that it is within the ordinary scope of such a body to purchase in entirety the business of another society, or fourteen companies, as was the case in one instance. As regards its being within the original scope, I at that time relied upon the opinion of Lord Cranworth (it was a dictum only) in moving the judgment of the House of Lords in *Ernest v. Nicholls*. He says, "Your Lordships will observe that the transaction in question was a purchase by the one company of the goodwill and the whole concern of the other. That would, ordinarily speaking, be a transaction in which no company would be justified in engaging, because it

certainly cannot be said to be within the ordinary scope or the object of any company to purchase the goodwill of another." I confess I entirely agree with that opinion. It seems to me that taking the instance which Mr. Daniel suggests of a company for the manufacture of cotton, it might well be that a gentleman of capital would engage as a sleeping partner with one well versed in the business of manufacturing cotton, confident in his skill and judgment, and quite satisfied that his capital should rest there; but I think he would be surprised to be told that his partner had power against his will to bind him in buying as many cotton businesses as he pleased, when he has not the same confidence in his judgment to carry on the business of another, or in his tact or management in undertaking so large a concern, for the considerations are entirely different where the chances of fraud or deceit are of a totally different character from those which might arise with respect to the business in which he engaged; and it is not because the business purchased is exactly analogous to the one in which he was engaged that it can be said that an ordinary partnership for manufacturing cotton would authorize the purchase of other manufactories with all their debts and all their liabilities, although they had been established for the same purpose. I still feel that very strongly with regard to the Era Society; and I do not think that Lord Justice Turner would differ as to its being within the ordinary scope, because he refers to the deed as giving peculiar powers, enabling directors to do that which otherwise would not be within the ordinary scope and range of the business of the society. He refers to the power of the directors under the 38th clause, by which they are authorized to do all that is conducive to the interests of the society, which may be omitted in that deed; and then a general power is given to the shareholders to ratify all that may be done by the directors so as to bind everybody. That, no doubt, is a very different matter, and opens the question which was raised. Mr. Daniel says that on the former occasion the case of *Simpson v. the Westminster Palace Hotel Company* was cited before me, where, under a similar power, it

was held that if the directors, always having the intention of availing themselves of the building as an hotel, thought it most conducive to the interests of the company and the best mode of carrying on the business, to let for a time a portion which they could not open as an hotel at the time, that was within the general scope of the power of doing that which was conducive to the interests of the company. I said, when the case was argued before me, that it was a very large question, and I should be glad to have it decided by an authority to which I must bow. These powers are, I may say, in the common form of powers given to directors, and I am the more confirmed in that observation because, on looking back to the case of *The Eagle Insurance Company* (5), I find not only that the same words occurred, but that they were in the same clause (No. 38) of the deed. I have no doubt whatever they are a set of cut and dried clauses which will be found in almost every deed; and therefore it is most important to know what is the extent of the authority which is conferred by these clauses. It is a case of very large importance, undoubtedly, to all shareholders engaged in concerns like the present. I there held, that where the engagement was, that the company should not be bound except by an instrument under the seal of the company, signed by three of the directors; an agreement by three of the directors, not under seal to execute a policy was within the general scope and power, because in truth it would come to this, that the company would not be legally bound, but only bound in equity; and the question was whether, under that general power, the directors were not enabled to enter into an agreement which would result in an instrument according to the expressed objects of the company in the very form authorized by the deed. I found that clause had the effect, and I continue to be of the same opinion. But the question that weighs on my mind is, whether the power to do all that is conducive to the interests of the society does not involve also that it must be something that is not *dehors* the scope and object for

which the society was originally formed. No doubt, the case of *The Westminster Palace Hotel Company* is analogous, but the analogy does not go so far as to authorize me to come to the conclusion I have referred to.

The second point, about acquiescence, has occasioned me very great consideration. Undoubtedly, the difficulties are very great, as Mr. Giffard argued, in saying that shareholders, if not originally bound, are ever to be bound by acquiescence in that which there is very great difficulty in supposing they ever became cognizant of in any way, where the only mode of making a company cognizant at all with what is done is by calling a meeting at which infants and other persons under disability cannot attend, and cannot, therefore, take part in the transaction, or be said to acquiesce; at the same time I find that both the Lords Justices in this particular case concur in coming to a very strong opinion that there had been complete acquiescence; and certainly authorities are not wanting that when a company has received large benefits, as was the case with *The German Mining Company* (6), having acquiesced in what has been done, they shall be bound. But my great difficulty is this: the affirmation of the judgment in the case between the Saxon and the Era Societies is beyond a dictum. The Lords Justices do not adopt the *ratio decidendi* of this Court; but it has been distinctly decided, upon the ground that as between these two societies themselves there has been a complete acquiescence though not as between the shareholders and their directors, so that the shareholders could not complain of what the directors had done in pursuance of it. Between the two societies themselves there had been so complete an acquiescence as to present an insurmountable bar to any steps taken by the shareholders of the Era Society, whom I had taken, and still conceive not to be capable of originally consenting to the transaction. I am far from saying that great justice may not be done by that conclusion, regard being had to the special circumstances of the case. No doubt, in

(5) 4 Kay & J. 549; s.c. 27 Law J. Rep. (N.S.) Chanc. 829.

(6) 4 De Gex, M. & G. 19; s.c. 22 Law J. Rep. (N.S.) Chanc. 926; 24 Ibid. 41.

this very case all the assets out of which the debts of the Saxon Society could be taken, have come to the hands of the Era Society, and have been dealt with by them, and cannot be reached again by the Saxon. There is no possibility, therefore, of putting the Saxon Society again in possession of those assets. Further than that, there is the goodwill, which cannot be dealt with in any way. New policies were granted. In truth, the contracts between those who insured in the Saxon Society and the Saxon Society were annihilated at once, and new contracts were entered into by the Era Society, and new funds acquired by the premiums so paid upon those contracts, and there was on the one hand a total appropriation of all existing funds, whatever they might have been, and on the other hand, an absolute prevention of the Saxon Society having claims in respect of those funds, inasmuch as they could not, having once parted with the property, secure any reinstatement of their business.

Now, if the contract is to be maintained, of course the consideration must be maintained. The consideration seems to have been to pay these sums of money, and although I have some doubt on my mind, I feel it ought to be overruled by the strong expression of opinion on the part of both the Lords Justices, amounting in fact to more than an opinion, because it appears to me to have been the grounds upon which the whole case was determined; and I ought now, under all the circumstances, not to put the parties to the expense of proceeding further, although, of course, if I entertained a strong opinion, as I do, upon the other point, it would not be right in me, even then, to avoid that inconvenience. But I do not feel upon the point of acquiescence quite so strongly as upon the other, and therefore I think I ought to allow these two proofs to be made.

Mr. Willcock and Mr. Roxburgh asked for the costs of the creditors' representative. —It was of the greatest importance to the creditors that he should be present to protect the assets. The only case in which the Lords Justices had declined to give the creditors' representative his costs was that of *Ex parte Cotterell, re the National*

Assurance and Investment Association (7), which was the case of an appeal, where he was neither appellant nor respondent. If he were not allowed his costs in a case like the present, it was difficult to conceive any case in which he would venture to appear—*Re the Mexican and South American Company (Costello's case)* (8).

WOOD, V.C.—I cannot think that the statute was intended to saddle unfortunate contributories in winding-up matters with two sets of costs in every possible case that can be devised. One can easily conceive some case in which both the official manager and creditors' representative may properly appear, because they may appear in entirely different capacities, and many reasons may be suggested why the creditors' representative cannot reasonably intrust the defence to the official manager; but in cases where it can be done it seems to me a monstrous thing that the estate should be burdened with a double set of costs. In this particular case, where it is said the creditors' representative got an order to attend, I think the proper thing will be to treat this as in chambers, and allow the costs of the creditors' representative, but, so far as he is concerned, not to certify that it is a proper case for counsel.

Jan. 31, 1863.—From the last part of the above decision the creditors' representative appealed.

Mr. Willcock and Mr. Roxburgh, in support of the appeal, referred to the statute 20 & 21 Vict. c. 78. (the Joint-Stock Winding-up Amendment Act, 1857) ss. 1, 3, 4, and contended that there could be nothing more material to the interests of the creditors than the allowance of claims against the society, which tended to diminish the fund out of which the creditors were to be paid; that the Vice Chancellor had, in effect, decided that the creditors' representative properly appeared by giving him his costs of the application, and the only way in which he could appear in court was personally or by counsel; that as the act of parliament provided that the creditors' representative

(7) *Ante*, p. 66.

(8) 30 Law J. Rep. (N.S.) Chanc. 113.

was to have his reasonable costs, it followed that the necessary costs of his appearance in court ought to be allowed; and that this appeal had been presented more with a view of obtaining some intimation from the Court as to what proceedings the creditors' representative was entitled to attend, than as to the particular costs in question, which were not large in amount.

Mr. F. S. Reilly, for the official manager, said, he considered the present to be a case in which it was not his duty to interpose, but would leave the matter in the hands of the Court to be disposed of as their Lordships might see fit.

LORD JUSTICE KNIGHT BRUCE.—This is a question in which the matters in dispute have been discussed on several previous occasions. The creditors' representative and the official manager having the same interest, the Vice Chancellor considered that on that particular application, although the general costs should be allowed, there was no ground on which as to that particular application the expense of counsel should be allowed. It is for the party who contends that the discretion of the Vice Chancellor was erroneously exercised to shew that such was the case. In this case that has not been done. My impression is, that he has properly exercised his discretion, and that it has not been unduly exercised.

LORD JUSTICE TURNER.—I am not sorry that the case has come here, as it is important that some general rule should be established. Great expense has been caused by the operation of the statute 20 & 21 Vict. c. 78, which directed two parties, the official manager and the creditors' representative to be served with notice of all proceedings; and great expense has been thrown on estates in consequence of that statute. It is our duty to lay down some general rule, to be applied to cases of this description, to prevent the enormous expense occasioned by the creditors and the contributories both appearing on every occasion. It seems to me right as a general rule (although it is of course impossible to lay down a general rule applicable to all cases and all circumstances), that where the creditors and the contributories have common and equal interests, the creditors' representative ought

not to appear on the application, but should leave the case in the hands of the official manager. Where any question arises between the creditors and the contributories, then the application is properly attended both by the creditors' representative and the official manager—one representing the creditors and the other the contributories. On the present question it is perfectly clear that both creditors and contributories have a common interest, and an equal interest, in resisting this claim. In truth the contributories have a greater interest, for if they had succeeded in throwing out the claim they would have had more chance of getting something out of the estate. It was therefore more the interest of the contributories than of the creditors to resist this claim. Under these circumstances, at all events, the creditor and the contributories had equal interests, and I rather think the contributories had the greater interest. I think, therefore, this case was not a case for the creditors to appear on this proceeding. It has been decided that on settling the list of contributories the creditors' representative is entitled to his costs. But there is a great distinction between settling the list of contributories and resisting a claim of debt made against the estate. On settling the list of contributories the official manager has a very limited interest, as all he has to do is to get on the list certain persons who are liable to contribute among themselves; but the creditors' representative has a very great interest, as by getting a particular person put on the list he makes that person liable to pay the debts due to the creditors. There is, therefore, a great distinction between settling the list of contributories and resisting a claim of debt. I think in the present case the weight of interest was with the contributories, and the creditors' representative ought to have left the matter in the hands of the official manager; but I think the question was properly brought before the Court, as it was important that a general rule should be laid down, and the motion will therefore be refused, without costs (9).

(9) As to the costs of creditors' representatives, see *Ex parte Cotterell*, *ante*, p. 66.

ROMILLY, M.R. }
 Nov. 20, 21. } WEBB v. DE BEAUVOISIN.

Will—Debts—Residue—Exoneration—Costs.

A bequest to trustees of a specific fund, for purposes mentioned in the will, with a direction "that it shall be liable to, and applicable by, the trustees to the payment of the debts, testamentary and other expenses and legacies,"—Held, not only to exonerate the residuary estate from debts, &c., but also to render the specific fund liable to the costs of a suit for the general administration of the estate.

William Webb, by his will, dated the 14th of September 1860, desired his debts, &c., to be paid so soon as conveniently might be after his decease; and after reciting that he was possessed of various leasehold houses which he specified, and also of shares in two railways and several sums of government stock, he said: "Now, I hereby give all and several the houses, shares, stock, and any other houses, shares or stock of which I may be possessed at the time of my decease, to Auguste Mariot de Beauvoisin and Lewis Wilcher, in trust for the uses and purposes hereinafter directed, namely, that they, the said trustees, shall hold the said houses, shares and stock, *subject to the provisions hereinafter made*, in trust, firstly, for my wife Sarah Webb during the term of her natural life, paying over to her from time to time, as such may become due and received, all and every the profits and dividends arising therefrom, for which the receipt of my said wife shall, *subject to such provisions*, be a full and sufficient discharge. * * Provided always, *that the principal sum of the said trust-funds shall be liable to and applicable by the said trustees to the payment of my just debts, testamentary and other expenses and legacies under this my will*; and I authorize and empower my trustees to sell and dispose of the said houses, shares or stocks in the manner in which they may think best; but they re-investing the balance of the proceeds thereof immediately thereafter in government or real securities for the trusts and purposes herein named."

The testator then declared that his wife should forfeit her life interest in certain

events, and that the trustees should hold the houses, shares and stocks for his child or children, and in the event of the death of his wife or the forfeiture of her interest, the interest was to be applied for their maintenance till twenty-one, when the property was to be sold and divided at the discretion of the trustees among the children, "but in all cases the principal sum of such trust property or funds *should be subject to the provisions herein made.*" The testator at the death of his wife then gave two legacies of 100*l.* each, and directed the houses, shares and stocks to be sold and converted into money by the trustees, and the proceeds divided in manner following, namely, 100*l.* each to the before-mentioned A. M. de Beauvoisin and Lewis Wilcher, and the remainder to my cousin Thomas Fricker. And after directing his trustees to reimburse themselves "all just and necessary expenses," the testator said, "I further give and bequeath to the said A. M. de Beauvoisin and L. Wilcher, to and for their own use and benefit, the sum of 50*l.* each; and will, *that subject to the provisions herein made*, they be joint residuary legatees of all lands and personal estate to which I may be or become entitled in possession, reversion, remainder, or expectancy."

The testator appointed Messrs. De Beauvoisin and Wilcher his executors, and died shortly after making his will, without leaving any child or other issue surviving.

This bill was filed, by Sarah Webb, the testator's widow, against the executors for the administration of the estate, and claiming to enjoy in specie the leasehold messuages and the rents and profits thereof. It also alleged that the defendants claimed their respective legacies, and also the residue of the testator's estate, free from any deduction on account of debts, funeral and testamentary expenses, and stated doubts as to whether the testator's estate ought or not to be converted and invested during her life.

Mr. Lloyd and *Mr. Kingdon*, for the plaintiff.—The residuary estate is the primary fund to pay debts, &c., and the costs, charges and expenses incident to the administration of the estate. Specific legacies could only be charged by specific words clearly expressed; inferences could not be made in the present case. The general estate was not exonerated; the words "the

principal sum of the trust funds" means no more than that the entire estate should be liable in the event of the residue being insufficient.—

Sanders v. Miller, 25 Beav. 154.

Ripley v. Moyney, 1 Keen, 578.

Mr. Selwyn and *Mr. Druce* followed on the same side.

Mr. Baggallay and *Mr. O. Morgan*, for the executors and residuary legatees.—The question whether the debts, legacies and the costs of and incident to the administration of the estate are to be paid out of the specific legacies must be answered in the affirmative. There was a clear and expressed intention to exonerate the general estate, and there was as clear an indication of the fund intended to pay them. The specific legacies, therefore, are liable to the burthen.—

Browne v. Groombridge, 4 Madd. 495.

Phillips v. Eastwood, 1 Lloyd & G. 297.

Choat v. Yeats, 1 Jac. & W. 102.

2 *Jarman on Wills*, 639.

Mr. Lloyd, in reply.—Express words or a satisfactory inference are as essential to charge specific legacies as they are to charge real estate. The executors were legatees as well as residuary legatees, but only "subject to the provisions herein made." There were no express words to exonerate the residue; and no residue could be ascertained until all the liabilities it was subject to were satisfied.—

Haslewood v. Pope, 3 P. Wms. 322.

Boote v. Blundell, 19 Ves. 518; s.c. 1 Mer. 193.

THE MASTER OF THE ROLLS.—It has been argued, on behalf of the residuary legatees, that the general personal estate is exonerated from its undoubted liability to pay the debts, legacies, and other expenses, when the testator gives a portion of his personal estate, and especially directs that it shall be subject to the payment of those charges. In the present case the testator must be considered to have selected a part of his estate, and to have made it liable to pay what otherwise the general personal estate would have been liable to. In *Browne v. Groombridge* it is by no means clear that the trust imposed upon the executors made any difference in the result. Here there is not only a direction that the

principal sum of the trust funds "shall be liable to and applicable by the trustees to the payment of my just debts, testamentary and other expenses and legacies," but in the foregoing parts of the will he has twice said that he gives this property in trust, "subject to the provisions herein made." It is the same as if the provision for payment had been inserted in those places. The property then is given to the plaintiff, but subject to such provisions, and the effect is that the specific property is not given to the widow entire, but subject to the charges which the trustees are directed to pay: the words, therefore, "and other expenses under this my will" include, not only the testamentary expenses, but also the costs of the suit necessary for the administration of the estate of the deceased. The costs, therefore, must be paid out of the trust funds specifically given in trust for the plaintiff in exoneration of the residuary estate which the defendants are entitled to retain without any deduction being made from it.

ROMILLY, M.R. }
1862.
Nov. 20.

MEYMOTT v. MEYMOTT.

Partnership—Dissolution—Monies overdrawn—Interest.

A partner who overdraws his share of profits contrary to the provisions of the deed of partnership, cannot, in the absence of an express provision, be charged with interest upon the sums overdrawn.

In 1843 the plaintiff and the defendant entered into partnership as solicitors, for a term of twenty-one years. The partnership was regulated by a deed, dated the 30th of September 1843, by which the partners were entitled to draw out of the business, for their separate use, such sums "as should not in the whole exceed the amount of profits of the partnership business to which they would be respectively entitled: provided that neither party should at any time draw out more than he would be presumptively entitled to at the time of drawing out the same, and not by anticipation or in advance."

No provision was made by the deed for charging interest on monies overdrawn.

In 1860 a decree was made dissolving the partnership, and directing the usual partnership accounts to be taken. It was found on taking the accounts that the defendant had, in every year, drawn out more than his share of the profits; and when the partnership was terminated the sums overdrawn amounted to 2,035*l*.

The cause came on for further consideration.

Mr. Selwyn and *Mr. Wickens*, for the plaintiff, considered that although the deed contained no provision for charging interest, yet, as the defendant had drawn out more than he was entitled to, contrary to the express provision of the deed, he was chargeable with interest on such monies as he had improperly withdrawn from the business; especially as it appeared that the partnership had been crippled, and had paid interest to clients and others for monies advanced by them to the firm.

Mr. Baggallay and *Mr. W. Forster*, for the defendant, were stopped on this point.

The MASTER OF THE ROLLS.—I do not see how I can give interest upon these monies. There is nothing to that effect in the deed of partnership. I should have to introduce a special provision into the deed before I could make the order asked for.

STUART, V.C.
1862.
March 8, 10;
April 30.
WESTBURY, L.C.
1863.
Jan. 14, 21.

BOLDING v. LANE.

Mortgage—Acknowledgment by Devisee of Mortgagor of more than Six Years Arrears of Interest—Foreclosure—Statute of Limitations, 3 & 4 Will. 4. c. 27; sections 40. and 42.

In November 1856, an acknowledgment in writing was signed by the devisee of a mortgagor, and given to a first mortgagee, whose mortgage was dated in May 1831, that a large arrear of interest was due on such mortgage. Upon a bill filed in July 1861,

by the first mortgagee against the mortgagor and the subsequent mortgagees for payment of his mortgage-money and interest, or for a foreclosure,—Held, by Stuart, V.C., that the above acknowledgment bound the property in mortgage as against the subsequent mortgagees, and entitled the first mortgagee to an account in respect of interest upon his mortgage-money for more than six years prior to the filing of the bill.

But, upon appeal, this decision was reversed by the Lord Chancellor.

By indenture, dated the 9th of May 1831, certain lands at Stowheath, in the parish of Wolverhampton, were demised by Joseph Lane for a term of 1,000 years to Thomas Lane and Walter Sprott, by way of mortgage, to secure the repayment of 1,281*l*. 12*s*. 3*d*. and interest.

Joseph Lane died on the 28th of July 1831, having by will given to his nephew and heir-at-law Thomas Lane, his heirs and assigns, the above lands at Stowheath, and appointed Thomas Lane and his son Farindon Lane his executors.

Walter Sprott died on the 3rd of May 1844.

By indenture, dated the 23rd of February 1846, Sydney Alleyne was appointed a trustee, in the place of Walter Sprott, and the mortgage debt and securities comprised in the indenture of the 9th of May 1831 were assigned by Thomas Lane to a trustee, upon trust to assign the same to Thomas Lane and Sydney Alleyne; and by another indenture of the same date, indorsed thereon, the mortgage debt and the residue of the term of 1,000 years were accordingly assigned to Thomas Lane and Sydney Alleyne, subject as to the latter to the equity of redemption therein.

By indenture, dated the 29th of September 1847, part of the lands comprised in the indentures of the 9th of May 1831 was conveyed to John Jones in fee, for the sum of 250*l*. freed and discharged from all claim in respect of the mortgage debt of 1,281*l*. 12*s*. 3*d*. and interest.

By indenture, dated the 1st of May 1848, and made between Thomas Lane of the first part, the defendant Maria Lane of the second part, the defendants John Elworthy Cutcliffe and Elizabeth his wife of the third part, the Reverend Anthony Boulton and

Harriet his wife of the fourth part, and John Elworthy Cutliffe of the fifth part, after reciting the said indentures of May 1831 and September 1847, Thomas Lane granted and released to Anthony Boulton and John Elworthy Cutliffe, their heirs and assigns, all the premises comprised in the indenture of May 1831, except such as were comprised in the indenture of the 29th of September 1847, upon trust, to let the same as they should think fit, and subject thereto to sell the same hereditaments, and stand possessed of the proceeds upon trust to pay interest, at 5*l.* per cent., on a sum of 827*l.* 8*s.* 11*d.* due to the defendant Maria Lane, and on a sum of 718*l.* 7*s.* 9*d.* due to the trustees of the settlement, dated the 4th of September 1831, of Elizabeth Cutliffe on her first marriage with William Dick deceased, and after payment of such interest to pay the capital so respectively due to the several parties until the whole should be fully paid in proportion to their respective debts, and upon further trust to pay to Anthony Boulton the sum of 461*l.* (being a sum of 300*l.* therein mentioned and interest thereon), and to pay out of the surplus (if any) to the defendants Maria Lane and Anthony Boulton, and assigns, the sums of 2,200*l.* and 1,500*l.* advanced by them to Thomas Lane, for the purposes of the estate of Joseph Lane.

By indenture, dated the 8th of September 1852, in consideration of the sum of 627*l.* 5*s.* 3*d.* another part of the hereditaments comprised in the indenture of mortgage of May 1831 was conveyed to the Oxford, Worcester and Wolverhampton Railway Company, freed and discharged from the mortgage debt of 1,281*l.* 12*s.* 3*d.* and interest.

By indenture, dated the 11th of November 1856, and made between Thomas Lane of the first part, Thomas Lane and Sydney Alleyne of the second part, and the plaintiff John Parker Bolding of the third part, after reciting the indenture of mortgage of May 1831, and that the principal of the mortgage-money thereby secured had been reduced to 407*l.* 7*s.*, and that there was also due on such security the sum of 302*l.* 15*s.* 10*d.* for arrears of interest, as the said Thomas Lane did thereby admit, Thomas Lane and Sydney Alleyne, in consideration of the sum of 555*l.* 14*s.* 11*d.* paid to them

by J. P. Bolding, assigned to him the principal sum of 407*l.* 7*s.* and all interest then due and to become due thereon, and the hereditaments comprised in the indenture of mortgage of May 1831, except such parts thereof as had been sold, for the residue then to come of the term of 1,000 years subject to the equity of redemption then subsisting therein.

Thomas Lane died on the 26th of December 1859, leaving the defendant Farindon Lane his heir-at-law.

Anthony Boulton died in May 1854, having by will appointed executors, of whom the defendant Samuel John Maclaren alone proved the will.

The bill was filed, in July 1861, by John Parker Boulding against Farindon Lane, John Elworthy Cutliffe and Elizabeth his wife, the former a trustee, and both beneficiaries under the deed of the 1st of May 1848, Maria Lane, Samuel John Maclaren, the personal representative of Anthony Boulton, a beneficiary under that deed; and by amendment against Anna Dick and James Jackson Riccard, who claimed to be interested under the marriage settlement of Elizabeth Cutliffe with her first husband, for an account, and asking that the defendants, or some or one of them, might pay to the plaintiff the principal and interest due to him, and in default for foreclosure.

The defendants, J. E. Cutliffe and Elizabeth his wife, by their answer submitted that no more than six years' interest could be recovered by the plaintiff against the estate.

The question was, whether the incumbancers subsequent to the plaintiff were bound by the acknowledgment by Thomas Lane, contained in the deed of the 11th of November 1856, of the arrears of interest due at that date, so as to entitle the plaintiff to an account of the arrears of interest from the date of the mortgage, or whether he was entitled to an account of interest upon his mortgage-money for six years only prior to the filing of his bill.

By section 40. of the 3 & 4 Will. 4. c. 27. it is enacted "That no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but

within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given."

Section 42. enacts "That no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

Mr. Malins and *Mr. Robinson*, for the plaintiff.—The acknowledgment contained in the deed of the 11th of November 1856 was sufficient to take the case out of the statute. Although by the form of the decree the second mortgagee was directed to pay the first mortgagee, yet it was clear that such second mortgagee was not meant by the words in the 42nd section of the

above act, by "the person by whom the same was payable." The mortgagor was, upon the true construction of the statute, the person by whom the money was payable.

Mr. Bacon and *Mr. W. W. Karslake*, for the defendants *J. S. Cutcliffe* and *Elizabeth* his wife.—The plaintiff was not entitled to an account further back than six years from the date of the filing of the bill. A mortgage was a charge within the former part of section 42. of the above act—*Du Vigier v. Lee* (1), and a foreclosure suit was one of the suits indicated therein—*Dearman v. Wyche* (2). In order to bind the second mortgagee there must be an acknowledgment by him; and no acknowledgment by the mortgagor alone would bind the second mortgagee so as to entitle the transferee to an account for more than six years' arrears of interest prior to the filing of the bill—*Hopkinson v. Rolt* (3).

They also referred to

Elvy v. Norwood, 5 De Gex & Sm. 240;
s. c. 21 Law J. Rep. (N.S.) Chanc. 716.

Shaw v. Johnson, 1 Drew. & Sm. 412;
s. c. 30 Law J. Rep. (N.S.) Chanc. 646.

Hunter v. Nockolds, 1 M. & G. 640;
s. c. 1 Hall & Tw. 644; 19 Law J. Rep. (N.S.) Chanc. 177; reversing
18 Law J. Rep. (N.S.) Chanc. 407.

Henry v. Smith, 2 Dr. & W. 381.

Harrison v. Duignan, Ibid. 295.

Hughes v. Kelly, 3 Ibid. 482.

Hodges v. the Croydon Canal Company,
3 Beav. 86.

Lewis v. Duncombe, 29 Ibid. 175;
s. c. 30 Law J. Rep. (N.S.) Chanc. 732.

Round v. Bell, 31 Law J. Rep. (N.S.)
Chanc. 127.

Mr. Langworthy, for the defendants, *Maria Lane*, *J. J. Maclaren* and *Anna Dick*, in the same interest.—Although the word "charge" would not necessarily include a mortgage, yet, in order to give effect to the proviso in the 42nd section,

(1) 2 Hare, 326; s. c. 12 Law J. Rep. (N.S.) Chanc. 345.

(2) 9 Sim. 570; s. c. 9 Law J. Rep. (N.S.) Chanc. 76.

(3) 9 H.L. Cas. 514.

it must be taken that the former part of that section included mortgages. The effect of the acknowledgment in the deed of transfer of the 11th of November 1856 was only to establish a liability against the mortgagor for arrears beyond six years from the time of filing the bill, and did not bind the land to the prejudice of the subsequent mortgagees.—He referred to *Sinclair v. Jackson* (4).

Mr. Jackson appeared for another defendant.

[STUART, V.C. referred to *Grenfell v. Girdlestone* (5).]

STUART, V.C. (April 30.)—The question in this case is, whether the plaintiff is entitled to an account of interest upon his mortgage money for more than six years prior to the filing of his bill. It was argued, for the defendants, that by the mere force of the word “charge” in the 42nd section of the statute 3 & 4 Will. 4. c. 27, mortgages are included. In support of this view, the cases of *Dearman v. Wyche* and *Du Vigier v. Lee* were quoted. During the argument I endeavoured to point out the fallacy of the notion that a charge properly so called and a mortgage are synonymous. In Lord St. Leonards’ most recent work (6) that great lawyer has discussed these two cases, and has very much shaken their authority. But he has also, by his elaborate examination of the statute, made it very clear (p. 139, sect. 51) that although the word “charge” does not by its own force include mortgages (as was argued in this case), yet that, as the 40th clause expressly mentions mortgages, they must be included in the 42nd, from the necessity of construing the two clauses by reference to each other, and as interpreting each other. It was well observed by Mr. Langworthy during the argument, that the express mention of mortgages in the proviso in the latter portion of the 42nd clause makes it necessary to construe the whole clause so as to include them in the former part. It is, therefore, from the peremptory language of the act of parlia-

ment, as ascertained upon a critical examination of its clauses, so as to produce a harmonious construction, and not by treating the word “charge” as necessarily including mortgages, nor on the discredited authority of the two cases referred to, that it is necessary to hold that mortgages are included in the first part of the 42nd clause of the act. It was contended, for the plaintiff, that by the deed of the 11th of November 1856, there is an acknowledgment of the arrears due at that time which entitles him to an account of the whole arrears from the date of his mortgage. This seems to be sufficiently established. An attempt was made to shew that there was not a sufficient acknowledgment by the person by whom the interest was payable. This argument was grounded on the proposition that the second mortgagee, and not the mortgagor, was the person by whom the interest was payable under the usual form of the decree, as the decree would direct payment by the second mortgagee to the first. It is hardly necessary to say that there is no solid ground for such an argument. The terms of the contract, and not the decree, are what must govern the construction of the act; and by the contract the mortgagor is the person by whom the interest is primarily payable, and by law compellable to pay it. There is, therefore, a sufficient acknowledgment to entitle the plaintiff to an account of the whole arrears of interest.

From this decision (Jan. 14), the defendants, Cutcliffe and wife, appealed.

Mr. Bacon and Mr. W. W. Karlake, for the appellants, cited—

Lord St. John v. Boughton, 9 Sim. 219;

s. c. 7 Law J. Rep. (N.S.) Chanc. 208.

Putnam v. Bates, 3 Russ. 188.

Fordham v. Wallis, 10 Hare, 217; s. c. 22 Law J. Rep. (N.S.) Chanc. 548.

Roddam v. Morley, 1 De Gex & Jo. 1;

s. c. 26 Law J. Rep. (N.S.) Chanc.

438; 25 Ibid. 329; 2 Kay & J. 336.

Francis v. Grover, 5 Hare, 39; s. c. 15 Law J. Rep. (N.S.) Chanc. 99.

Sugden's New Statutes, 119, 2nd edit.

Mr. Malins and Mr. Robinson, for the respondent, referred to—

Hopkinson v. Rolt, ubi supra.

Sugden's New Statutes, 132, 2nd edit.

Mr. Bacon replied.

(4) 17 Beav. 405.

(5) 2 You. & Coll. 662; s. c. 7 Law J. Rep. (N.S.) Ex. Eq. 42.

(6) Practical Treatise on the New Statutes relating to Property, 2nd edit. 1862.

The LORD CHANCELLOR (Jan. 21). — This case depends on the true construction of the 42nd section of the act for the limitation of actions, 3 & 4 Will. 4. c. 27. The Vice Chancellor has decided that where there are successive mortgages, and arrears of interest for more than six years are due upon the first mortgage, an acknowledgment in writing that such arrears are due, signed by the mortgagor, will enable the first mortgagee to recover the whole amount of such arrears as against the second and subsequent mortgagees. As a reason for this decision, the Vice Chancellor apparently held that the words in the 42nd section, "the person by whom the same was payable," meant the person who was liable at law to pay the mortgage-money; that is, the mortgagor or his representative; and accordingly he considered the second mortgagee as not included within those words. This decision seems to me calculated to lead to very extraordinary and alarming consequences; for if it is well founded, the right of a man may, according to the statute, be entirely taken away by the act of another. If a second mortgagee is in possession, and the first mortgagee seeks to recover his principal and interest for twenty years by filing his bill for foreclosure or a sale, it seems impossible to deny the right of the second mortgagee to insist on the enactment; but, according to this decision, if the first mortgagee obtains at any time the acknowledgment of the mortgagor or his representative, this right of the second mortgagee will be defeated, and all the arrears will be recoverable against the second and subsequent mortgagees; that is to say, the mortgagor or his representatives, who may have no interest in the land (for the ultimate equity of redemption may be worthless) would be able to charge the estate anew with any amount of arrears of interest against the estate of the second and subsequent mortgagees. The Court is bound by every principle of judicial interpretation to find a construction of the statute which is not so inconsistent with natural justice. With very great consideration for the judgment of the Vice Chancellor, the vice of the decision appears to me to lie in the limited interpretation put by him upon the words "the person by whom the same was payable," which appear to me to include

not only all persons who are legally bound by covenant to pay the money, but all persons against whom payment of the arrears may be sought to be enforced in any suit, and by whom therefore, as they have a right to pay the interest, interest may properly be said to be payable. Take the case of a legacy charged upon land, and the land then specifically devised, the devisee would not be personally liable to pay the legacy or interest, but he would be a person by whom the same was payable; for he would be entitled to redeem the lands devised. In fact, these words, so far from having the limited construction which the Vice Chancellor has put upon them, seem to me to have been selected for the very purpose of including not only everybody who is personally liable for the money, but everybody who, having an interest in the land, may be properly made a defendant in a suit for enforcing payment out of the land. If this be so, it follows as a necessary consequence, that it was not the intention, nor is it the effect of this section, to give to the mortgagor a statutory power to deprive a subsequent incumbrancer of the benefit of the statute, by means of an acknowledgment given to a prior incumbrancer—a construction which would be monstrously unjust—but to enact a plain and simple rule, that no person having a charge on land should recover more than six years' arrears of interest against any other person having an interest in that land without a memorandum in writing signed by the person having such interest. This appears to me to be the just interpretation of the 42nd section of the statute, and to make it consistent with the language of the 28th section. Therefore reverse the order of the Vice Chancellor, so far as relates to the arrears of interest on the mortgage of 1831, and declare that the plaintiff is entitled to recover interest for six years only immediately preceding the filing of the bill; and let the plaintiff pay such costs, other than the costs of the rehearing, as have been occasioned by the larger claim of interest.

STUART, V.C. } *Re SAUNDERS'S ESTATE.*
 Jan. 16. } *SAUNDERS v. WARTON.*

Felony—Voluntary Settlement of Personality by Felon before Apprehension—Forfeiture.

In November and December 1860, A. committed acts, in respect of which he was, on the 8th of June 1861, taken into custody, and, on the 21st of the same month, convicted of felony. Prior to his apprehension, viz., on the 23rd of May 1861, he executed a voluntary settlement of personal estate belonging to him upon his wife and children:—Held, that such settlement was fraudulent and void as against the Crown.

By indenture dated the 23rd of May 1861, and made between Alfred Saunders, then resident at Melbourne, in Australia, of the one part, and John Browning and William Jones of the other part, Saunders conveyed and assigned all his real estate, and all his interest under the will of his father, whose estate was in course of administration in this suit, and all other his property and effects, to Browning and Jones, upon trust for the benefit of his wife for her life, and, after her death, upon trust for his children as therein mentioned.

On the 8th of June 1861 A. Saunders was taken into custody, and on the 21st of the same month he was convicted of embezzlement and sentenced to imprisonment.

By the law of Victoria embezzlement is felony.

The acts of embezzlement for which A. Saunders was indicted consisted of appropriating to his own use monies of the corporation of Melbourne, and those acts were stated in the indictment to have been committed in the months of November and December 1860.

A. Saunders's share of his father's estate was now standing in court to the credit of this cause.

This was a petition by the trustees of the settlement of the 23rd of May 1861, praying for the payment of such share to them.

The petition alleged that Saunders had, prior to his apprehension, offered and proposed to the corporation of Melbourne that,

upon receiving the money coming to him in this suit, he would repay and make good the monies which had been used or appropriated by him belonging to the corporation.

Mr. Greene and *Mr. Talfourd Salter*, of the common law bar, for the petitioners, contended that the settlement was made *bond fide*, and was valid as against the Crown.

Mr. Wickens, for the Crown, contended that the settlement by A. Saunders of his share, now in court, of his father's property was, under the circumstances of the case, fraudulent and void as against the Crown.

He referred to

Morewood v. Wilkes, 6 Car. & P. 144.
Jarm. Conveyancing, by Sweet, vol. 4.
 p. 77.

STUART, V.C.—The question is, whether the settlement of the 23rd of May 1861 was executed in order to defeat the rights of the Crown to the personal estate of the felon. If the dates mentioned in the indictment are correct—and their being mentioned in the indictment must be taken as *prima facie* evidence that they are correct—the acts of embezzlement were committed before the date of the settlement. The petition also states an offer by Saunders to repay to the corporation of Melbourne the money which he had embezzled from them. This offer must have been made before the date of the settlement. I assume, therefore, that the acts of embezzlement were committed before the date of the settlement; and if the deed was executed in apprehension of a conviction, it was clearly fraudulent. I think it was executed under such an apprehension. The petition must therefore be dismissed, so far as it seeks payment of the fund in court to the trustees of the settlement of the 23rd of May 1861. The costs of all parties must come out of the fund in court, and the balance be transferred to the Solicitor of the Treasury and the Assistant Paymaster for the time being.

KINDERSLEY, V.C. }
 Jan. 12. } TOWSEY v. GROVES.

Infant—Next Friend—Solicitor.

A suit to administer the estate of a testator is instituted by a stranger on behalf of infants, without communication with the family, and contrary, as alleged, to their wishes, and no explanatory affidavit is filed, the next friend being the son and articulated clerk of the solicitor in the suit and having the same address. On motion to restrain the next friend from proceeding with the suit, or for an inquiry,—Held, that an inquiry must be directed whether the suit is for the benefit of the infants, and if so whether the next friend shall be continued.

This was a motion on behalf of the defendants that Sydney Mayhew, the next friend, might be restrained from taking any proceedings in the suit; or for an inquiry as to whether the suit was for the benefit of the infants; and if that inquiry was answered in the affirmative, that some other person might be appointed next friend.

Edward Towsey, the testator in the cause, had been a solicitor, and died in 1857, and by his will left his property in fifths: one-fifth to his mother for life; one-fifth to his sister-in-law Mary Ann Pryce; and the three-fifths to his three children (the infant plaintiffs), Jane Rosalie Towsey, Edward Towsey and Arthur Towsey, the eldest being now fourteen years old, and appointed Charles Groves and Mary Ann Pryce guardians of his infant children and trustees and executor and executrix of his will.

The bill was filed, in July 1862, against C. Groves and M. A. Pryce, as the defendants alleged, without any communication with either of the parties, and contrary to their wishes and as they believed to those of the plaintiffs: the next friend, Sydney Mayhew, was the son and articulated clerk of Alfred Mayhew, the solicitor in the cause, and his address was the same, and both father and son were strangers to the parties.

The bill stated the facts, with regard to the will, death, &c., and alleged that the defendants had possessed themselves of the personal estate of the testator to a considerable amount; that they had sold the real estate, and received considerable

sums of money, and that the plaintiffs were desirous of carrying out the trusts of the will; and there was the usual charge as to papers and documents.

The defendants put in an answer, whereby it appeared that Mary Ann Pryce had alone acted, and that there was no real estate; and in a schedule was set out the account relating to the estate.

The answer also stated that the suit was instituted without any communication with the family, and contrary to their views and wishes, as the defendant Mary Ann Pryce believed, and that was repeated in an affidavit in support of the motion.

There was also a cross-motion for the payment of the whole fund (admitted by the answer) into court, which was not now gone into.

There was no affidavit on the part of the next friend.

Mr. Glasse and Mr. Nalder, in support of the motion.—The next friend, being the son of the solicitor in the cause, a stranger to the family, the bill filed without communication with them, and contrary to their wishes, and no explanation whatever given, is sufficient to entitle the defendants to what they ask, added to which the suit should have been by administration summons. This case comes within the established rule of the Court, that a full explanation must be given where a suit is instituted without the direct authority of the parties. It is a case of a most suspicious kind, and it would be almost a matter of course to make the order asked, or, at all events, in the alternative.

Mr. Southgate and Mr. Little, for the next friend.—The answer of the defendant shews that this is a case where a suit is absolutely necessary. The account is very inaccurate, and the fact that the next friend is the son of the solicitor in the cause is not any ground for his removal. The motion is inconsistent and unusual, as it asks that if on an inquiry it shall be found that this suit is beneficial then that the next friend shall be removed. The father of the next friend was a personal friend of the testator for many years, and the bill was filed at the instance of friends of the family.

The following authorities were cited—

Nalder v. Hawkins, 2 Myl. & K. 243.

Richardson v. Miller, 1 Sim. 133.

Fox v. Suverkrop, 1 Beav. 583.

Guy v. Guy, 2 Beav. 460 ; s.c. 9 Law J. Rep. (N.S.) Chanc. 289.

Startin v. Bartholomew, 6 Beav. 143.

Sale v. Sale, 1 Ibid. 586.

Smallwood v. Rutter, 9 Hare, 24 ; s.c. 20 Law J. Rep. (N.S.) Chanc. 332.

KINDERSLEY, V.C.—This is a motion, on behalf of the defendants, or some of them, that Sydney Mayhew, the next friend of the infant plaintiffs, may be restrained from taking any further proceedings in this suit, or for an inquiry whether the suit is for the benefit of the infants ; and if the finding should be in the affirmative, that the next friend may be removed, and another person appointed in his stead. — [His Honour stated the facts.]—Now, one thing is obvious at the outset, that the interests of mankind require that encouragement should be given to suits instituted *bond fide*, on behalf of persons not *sui juris*, or capable of protecting themselves ; at the same time, however, it is equally obvious that the greatest caution is necessary to prevent the institution of suits which are not *bond fide*, but improper. In the present case nothing is alleged rendering the interference of the Court necessary ; although it does not therefore follow that the suit is an improper one. Mr. Alfred Mayhew, the solicitor in the suit, and ostensibly employed by the next friend, turns out to be his father, and it appears that Mr. Sydney Mayhew is either residing with him, or, at all events, has the same address, and was his father's articled clerk, if he is not so now. At all events, we have this : that he is an entire stranger to the defendants, and for all that appears, to the plaintiffs ; and the defendants, or one of them swears, that the suit was contrary to their wishes. That the bill was filed without any communication with the plaintiffs, considering their youth, may be right enough ; but in such a state of circumstances the least the Court expects is, that some explanation should be given on the part of the next friend. But how stands the case ? There are these circumstances, which I must take to be true, because they are not contradicted ; indeed, nothing whatever is stated as to the motive for filing the bill,—no affidavit made, and no explanation whatever given on the subject. It is there-

fore a case of grave suspicion that it is not a suit for the benefit of the infants. Solicitors, as a body, stand as high in character as any other profession, but, of necessity, their pecuniary interest is all one way, and cases may, and often do, occur in which their duty and their interest conflict ; and in a case of such suspicious circumstances as the present, I should expect some explanation, but none has been given. It may be that Mr. Sydney Mayhew employed his father *ab initio* ; but it may also be that his father suggested the institution of the suit ; an inference, therefore, is left to be drawn from this intentional silence. I will not at once infer that Mr. Sydney Mayhew is an improper person to be next friend, or that the suit is an improper suit ; but what I shall do is, to direct an inquiry whether it is for the benefit of the infants that such a suit as this, or any suit, shall be instituted ; and if it is beneficial, then whether Mr. Sydney Mayhew shall be continued as next friend ; and, if not, that some other proper person be appointed in his stead ; and in the mean time, that all proceedings in this suit be stayed.

WOOD, V.C. } *Re WILLWAY'S TRUST.*
Feb. 21.

Petition—Practice—Reservation of Minerals—25 & 26 Vict. c. 108. s. 2.

Under 25 & 26 Vict. c. 108. s. 2. the Court will make an order (on petition) authorizing the sale of land with a reservation of the minerals, or of the minerals apart from the land, in general terms without reference to any particular sale.

By an indenture of settlement, dated the 30th of May 1843, made in contemplation of the marriage which was afterwards solemnized between John Willway and Hester Antrobus, certain lands and hereditaments were vested in trustees, with the ordinary powers to sell or grant building leases. The settlement contained no provision forbidding the disposition of the lands therein comprised with an exception or reservation of any minerals.

A petition was now presented by the trustees and *cestuis que trust* under the

above-mentioned settlement, under 25 & 26 Vict. c. 108. s. 2, containing a statement (supported by affidavit) that the lands and hereditaments then subject to the trusts of the settlement were suitable for sale in numerous lots for building, and contained mines minerals and coal, the reservation of which out of the grants of the said lands would not lessen the value of the said lands for building purposes, but would by the separate sale of such mines minerals and coal be of great profit to the person beneficially entitled.

The petition prayed that the trustees, or the survivor of them, or other the trustees or trustee for the time being of the said indenture, might be at liberty to exercise all or any of the trusts powers and authorities of the said indenture so as to dispose of the land and hereditaments then held under and subject to the trusts of the said indenture, with an exception or reservation of the coals mines and minerals in and under the same, and with or without rights and powers of, or incidental to, the working, getting or carrying away of such coals mines and minerals, and so as to dispose of the coals mines and minerals, with or without such rights or powers, separately from the land, and in either case without prejudice to any future exercise of the said trusts powers and authorities with respect to the excepted coals mines and minerals or (as the case might be) the undisposed-of land, and that the sanction of the Court might be given to such disposition.

Mr. Fry appeared for the petitioners.

WOOD, V.C. made an order according to the prayer of the petition.

KINDERSLEY, V.C. }
Jan. 15. } WRIGHT v. WILKIN.

Orders of March, 1860—Printed Bill appended to Answer.

A bill being dismissed with costs, a new bill was filed, neither seeking discovery nor an answer; but a voluntary answer was put in, alleging that the new bill was the same in substance as the original bill, and as evidence thereof a print of such original bill was appended to the answer. On a motion being made to take such answer off the file

for irregularity, as being a schedule of documents within the terms of the Orders of March, 1860,—Held, that the case was neither within the language nor the spirit of the Orders, and the motion was refused with costs.

This was a motion to take an answer and the schedule to it off the file on the ground of irregularity. A suit was instituted to set aside a will whereby the testatrix, Miss Mann, had left large real estate to the defendant, her solicitor, the ground of the bill being that undue influence had been used. That bill was dismissed for want of equity, but liberty was given to the plaintiff to file another bill, on the footing that the will was valid at law, and without prejudice to any equity the plaintiff might have. The present bill was then filed, seeking relief on the same ground as the former bill, but asking neither discovery nor answer. The defendant, however, put in a voluntary answer alleging that this bill was, in substance, if not *ipseissimis verbis*, the same as the former bill; and, in order to substantiate that allegation, he appended a print of the former bill as a part of the schedule, or as the schedule to such answer, craving leave to refer to it in the usual way. This motion was then made.

Mr. T. H. Terrell.—The appending of this printed bill to the schedule of the defendant's answer is in direct contravention to the Orders of March, 1860, viz., the 2nd, 3rd, 6th and 10th Orders. Such print is, in fact, a document within the terms of the Orders, and if such a practice was suffered to be introduced, it would be a gross abuse of the rules of the Court, besides leading to a very great increase of expense. So far as this print is concerned, being on the file of the Court, it is in fact on the Record; and, therefore, on that ground alone, it is quite unnecessary to do more than to refer to it. Besides this, the defendant had copies of this very bill in his possession, which might be used for all purposes without appending it as he has done. The Record and Writ Clerk (Mr. Murray) was of opinion that the proceeding was irregular, and had warned the defendant that if he filed the answer and schedule it would be at his peril.

Mr. Baile and *Mr. C. Hall* appeared for the defendant, but were not called upon.

KINDERSLEY, V.C.—I am of opinion that this motion is altogether misconceived. One thing is clear, that had it not been for this Order, (1) the defendant would have had to print both his answer and the schedule; and it is contended, in support of this motion, that the Order precludes such printing. The question therefore is, whether this is such a schedule as the Orders prescribe shall not be printed. The second of these Orders refers to the exception of a schedule of accounts and documents; and the question, therefore, on this motion, resolves itself simply into this: whether this schedule, containing the whole print of this original bill, is a schedule of accounts and documents? It is certainly not a schedule of accounts. Is it then a schedule of documents? The purpose and object of these Orders were, that inasmuch as upon common questions of administration the defendant was called upon to set forth accounts, documents, &c., it is now made unnecessary to have those printed with the answer: it is sufficient that there should be the common office copies. But this case is nothing of the kind; it is not a case coming within the language, and certainly not within the intention, of the Orders. The contention of the defendant is that, in point of fact, this present bill is the same in substance as the bill originally filed; and for the purpose of shewing that it is so, he appends that original bill to his answer, instead of inserting it in the body of it; and in order, no doubt, to save expense, and for greater convenience, it was made a part of the schedule in the printed form, and not as a schedule of documents, but in fact as a part of the defence. This case, therefore, is not a case contemplated by the Orders, and there is no irregularity in what has been done. The motion, therefore, must be refused, with costs.

(1) *i. e.* The exception as to schedules contained in the 2nd Order.

WOOD, V.C. } GLADSTONE v. THE OTTO-
Feb. 26, 27. } MAN BANK.

Demurrer — Jurisdiction — Rights of Foreign Sovereign — Inconsistent Grants.

By a concession from the Turkish Government certain persons were authorized to form a bank, to be called the Bank of Turkey, with the sole privilege of issuing paper-money and bank-notes in Turkey. Shortly afterwards, and before the Bank of Turkey had commenced business, the Turkish Government granted a similar concession to the directors of the Ottoman Bank. A bill was filed by the Bank of Turkey against the Ottoman Bank and the Sultan, seeking a declaration of the rights of the Bank of Turkey, and an injunction to restrain the Ottoman Bank from issuing paper-money or bank-notes in Turkey:—Held, on demurrer, that the Court has no jurisdiction to interfere with the acts of a foreign Sovereign, who, having entered into a contract with British subjects, makes a grant in derogation of that contract, nor to restrain British subjects from doing in a foreign country whatever they are authorized to do by the sovereign power there.

In 1858 William Gladstone and others, the plaintiffs in this suit, took up a scheme for the formation of a joint-stock company for carrying on banking operations in the dominions of the Sultan, under the name of The Bank of Turkey. It was an essential stipulation in such scheme that the Turkish Government should grant to the projected company the exclusive privilege of issuing bank-notes throughout the Sultan's dominions; and it was arranged that it should be made a condition precedent to the company's commencing business that the whole of the *kaimes*, or paper-money, which had been issued by or in the name of the Sultan should be withdrawn from circulation, and that no further issue of paper-money should be made by or in the name of the Sultan.

A statement of the above-mentioned scheme was submitted to and approved by the Turkish Government; and on the 18th of May 1858 the Sultan gave his royal assent to a concession, which provided, amongst other things (Art. 3) that the duration of the concession should be for thirty years; (Art. 11) that The Bank of Turkey should have the exclusive privilege

of issuing bank-notes, payable on demand, which should be a legal tender in those parts of the empire of the Sultan where there were branch banks; (Art. 12) that the Government should not issue any description of paper-money, nor accord or permit the exercise of any similar privilege in the empire to any person or company during the existence of the concession to the bank.

The concession was delivered over to and adopted by the plaintiffs on the 15th of February 1859, and The Bank of Turkey was started by the plaintiffs to carry out this concession. The bank never actually commenced operations; but the Bill stated that the plaintiffs and other persons continued to be shareholders in it.

The Turkish Government not only neglected to withdraw their *kaimies*, but proceeded to issue a further amount of paper-money. Under these circumstances, the directors of The Ottoman Bank (a joint-stock banking company) concerted a scheme for supplanting The Bank of Turkey, and the Turkish Government granted to them a concession similar to that granted to The Bank of Turkey, together with the sole and exclusive privilege of issuing paper-money and bank-notes, which were to be a legal tender within the Turkish dominions.

This Bill was thereupon filed, by William Gladstone and others, on behalf of themselves and all other persons interested in the concession of the 15th of February 1859, or as shareholders in The Bank of Turkey, and The Bank of Turkey, against The Ottoman Bank, the directors of The Ottoman Bank, and His Imperial Majesty the Sultan. The 34th paragraph of the Bill was as follows:

"The plaintiffs have lately discovered, as the fact is, that the defendants, The Ottoman Bank, a joint-stock banking company, incorporated by charter, and who carry on business in Bank Buildings, in the city of London, have recently concerted a scheme for supplanting The Bank of Turkey, and obtaining for their own use the sole privilege of issuing notes or paper-money within the Turkish dominions, and of depriving the plaintiffs and the shareholders in The Bank of Turkey of the benefit of the concession granted to them as aforesaid; and with that view The Ottoman Bank and the directors thereof, have applied to the Turk-

ish Government for a concession, to enable them, in conjunction with other persons, whose names are unknown to the plaintiffs, to establish a company for the purpose of carrying on banking business at Constantinople and in London: which company is intended to be formed with a joint-stock capital of 2,700,000*l.*, in 135,000 shares, under the style of 'The Imperial Bank of Turkey'; and the Turkish Government has, at the instance of The Ottoman Bank, agreed to grant to them a concession for the purpose, together with the sole and exclusive privilege of issuing paper-money and bank-notes, which are to be a legal tender within the Turkish dominions; and a concession, with such sole and exclusive privilege as aforesaid, has been already granted by the Government."

The Bill also alleged that the concession of the 15th of February 1859 was still in existence, and conferred rights of great value, which were vested in the plaintiffs; and that The Ottoman Bank had notice of this concession, and of the rights of the plaintiffs thereunder.

The Bill prayed that it might be declared that so long as the concession of the 15th of February 1859 was in existence, The Bank of Turkey was entitled to the exclusive privilege of issuing bank-notes or paper-money in the empire of the Sultan, and that the concession to The Ottoman Bank was inoperative as against the plaintiffs; and that the defendants, The Ottoman Bank, and their directors, servants and agents, might be restrained by the order and injunction of the Court from issuing or causing to be issued any bank-notes or paper-money for circulation within the empire of the Sultan during the existence of the said concession of the 15th of February 1859, and from doing or causing to be done either alone or in conjunction with any other person or persons, any act, deed, matter or thing, whereby or by reason or means whereof The Bank of Turkey or the plaintiffs and other persons entitled to the benefit of the said concession of the 15th of February 1859, might be prevented or hindered from having the full benefit thereof, and of the said exclusive privilege thereby granted.

To this Bill The Ottoman Bank and the directors put in separate demurrers for want of equity.

Sir H. Cairns (*Mr. Wickens* with him), for the demurrer of The Ottoman Bank, contended that the Court had no jurisdiction, as one of the parties to the contract was a foreign Sovereign, who was not and never had been within the jurisdiction of the Court; that the plaintiffs were not entitled to prevent other persons from carrying out that which they had confessed themselves unable to perform; that the plaintiffs could only proceed against The Ottoman Bank through the Sultan, as there was no privity between the plaintiffs and The Ottoman Bank; that the subject-matter of the suit was a matter *inter regalia*, being the *jus monetis* of a foreign Sovereign in his own dominions; that the plaintiffs, even if he was here, could not proceed against him to determine his rights in that respect in this Court.

The Solicitor General and *Mr. Giffard* (*Mr. Wickens* with them), for the directors, submitted that the subject-matter was entirely a matter of state polity, and must be governed by the laws of Turkey; that this Court would not interfere unless the whole subject-matter of the suit was within its jurisdiction; that the plaintiffs, in fact, asked the Court, having no jurisdiction over the subject-matter of the suit, to lay hold upon persons in this country to restrain them from doing that in Turkey which they were authorized to do by the Turkish Government: and on these points they cited—

The Duke of Brunswick v. the King of Hanover, 6 Beav. 1; s. c. 13 Law J. Rep. (N.S.) Chanc. 107.

The Emperor of Austria v. Day, 2 Giff. 628, 678; s. c. 30 Law J. Rep. (N.S.) Chanc. 690.

Mr. Rolt and *Mr. Druce*, in support of the Bill, contended that the grant of a similar concession to other parties did not annul the first concession, and that, until annulled, it must be held binding; that the Court had jurisdiction to restrain the breach of negative covenants, even though there might be no jurisdiction to compel specific performance of the affirmative covenants: on this point they cited—

Lumley v. Wagner, 1 De Gex, M. & G. 604; s. c. 5 De Gex & Sm. 485; 21 Law J. Rep. (N.S.) Chanc. 898.

Messageries Impériales v. Baines, 11 W. R. 322.

Wood, V.C. (without calling for a reply). —I confess I cannot entertain any doubt upon this Bill. I think it is quite clear that an engagement such as this, entered into with a foreign Government, upon which alone the plaintiffs' rights stand, is not an engagement to which this Court can give any effect, or against the breach of which it can give any relief. From beginning to end the Bill states, no doubt consistently with the fact, that this grant upon which they stand is the act of a foreign Government; a foreign Government has entered into a concession which alone has given to the plaintiffs the rights which they now claim.

The case raised by the Bill is this, that this Court, acting upon that jurisdiction which it always exercises over contracts, and which authorizes the Court to say, that one individual having contracted with another shall not do anything in derogation of that contract, is to say, that a third person, with knowledge of the contract between the two, shall not assist the second to defeat his own engagements; upon those principles the Court is now asked to act, where the engagement is with the sovereign power of a foreign country. Unless the Court is prepared to hold that this is a contract which can be enforced by this Court the Bill must fail, inasmuch as all the rights of the plaintiffs stand upon the contract: and it seems to me that it is quite impossible, where a Sovereign chooses to act in derogation of rights granted by his first sovereign act, that I can interfere to prevent the derogation of those rights; and if I cannot interfere with the principal, how can I interfere with the accessory, namely, the person endeavouring to defeat the right which the sovereign power has granted by the first concession? Now, that this grant is a grant operating through the medium of the sovereign power, and for sovereign and state purposes, there can be no question. An attempt was made in the argument to draw a distinction between the act of a Sovereign in his legislative capacity and as an individual doing something for his own benefit. The act of what is called the legislature, where the legislature exists in any sense of the term, binds the general interests of the country. The fact that the Sovereign has

the control of the money current in his kingdom only amounts to this, that it is for the benefit of the country that the right of ascertaining what shall be the current coin of the country should be vested in the Sovereign; but this, like every other right which he holds *quâ* Sovereign, must be exercised for the benefit of the community, not for the private benefit of the Sovereign, of which this Court can take cognizance. Here is simply a grant of a right by the Sovereign that the plaintiffs shall have the sole right of issuing notes, as part of the current coin of his realm, during a certain number of years. That is, in fact, the foundation of the Bill; because the plaintiffs stand upon the grant, as being a grant of a right emanating from the sovereign authority.

Now, what is the breach that is alleged? In the 34th paragraph of the Bill it is stated that the concession to The Ottoman Bank had been already granted, and that this concession conferred the same privileges as were conferred by the grant to the plaintiffs. I do not think it is necessary to inquire whether the first grant has been annulled or not. A second grant, inconsistent with the first, has been made by the same sovereign power. Now, suppose there was an Act of Parliament granting to the Bank of England the right of issuing bank-notes which should be a legal tender throughout the country, and suppose another Act of Parliament was passed which granted the same privilege to some other company, this Court could not possibly interfere if such a case ever occurred in England. It has been argued, by the plaintiffs, that this demurrer must be overruled, unless persons are to be protected in breaking the law when they do so with the assistance of foreign authority and under the grant of a foreign Sovereign; but persons who depend upon the grant of a foreign Sovereign cannot obtain the aid of this Court against the act of that foreign Sovereign because a grant is made by him that is inconsistent with the first grant; for the act of a foreign Sovereign overrides everything. When I read the 34th paragraph of the Bill which first speaks of the impropriety of the defendants (I do not call it fraud), in applying to the Turkish Government for a concession, I was reminded

of those cases in which the Court has been asked to restrain persons from applying for an Act of Parliament which was contrary and inconsistent with some right vested in the plaintiffs. But the Court cannot interfere to prevent persons from applying to the legislature, the sovereign power, to grant anything whatsoever, and cannot prevent their applying for a power similar to that which has been already granted to others. I could not have restrained these defendants, in the first instance, before the grant was made from applying to the Sultan of Turkey, any more than I could restrain them from applying to our own legislature for an Act of Parliament; nor when the grant is made can I interfere to prevent them from using a second grant made by the same sovereign authority. I cannot conceive where applications of this description would end if they were once acceded to. Take, for instance, grants for railroads, because the principle does not depend upon this power of directing the currency, this *jus monetæ*, being the peculiar right of the Sovereign; but whatever else is within the right of the Sovereign would come within the same principle. Suppose the legislature of France or Belgium had made two inconsistent enactments—had granted the right to make a railway from one foreign port to another, to an English railway company, and had afterwards granted a right to a second English railway company to make the same railway, how could I restrain that second English company from constructing the railway? I might go much further and take the case of a country like Turkey, or any other sovereign power which might choose to give to English merchants in general the sole right of trading to any port in their dominions; could the Attorney General of this country proceed against some Italian or Frenchman residing in this country, over whom the Court would have jurisdiction, to prevent his sending a ship to that country? It seems to me it is impossible to hold that this Court has jurisdiction to interfere with any step which the Ottoman Government might take, according to its own sole will and discretion. Therefore, I am bound to allow the demurrers.

WOOD, V.C. } THE EARL OF SUFFOLK v.
March 4. } LEWIS.

Demurrer—Defence Act, 1860—Interest on Compensation for Lands required to be kept free from Buildings.

Under the Defence Act, 1860, certain lands were taken absolutely by the Secretary of State for War, and other lands were required to be kept free from buildings. The amount of compensation for both classes of land was agreed upon; and the plaintiffs, by their Bill, claimed interest at 5l. per cent. on the amount paid as compensation for the lands required to be kept free from buildings from the date of the agreement to the time of payment.—Held, on demurrer, that the compensation paid for lands required to be kept clear of buildings was only a payment for damage, and did not carry interest.

The Bill in this case was filed, by the personal representatives of the late Lord Sherborne, against Sir G. C. Lewis, the Secretary of State for War. Under the provisions of the Defence Act, 1860 (23 & 24 Vict. c. 112), the Secretary for War required absolutely a portion of certain lands, of which Lord Sherborne was then tenant for life, and that the rest of such lands should be kept free from buildings and other obstructions, and two notices were served upon Lord Sherborne accordingly. The first of such notices was dated the 31st of December 1860, and to this was annexed a schedule, in which the lands required to be taken absolutely were described. The second notice was dated the 21st of June 1861, and to this was annexed a schedule, in which the lands required to be kept free from buildings and other obstructions were described.

By an agreement dated the 6th of August 1861 it was agreed between Lord Sherborne and the Secretary for War, that 10,000*l.* should be accepted as compensation in full for such lands and damage: of this sum 3,500*l.* was the compensation for the lands which were required to be kept free from buildings.

By section 31. of the Defence Act, 1860, it was enacted, that it should be lawful for the Secretary of State, at any time after the expiration of fourteen days from the

service of such notice as aforesaid in relation to any lands required to be taken by him, to enter upon and take possession of, and hold such lands or any of them, and to cause to be executed thereon all such works as such Secretary of State might think fit.

Section 32. was as follows: "Provided also, that in case possession be taken of any lands before payment of the compensation for the same, interest shall be payable upon the amount of such compensation until payment thereof after the rate of 5*l.* per cent. per annum from the time of taking possession as aforesaid, and such interest shall go and be applied as the income of the lands would have gone and been applied if possession had not been so taken."

Under these circumstances, a question arose whether interest was payable by the Secretary for War upon the compensation for the lands which were required "to be kept free from buildings."

On the 7th of May 1862 the Secretary for War paid into the Bank of England 3,500*l.*, without interest, but with the additional sum of 30*l.* as an equivalent for the expenses (under the 20th and 21st sections of the act).

The 1st, 7th, 10th, 11th, 20th, 21st, 24th, 30th, 31st, 32nd and 34th sections of the Defence Act, 1860, were set out in the Bill.

Lord Sherborne died in October 1862, and the plaintiffs, his personal representatives, prayed that it might be declared that the defendant, the Secretary for War, ought to pay to the plaintiffs interest upon the compensation monies of 3,500*l.*, from the 6th day of August 1861, the date of his assent to the said agreement, up to the 7th day of May 1862, when such sum of 3,500*l.* was paid into the Bank of England, and that such interest should be computed at the rate of 5*l.* per cent., and that the defendant might be ordered to pay the said interest.

To this Bill the defendant demurred for want of equity.

The Solicitor General and Mr. Wickens, in support of the demurrer, contended that the question could only be decided by reference to the act. In the act a distinction was made between the case of lands absolutely taken and lands required to be kept

clear of buildings. In the one case there was a provision for the payment of interest, in the other there was no such provision. Interest was not payable, except in accordance with usage or under a special contract. On this point they cited—

Page v. Newman, 9 B. & C. 378.

Foster v. Weston, 6 Bing. 709.

Sir H. Cairns and Mr. Kay, in support of the Bill.—The purchaser was in possession from the time of his notice, and, according to the ordinary rule of vendor and purchaser, must pay interest from the time when he took possession. On this point they cited—

The Attorney General v. Christchurch, 13 Sim. 214; s. c. 12 Law J. Rep. (N.S.) Chanc. 28.

Regent's Canal Company v. Ware, 23 Beav. 575; s. c. 26 Law J. Rep. (N.S.) Chanc. 566.

The act had not deprived the parties of their rights by express provision, and could not do so by implication.

WOOD, V.C. said that the statute made a distinction between the two cases. Where lands were required absolutely, the 32nd section provided for the payment of the interest on the purchase-money from the time possession was taken until the purchase-money should be paid. The statute contained no such provision with regard to the compensation for lands required to be kept free from buildings. No possession of such lands was in fact taken. To argue that because the Secretary of State gained a negative right as to these lands from the date of the notice, therefore he was in possession, was to confuse the possession of property with the possession of a right to commit an injury on that property. The plaintiffs remained in actual possession of the land, and received the rents and profits; the case, therefore, must follow the ordinary rule that there is no interest unless there is a contract for interest. The demurrer must be allowed.

WESTBURY, L.C. }
Nov. 7, 18. } GOSLING v. GOSLING.

Will—Construction—Trust executed or executory—Gift in tail—Trusts of Personality to correspond with the Uses of Realty—Suspense of absolute Vesting during Minority of Tenant in tail—Remoteness.

A testator directed real estate to be purchased and settled in strict settlement, and declared that his trustees should stand possessed of his personal estate upon such trusts, &c. as were thereby declared concerning the lands directed to be purchased, or as near thereto as the rules of law and equity would permit, provided that the personal estate should not vest absolutely in any tenant in tail, unless such person should attain the age of twenty-one years:—Held, first, that the trusts of the personality were not executory; secondly, reversing the decision of the Master of the Rolls, that the proviso suspending the absolute vesting of the personality during the minority of tenants in tail applied only to such tenants in tail as took by purchase, and was, therefore, not void for remoteness, and that the effect of the trust was to vest the personal estate in the first tenant in tail (an infant), subject to its being divested in the event of his dying under twenty-one.

This was an appeal from a decision of the Master of the Rolls, the question being whether certain trusts of personal estate by reference to the limitations of real estate were void for remoteness.

Bennett Gosling, banker, by his will, dated the 8th of March 1844, directed that the right to succeed him as a partner in the bank should be offered first to Ellis Gosling, the second son of his brother Robert Gosling, and in case he should refuse or neglect to accept such offer, that the like offer should be made in succession to the third and every other younger son of Robert Gosling; and he bequeathed 50,000*l.* to trustees to be laid out in the purchase of an estate to be settled in manner therein mentioned until some one of them the said second and younger sons of Robert Gosling having had the offer made to him should accept the same, or until the period within which the last of such offers might be

accepted should have expired; and from and immediately after either of such events should have happened, then, in case any of them, the said second or other younger sons of Robert Gosling should accept the said offer, to the use of the son so accepting and his assigns for and during his life without impeachment for waste, with remainder to the use of his first and other sons in tail, with divers remainders over; and the testator directed his trustees to receive and invest the rents of the estate so to be purchased until the happening of the events above referred to, and to add such accumulated rents to his residuary personal estate; and the will proceeded as follows: "I give and bequeath unto my said trustees all my real estate and all the residue of my personal estate upon trust to sell my chambers in Lincoln's Inn, and to get in and convert into money all my said residuary personal estate, and to invest the monies arising from my said chambers and residuary personal estate in their names in the parliamentary stocks or public funds of Great Britain, or at interest in government or real securities in England, and to stand possessed of all such investments and personal estate, and also to stand possessed of all such real estate to such uses, upon such trusts, and for such estates and interests, and with, under and subject to such powers and provisions as hereby are declared concerning the lands and hereditaments hereinbefore directed to be purchased, or as near thereto as the rules of law and equity will admit. Provided, nevertheless, and I hereby declare that the said accumulations and personal estate shall not, nor shall any part thereof, vest absolutely in any tenant in tail unless such person shall attain the age of twenty-one years."

The testator died in May 1855; Ellis Gosling accepted the offer of the partnership, and died in January 1861; and Ellis Duncombe Gosling, his only son, was born a few weeks after his father's death.

The bill was filed on behalf of Ellis Duncombe Gosling, who claimed to be entitled to an estate tail in the real estate devised by the will of the testator, and absolutely to the personal estate, subject only to the proviso that the same should not vest absolutely in him unless he should

attain twenty-one, and he claimed the income in the mean time. On the other hand, it was contended, on behalf of the next-of-kin of the testator, that the gift of the residuary personal estate and accumulations in favour of the sons and remoter issue of the tenant for life was void for remoteness. The Master of the Rolls came to the conclusion, that the proviso formed an integral portion of the trusts declared, and not a separate proviso, which was simply inconsistent with the previous gift; the trusts, then, if stated at length, would be for Ellis Gosling for life, and after his death for his eldest son, grandson, great-grandson, or remoter issue who should first attain the age of twenty-one years, and then, and not till then, would it become vested. Such a trust would be bad in its creation, inasmuch as the vesting might be delayed for many generations, and though the first tenant in tail might attain twenty-one within the requisite time, that would not make the gift good which was originally void. He therefore held that the bequest of the personalty after the death of Ellis Gosling was void, and declared that, subject to the life estate of Ellis Gosling, the testator died intestate as to his residuary personal estate.

From this decision the infant plaintiff appealed.

The Solicitor General (Sir R. Palmer) and *Mr. Osborne* appeared for the plaintiff.

Mr. Selwyn and *Mr. Rasch*, for the executors and trustees of the will.

Sir Hugh Cairns and *Mr. Charles Hall*, for the next-of-kin.

The cases cited were—

Lord Scarisdale v. Curzon, 1 Jo. & H. 40; s. c. 29 Law J. Rep. (N.S.) Chanc. 249.

Egerton v. Earl Brownlow, 4 H.L. Cas. 1; s. c. 23 Law J. Rep. (N.S.) Chanc. 348.

Vaughan v. Burslem, 3 Bro. C.C. 101.
Gover v. Grosvenor, Barnar. 54; s. c. 5 Madd. 337.

Lord Dungannon v. Smith, 12 Cl. & F. 546.

Tollemache v. the Earl of Coventry, 2 Ibid. 611.

The Countess of Lincoln v. the Duke of Newcastle, 12 Ves. 218.

Taylor v. Frobisher, 5 De Gex & Sm.
191; a.c. 21 Law J. Rep. (N.S.)
Chanc. 605.

Wainman v. Field, Kay, 507.

Ibbetson v. Ibbetson, 10 Sim. 495.

Byng v. Byng, 31 Law J. Rep. (N.S.)
Chanc. 470.

Leake v. Robinson, 2 Mer. 363.

1 *Jarman on Wills*, 254 (3rd edit.).

The LORD CHANCELLOR (Nov. 18).—In the will of the testator there is, first, a series of limitations of real estate directed to be purchased, which, it is admitted, are not open to any objection. The testator then directs an accumulation of the rents of the purchased estate in an event which did not happen, and he gives such accumulations, and also devises and bequeaths his real estate and all his personal estate unto trustees, who, it is declared, shall stand seised and possessed thereof, to such uses, upon such trusts and for such estates and interest, and with, under and subject to such powers and provisions as are thereby declared of and concerning the estate thereinbefore directed to be purchased, or as near thereto as the rules of law and equity will permit. Then follows this proviso: "Provided, nevertheless, and I hereby declare, that the said accumulations and personal estate shall not, nor shall any part thereof, vest absolutely in any tenant in tail, unless such person shall attain the age of twenty-one years." The question I have to decide depends on the true construction of this proviso. The expression "tenant in tail" in the proviso must mean a person who takes the real estate in tail under the limitations thereof, and who also takes the personal estate under the trusts that are by reference declared of it, for the tenant in tail described is one in whom, but for the proviso, the personal estate would vest absolutely; that is, vest without being subject to be divested. The proviso is intended to provide for an infant tenant in tail taking an absolute interest in the personal estate under the trusts which are declared of it, and afterwards dying during his infancy. But inasmuch as personal property does not pass by descent, and there can be no estate tail in it, the proviso must apply to such tenants only of the real estate as take the personal estate (if I may use an incorrect expression) by pur-

chase under the trusts declared by the will; and the question is, whether such tenants in tail include any tenant in tail taking by descent. As I read the judgment of the Master of the Rolls, he assumes the fact to be, that the proviso includes and applies to tenants in tail taking by descent under the limitations of the devised real estate, as well as those taking by purchase. The correctness of this conclusion depends on the inquiry whether the disposition made by the will of the personal estate contains or involves any trust for a tenant in tail who takes the real estate by descent. Before entering on that inquiry, I ought to observe, first, that it is clear that the trusts of the personal estate are not executory, in the proper sense in which that word is used in this Court; if they were, there would be no illegality. Secondly, it is well settled that the disposition made of the personal estate is not extended or altered by the words "as near thereto as the rules of law and equity will admit." The personal estate is given by words of reference. The trustees are to stand possessed of it upon such trusts and for such estates and interest as are declared concerning the real estate. I will state concisely, so far as is necessary, the uses of the real estate, and the corresponding trust of the personalty, premising (what it is hardly necessary to mention) that words creating an estate tail in realty confer the absolute ownership in personal estate. The uses of the real estate stated shortly,—and substituting the name of Ellis Gosling, the nephew, who accepted the partnership, for the description of "the son so accepting,"—are the following: To the use of Ellis Gosling for life; with remainder to the use of the first and other sons of Ellis Gosling in tail male; with remainder to the other sons of the testator's brother Robert, younger than Ellis, who shall be *in esse* at the testator's death, severally and successively for life, in the order of seniority; with remainder to the first and other sons of such younger sons respectively in tail male.—[His Lordship then stated other remainders, which it is not necessary to detail, and proceeded as follows:] Now, what are the trusts of the personal estate which, as far as the difference of tenure will admit, will be identical with those uses of the real estate? I will state them first without the

proviso, and then shew the effect of the powers, and to what persons it will apply. The first trusts of the personalty would be to pay the dividends, interest and income to Ellis Gosling, the nephew, during the term of his natural life; and after his decease, the trustees would hold the personal estate and the income thereof, upon trust for the first or only son of the said Ellis Gosling, his executors, administrators and assigns. Here, but for the proviso, the trust would stop, and could not be extended to the second and other sons of the tenant for life; for the next trust directed by the words of the gift of the personal estate without the proviso would be a declaration, that in case there should be no son of Ellis Gosling, the trustees should hold the personal estate upon trust to pay the income to the next younger brother of Ellis Gosling for life; and after his death, in trust, as to principal and interest, for his eldest or only son absolutely, with a gift over, in like manner as before, to the next tenant for life of the real estate, and so on throughout the series. But when you add the proviso to the disposition of the personal estate which is made by the words of reference, the effect is this: that a new trust is created, in the event of any tenant in tail taking the personal estate under the trusts I have described, and dying under the age of twenty-one years, for the next succeeding tenant in tail or tenant for life, as the case may be; but it is plain that the proviso attaches only to tenants in tail taking by purchase; for no tenant in tail by descent can take the personal estate under the disposition which is made of it. The only object and effect of the proviso are to substitute the next tenant in tail or tenant for life, as the case may be, taking by purchase for the preceding tenant in tail, also taking by purchase, in case such preceding tenant in tail dies under the age of twenty-one years. It is true that a contingency, very material to be provided for, is not included in this proviso. A tenant in tail, taking the real and personal estate as a purchaser, may marry and have a son, and afterwards die before attaining the age of twenty-one years, leaving such son tenant in tail of the real estates. In such an event, the proviso transfers the personal estate to the next purchaser in the series of limitations, and

the personalty becomes severed from the realty, which descends to the son of the deceased tenant in tail. This event is not provided for by the will; but that circumstance does not authorize any different interpretation of the proviso. If the will had provided for the event of a tenant in tail by purchase dying under the age of twenty-one years, leaving a son, by declaring an express trust for such son of the personal estate, the case would have existed of a tenant in tail of the real estates by descent taking the personal estate by purchase; and if in that case the proviso were held to apply and include such tenant in tail taking by descent, the whole disposition of the principal of the personal estate would be void for remoteness. But no such trust is, in my opinion, either expressed or implied, or in any manner warranted by the words of gift of the personal estate, either with or without the proviso. Again, if the words of gift of the personal estate taken with the proviso could possibly be interpreted to amount to a trust of the *corpus* of the personalty for such tenant in tail male, under the limitations of the real estate, as should first attain the age of twenty-one, so that, in the words of the Master of the Rolls, the attaining twenty-one would be a precedent condition of the vesting, it would follow that the gift of the *corpus* of the personal estate would be void for remoteness. But, in my judgment, it is not possible to put any such construction on this will. I am of opinion, therefore, that the disposition of the personal estate made by this will is good in law.

Therefore, reverse the decree of the Master of the Rolls. Declare that the trusts of the personal estate declared by the will are valid in law; and that under and by virtue thereof the accumulated rents of the real estate and the personal estate bequeathed by the will are vested in the plaintiff, subject to be divested in the event of the plaintiff dying under the age of twenty-one. The costs of all parties to the appeal must come out of the personal estate, and the deposit be returned to the petitioner.

WESTBURY, L.C. }
 Dec. 17; } FARRANT v. BLANCH-
 Jan. 21. } FORD.

*Trustee—Breach of Trust—Release—
 Acquiescence—Full Knowledge.*

Where a breach of trust has been committed from which a trustee alleges that he has been released, it is incumbent on him to shew that the release was given by the cestui que trust deliberately and advisedly, with full knowledge of all the circumstances and of his own rights and claims against the trustee, and without pressure or undue influence. But where a cestui que trust, shortly after attaining twenty-one pressed for payment of a sum of money to which he was entitled, and four years afterwards accepted from one of his trustees a packet of deeds, which the co-trustee (the father of the cestui que trust) had deposited by way of security on the occasion of a misappropriation by him of the trust fund before the cestui que trust came of age, and at the request of his father signed and sent a release in writing (not under seal) to such trustee, and took no further steps till after his father's death six years later, and ten years after he came of age, when, the security turning out insufficient, he filed a bill to have the deficiency made good by the surviving trustee; it was held, reversing the decision of the Master of the Rolls, that all the requisites for constituting a valid release had been complied with, and the cestui que trust must be taken to have had full knowledge of the value of the security, notwithstanding he had never opened the packet of deeds.

This was an appeal of Joseph Green Bidwell from the decision of the Master of the Rolls, reported *ante*, p. 107. The facts of the case are fully set out in the former report and in the Lord Chancellor's judgment.

Mr. Selwyn and Mr. Wickens appeared for the plaintiff.

Mr. Southgate and Mr. Hislop Clarke, for Mr. Bidwell.

WESTBURY, L.C. (Jan. 21.)—As my judgment depends upon the particular circumstances of this case, I think it necessary to state them fully. Under the will of the testator, who died in 1819, the sum of

1,000*l.* was bequeathed upon trust for one Harriet Radford for life, and at her death for her children equally. Harriet Radford intermarried with Mr. Farrant, the father of the plaintiff. She died in 1832, having had two children only, the plaintiff and his sister, who became entitled to that legacy. In 1838 Mr. Farrant and the defendant Bidwell were duly appointed trustees of the will. The sum of 970*l.* was the whole amount of the legacy, and it was invested in the purchase of bank annuities. Before either of the children attained twenty-one, Mr. Farrant prevailed on his co-trustee, the defendant Bidwell, to lend him the whole of the trust fund, and accordingly the bank annuities were sold and the proceeds paid to Mr. Farrant. As security for the trust fund Mr. Farrant deposited with Bidwell the title-deeds of six freehold houses situate in the city of Exeter, of which Farrant appears to have been seised in fee simple. On the sister's marriage her share of the trust fund was paid or satisfied by her father. Afterwards, in March 1851, the plaintiff attained his majority. The plaintiff's statement is, that on the 21st of May 1851 he called on the defendant Bidwell and requested payment of 485*l.*, being his moiety of the trust fund. He appears, therefore, to have been then fully aware of the amount of the principal trust-money, and that it was not invested in the funds. The plaintiff goes on to say that he was referred by Bidwell to his (the plaintiff's) father, as the acting trustee, and some angry words having passed, the plaintiff said that he would place the matter in the hands of his professional adviser. Upon this the defendant Bidwell told him that he, Bidwell, had never had the trust-money or anything to do with it; that the plaintiff's father had had the money, but that he, Bidwell, held security for the plaintiff's interest of considerable value, and given for a larger amount than the plaintiff's claim of 485*l.*, and that the securities were in Bidwell's strong box and perfectly safe, and he again requested the plaintiff to apply to his father, but which the plaintiff declined to do.

In this account of the interview, taken from the plaintiff's own affidavit, it is plain that after it he knew, if he did not know

the fact before, that the trust-money was in the hands of his father, and that Bidwell had received from the father the deeds of some freehold houses as a security. The whole of the plaintiff's statement as to the representations alleged to have been made by Bidwell of the sufficiency of the security and the value of the houses is positively denied by the defendant.

In July 1851 some correspondence took place between the plaintiff and Bidwell, and from the language and contents of the plaintiff's letters they would seem to have been written with the assistance of a professional adviser. The plaintiff was again referred by the defendant to his father, to whom the plaintiff's letters were sent, and from the father the plaintiff received, on the 31st of July 1851, or a day or two afterwards, a note or written message in the following words: "Mr. Bidwell has already told you truly that he had nothing to do with the money, but holds securities for a larger amount than was due to you, so that you are not likely to be robbed by your father. There are no securities for your money alone, and therefore cannot be handed over to you, but you will get your hard cash as early as I can possibly manage it. If this does not suit you, it would be well to consult some respectable person, either lawyer or other, to learn what would be the fitting course for you to adopt. Peetering Mr. Bidwell in my stead is a shallow artifice." I think the plaintiff's conduct is correctly described by the father's expressions. He knew that his father had received the money, and was his trustee and debtor, and therefore to demand payment from Bidwell was but a device to avoid a direct application to the father. The plaintiff says, that in his reply he begged his father to have a better opinion of him, and that he then allowed the matter to rest, and ceased to make any further application to Bidwell; but he insists that his acquiescence was throughout occasioned by his reliance on the alleged statement of Bidwell, that the security was of ample value. I have already observed that Bidwell swears he never made any such statement, and the plaintiff's oath not being corroborated, I could not make a decree upon his evidence alone; but as this alleged fact of the statement by Bidwell forms the

basis of the plaintiff's case, and the main ground on which he meets the case against him of delay and acquiescence, I shall examine the subject more minutely.

Taking the whole of the plaintiff's statement of the interview and conversation with Bidwell in May 1851, it is plain that Bidwell was ignorant of the matter, and that the plaintiff must have perceived that Bidwell made no statement from personal knowledge, but that what he said was merely the repetition of what had been told him, and most probably by the plaintiff's father. The words of the plaintiff's affidavit are—"He, Bidwell, further said, he had not opened the packet of deeds containing the security, nor did he know what the security was, but he believed that it was upon some freehold houses of very ample value." The plaintiff is referred to his father for information; and under these circumstances, if the conversation passed as is here represented, but which is wholly denied, the plaintiff was hardly justified in relying upon it as a representation of the value of the security. But assuming that there was a positive statement by Bidwell of the sufficiency of the security, I am still to consider whether I can believe, having regard to the circumstances of the case, that the plaintiff remained until the death of his father in ignorance of the real nature of the security; and if he was not ignorant, he could not have relied on the representations of Bidwell.

The plaintiff when he became of age in March 1851, and afterwards, down to the end of December 1854, was an inmate in his father's house as part of his family. It is true that he denies that he constantly lived there, but he does not state that he had any other place of abode. The father was a surgeon residing in the city of Exeter. He seems to have been possessed of little or no property, except the six houses the subject of this security. They were all situate in the city of Exeter, and in one of them the father lived. The son does not appear to have had any occupation until about the end of the year 1854, when he obtained a commission in a militia regiment. He admits he was told by Bidwell, that the security consisted of freehold houses of the father; and it is difficult to believe he did not know which were the houses, or that he could suppose his father

was the owner of some other houses than formed the security. The plaintiff does not, by anything he has sworn exclude this natural inference, for although he states that he did not know the contents of the packet of deeds until after his father's death, that statement is consistent with the fact that he was perfectly well acquainted with the six houses of his father in Exeter, and knew that they were the subject of his security. But I do not feel it to be necessary that my judgment should rest on the conclusion derived from these circumstances, for the plaintiff's further statement is, that in February 1855, his father, whilst lying dangerously ill in bed, in his house in Exeter, spoke to him, the plaintiff, on the subject of the trust-money of 485*l.*, and desired him to call on the defendant Bidwell, who had something for him. The plaintiff gives no further account of the conversation; but he states that he went to the office of Bidwell, and received from a clerk a packet, which he brought back to his father, and was desired to keep, and which he says he surmised contained the deeds and security for the money due to him. The plaintiff states that he never opened this packet, or made any inquiry respecting it, but that he affixed his seal to it, and deposited it with his bankers at Exeter. If, as I infer the fact to have been, the plaintiff was already well acquainted with the security, this statement becomes credible; but if not, it is hardly to be believed that a man who was anxious about the security of his money, of the nature of which he was ignorant, should not look into the parcel when given to him before he sealed and deposited it with his bankers. This is, however, immaterial, for I must impute to him the knowledge that he might have obtained by examining the parcel which was delivered to him as his property; and if he did not examine it, it was, I think, because he was already acquainted with the nature and subject of the security.

The plaintiff further states that in the month of February 1855, he received a letter from his father, still lying dangerously ill, requesting the plaintiff, in the event of his, the father's, death, not to hold Mr. Bidwell responsible for the 485*l.*, and inclosing the form of a memorandum for the plaintiff to copy, sign and send to Bidwell. The

form or language of the memorandum so sent by the father to the plaintiff is not stated; but, in consequence of this request, the plaintiff wrote and signed and sent to Bidwell⁽¹⁾ a document in the following words: "In consideration of certain deeds of conveyances delivered to me, I hereby release, quit and discharge Joseph Green Bidwell, Esq. from all claims and liabilities I may have on him, as one of my trustees under the will of the late William Tucker, Esq. Dated 26th February 1855." This paper was sent to Mr. Bidwell without any condition or qualification. Mr. Bidwell had a right to consider it was a discharge given by the plaintiff freely and deliberately, with full knowledge of his rights, and after he had satisfied himself of the sufficiency of the security which he had some time before applied for and received. The plaintiff appears to have told his father that he had sent Bidwell a discharge. The secret intention with which the plaintiff acted is best described by himself. With respect to his father, he tells us, in his affidavit, that he considered what he did as a matter of form to soothe his father in what he believed to be his last illness. With respect to Bidwell, he says, that he sent the paper upon the express understanding and faith that the representations made to him on the 21st of May 1851 by Bidwell, as to the ample nature of the security were true, and that the packet handed to the plaintiff by Bidwell's clerk contained such ample security. He does not, however, state that he expressed anything of this kind to either his father or the defendant. The father lived until the 14th of February 1859; the son never undeceived him as to his real intentions; he permitted his father to die in the belief that Bidwell had been effectually discharged; he permitted Bidwell also to remain under the same impression until the 10th of December 1859, when he wrote a letter to the defendant, demanding payment of the 485*l.*; and in the month of April 1861 the bill in the present suit was filed.

Of the principles of this Court there can be no doubt. I do not mean to weaken them, and I will state them rather more

(1) It appears from the former report of this case, *supra*, p. 108, that the plaintiff sent this document to his father, who forwarded it to Bidwell.

strongly than I remember to have seen them worded. The duty of proving an effectual discharge lies on the trustee. When a breach of trust has been committed, from which a trustee alleges that he has been released, it is incumbent upon him to shew that such release was given by the *cestui que trust* deliberately and advisedly, with full knowledge of all the circumstances and of his own rights and claims against the trustee; for it is impossible to allow a trustee who has incurred personal liability to deal with his *cestui que trust* for his own discharge upon any other ground than the obligation of giving the fullest information and of shewing that the *cestui que trust* was well acquainted with his own legal rights and claims, and gave the release freely and without pressure or undue influence of any description.

The question is, do these requisites exist in the case before me? I am of opinion that they do; and, further, that without the discharge, the acts of the plaintiff amount to an acquiescence in the breach of trust, and an acceptance or adoption of the security given by his father. There are two passages in the judgment of Lord Eldon, in *Walker v. Symonds* (2), in one of which (p. 64) his Lordship says: "It is established by all the cases that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust. I go further, and agree that either concurrence in the act, or acquiescence without original concurrence, will release the trustees;" and in the other (p. 75) he says that "a *cestui que trust*, suffering from a breach of trust, and proving that the breach of trust was neither authorized nor adopted by him, may proceed against either or all of the trustees." But acquiescence or adoption may be an answer to the *cestui que trust*. From the narrative which I have given of the plaintiff's acts, taken almost entirely from his own affidavit, it is plain that from the time he attained his majority in March 1851, ten years before the institution of this suit, he was well aware of his own rights and of the liability of Bidwell, and knew well the breach of trust

that had been committed by the money having been lent to his father. For the reasons I have given, I impute to him full knowledge of the nature of the security and of his father's houses, which were the subject of it. In January 1855, without any solicitation from Bidwell, he voluntarily and deliberately requests that the security which his father had given may be handed over to him, and he accepts and treats it as his property. After an interval quite sufficient to enable him to become fully acquainted, if he was not already, with the nature and value of the security, he freely, and without pressure, sends an ample discharge in writing to Bidwell. I say without pressure, for I cannot regard the entreaty of his sick father as amounting to undue influence. His design in giving the discharge is apparent; it is even avowed by himself; in plain words, it was to cheat his father and Bidwell into the belief, so long as his father lived, that his claim against Bidwell was relinquished, and then to renew it as soon as his father ceased to exist. If I permitted this to be done successfully by means of the principles of this Court, I should make them instruments for perpetrating the greatest fraud and injustice.

Therefore, reverse the decree of the Master of the Rolls, and let so much of the bill as seeks relief against the defendant Bidwell personally be dismissed with costs.

STUART, V.C. }
 Jan. 21. } WEST v. WEST.

Will—Construction—Gift of Share of Residue to Testator's Daughter, to be vested in her on her Marriage with the Consent of her Guardians.

A testator, by will, gave a portion of the residue of his real and personal estate to trustees upon trust for his son W. R. W., and his daughter J. M. W., to be divided between them in equal proportions as tenants in common, the share of his son to be vested in him at the age of twenty-four years, and the share of his daughter to be vested in her on her marriage with the consent of her guardians; and the testator declared that in case his son should die under twenty-four

and without leaving issue, or his daughter should die without having been married with such consent as aforesaid, the share of him or her so dying should be held in trust for the survivor of them, his or her heirs, executors, administrators and assigns, and to be a vested interest in him or her respectively at the same age or time as his or her original share. The testator also declared that if at his death his son W. R. W. should not have attained the age of twenty-one years, or his daughter should not have been married with such consent as aforesaid, it should be lawful for his trustees to apply all or any part of the income of his or her presumptive or contingent share in his said trust estates for his or her maintenance and education or benefit until such shares should respectively become vested. The son had attained the age of twenty-four and the daughter had attained twenty-one, but she had not been married:—Held, that the daughter became absolutely entitled to a share of the testator's residue upon her attaining twenty-one years of age.

William James West, by will, dated the 7th of April 1848, gave all his real and personal estate to John Cole (now deceased), Thomas Perfect Charlton and John Sills Charlton, upon trust to pay his debts and funeral and testamentary expenses, and to stand possessed of the residue thereof respectively, upon trust as to one-third of such residue, and of the rents, interest and annual income thereof, for his widow for her life, if she should so long continue his widow and unmarried, and after her decease or marriage then upon the same trusts for the benefit of his son and daughter as were next therein-after declared. And as to one other third part of the residue of his real and personal estate, upon trust for his son, William Robert West and his daughter Julia Mary West, "to be divided between them in equal proportions as tenants in common, and not as joint tenants; the share of his said son to be vested in him at the age of twenty-four years, and the share of his said daughter to be vested in her on her marriage, with the consent, nevertheless, of her guardian or guardians for the time being. And in case his said son should die under the age of twenty-four years, and

without leaving lawful issue, or his said daughter should die without having been married with such consent as aforesaid, then the testator declared that the share of him or her so dying, together with all accumulations and savings, if any, of the rents, interest, dividends and income thereof, should be held in trust for the survivor of them, his said son and daughter, his or her heirs, executors, administrators and assigns, and to be a vested interest in him or her respectively at the same age or time as his or her original share." And as to the remaining one-third share of the residue of the testator's real and personal estate, he gave the annual income thereof to his son James Edwin West, for his life, and after his decease the testator gave such last-mentioned share upon the same trusts for the benefit of his son William Robert West and his daughter Julia Mary West, as were last thereinbefore declared concerning the one third part of the said trust estates so limited in trust for them as aforesaid. The testator also declared that if at his decease his son William Robert West should not have attained the age of twenty-four years, or his said daughter should not have been married with such consent as aforesaid, it should be lawful for his trustees to apply all or any part of the income of his or her presumptive or contingent share in his said trust estates for his or her maintenance and education, or otherwise for his or her benefit until such shares should respectively become vested; and the testator appointed his trustees his executors, and also, together with his wife, guardians of such of his children as for the time being should be under the age of twenty-one years.

The testator died on the 24th of May 1848.

James Edwin West died on the 26th of September 1860, under twenty-one years of age.

William Robert West had attained the age of twenty-four, and Julia Mary West attained the age of twenty-one years on the 4th of May 1850, but she was still unmarried.

The bill was filed, on the 3rd of June 1862, by Julia Mary West, against William Robert West, the testator's widow, and the

surviving trustees of his will, for the purpose of having the rights and interests of the plaintiff and all other parties in the testator's estate declared.

Mr. Malins and *Mr. Hardy*, for the plaintiff.—One-third part of the residue became vested in the plaintiff at once upon the testator's death, subject, however, to be divested upon her marrying under twenty-one years of age without the consent of her guardians. When the testator said that the plaintiff's share was to be vested in her upon her marriage with the consent of her guardians, he meant that it was to be paid or transferred to her in the event of her marrying under twenty-one with such consent, and that she was entitled to have it paid to her upon her attaining that age, if she had not been married. The present case fell within the principle of *Booth v. Booth* (1), where it was held that a gift of residue to the testator's great-nieces upon their marriage, with interest thereon in the mean time until that event vested in them before marriage, they having respectively attained the age of twenty-one years before the will was made. They also referred to

Berkeley v. Swinburne, 16 Sim. 275; a. c. 17 Law J. Rep. (N.S.) Chanc. 416.

Taylor v. Frobisher, 5 De Gex & Sm. 191; s.c. 21 Law J. Rep. (N.S.) Chanc. 605.

Young v. Robertson, 8 Jur. N.S. 825.

1 *Jarman on Wills*, 2nd edit. 722 (2).

Mr. J. J. Aston, for R. W. West, contended that the plaintiff had only a contingent interest in the testator's real and personal property dependent on the event of the marriage with the consent of the persons named in the testator's will, and that until such marriage her share would not vest in her. Marriage, with the consent declared by the testator, was a condition precedent, upon which, and not before, a share of residue was to vest in the plaintiff. He referred to *Atkins v. Hiccocks* (3).

Mr. Bacon and *Mr. Marten*, for the trustees.

STUART, V.C.—There is great difficulty in cases of this kind.

(1) 4 Ves. 399.

(2) See also *Jones v. Mackilwain*, 1 Russ. 220.

(3) 1 Atk. 500.

Lord Hardwicke, in the case of *Atkins v. Hiccocks*, held that, where the words referring to marriage amount to a condition precedent, the condition must be performed in order to entitle the legatee to a vested interest. That is an intelligible ground of decision, and the authority of that case has never been questioned. It is certain in the present case that there is no condition precedent, and there are authorities which shew that upon questions of this kind the Court has done some violence to the language of the testator in order to prevent the consequences which would follow from a construction inconsistent with the intention of the testator in favour of the legatee.

In the case of *Booth v. Booth* there was a gift of residue, as in the present case, upon trust to pay the dividends equally between the testator's two great-nieces, Phoebe Booth and Ann Booth, until their respective marriages, and from and immediately after their respective marriages to assign and transfer their respective moieties or shares thereof unto them respectively. That was a strong case, for there was an express gift of a life interest with a direction to pay the capital upon the marriage of the nieces. One of the nieces died without having been ever married, and the question was whether her share was vested. Lord Alvanley decided that it was a vested interest, though the event of marriage had never occurred. Looking at the whole will, and doing violence to the particular words which said that the capital was to be paid upon marriage, he held that the capital was transmissible, though the lady was never married at all. In that case the Court had to consider the various authorities, and amongst the rest the case of *Atkins v. Hiccocks*; and Lord Alvanley, in deciding in favour of the niece, who had never been married, relied very strongly upon the circumstance that the subject-matter of the gift was not a legacy of specific amount, but a share of residue. That seems a small distinction, but it is beyond a doubt that this Court in questions of this kind has made a distinction in favour of residuary legatees.

Sir W. Grant, in *Leake v. Robinson* (4), had occasion to consider the decision of

(4) 2 Mer. 363.

Lord Alvanley in *Booth v. Booth*, and after criticizing the judgment of Lord Alvanley, he ends by expressing his strong approbation of the principle upon which that learned Judge proceeded. At page 386 Sir W. Grant says, "I am aware, however, that although with regard to particular legacies, this doctrine," that is in favour of vesting, "has not been controverted, yet the case of *Booth v. Booth* may be considered as throwing some doubt upon it when it is a residue that is the subject of the bequest. There is certainly a strong disposition in the Court to construe a residuary clause so as to prevent an intestacy with regard to any part of the testator's property. With all that disposition, it is evident that Lord Alvanley felt that he had a difficult case to deal with. Some violence was done to the words in favour of what he conceived to be, and what in all probability was the intention. That intention, however, was collected from words which do not occur in the present case. Both the legatees were adults at the time the will was made. Lord Alvanley admits that if it had been otherwise, it might have made some ingredient in the argument." He goes on with further observations on the case of *Booth v. Booth*, and adopts the principle on which that decision was founded.

Now, in this case there is a clear manifestation of bounty towards the daughter, and the whole question seems to be whether those words which refer to her marriage were or were not intended to give her a beneficial interest in regard to the time of vesting, greater than the testator intended to give to her brother. This is a case of a gift of residue, as in the case of *Booth v. Booth*. But there is no distinction like that in *Booth v. Booth*, where the first gift was to the daughter of the dividends, with a subsequent direction, in the particular event of marriage, to pay the capital to her; but a gift of residue, with an express trust for the son William Robert and the daughter Julia Mary West, to be divided between them in equal proportions, as tenants in common, and not as joint tenants. These words are free from all doubt. The testator intended that the son and daughter, at some time or other, should take the whole equally between them as tenants in common. Having said that, he goes on to say that the share of the

son is to be vested at twenty-four. He might have said the same thing as to the share of the daughter, but at the date of the will she was only eighteen years of age, and he contemplated she might marry before twenty-one, and intended that if she did marry before she attained twenty-one, that it should be with the consent of her guardians, and that her share should be then payable. That was a rational intention and expressed by these words, "the share of the daughter to be vested in her upon marriage with the consent of her guardians or guardian for the time being." It seems very clear that her marriage with the consent of guardians must mean her marriage under twenty-one; for, if her marriage did not take place under twenty-one, she could not have any guardian. The testator meant that if she married under twenty-one, without consent, the legacy should not then vest in her. But it is a rational intention to assume that he gave her a greater benefit than he gave to his son, whose share was not to vest until twenty-four. He goes on to say, "in case Robert William should die under twenty-four, and without having lawful issue, or his said daughter Julia Mary should die without having been married with such consent as aforesaid." These words, "die without having been married with such consent as aforesaid," can mean nothing else than "die under twenty-one unmarried." Thus, if she died unmarried under twenty-one, her share was to go to her brother. This gift over in the event of a death before vesting would be almost nonsense, if the construction contended for by the brother and trustees were to prevail. Suppose the son died under twenty-four, what was to become of the two shares? There is a clear gift of them to the daughter as the survivor; and in that event, if the will be construed with reference to the marriage, that the daughter was to take a vested interest only if she married with the consent of guardians, and that could not occur after twenty-one, the whole gift would fail. Sir W. Grant said, that a gift of residue was a different thing from a gift of a legacy; and that there was a strong disposition in the Court to construe a residuary gift so as to prevent an intestacy. But here there would be an intestacy of the whole if the son died under twenty-four, and the daughter sur-

vived and married at thirty; for neither would take a share of the residue. That is a construction entirely different from the whole scope of this will. This is, I think, a stronger case than that of *Booth v. Booth*, where it appeared that the Court wished to accelerate vesting and prevent intestacy.

Under these circumstances, it seems to me that the plaintiff is entitled to a declaration that her share is vested, and I think the proper order will be to declare that the son and daughter were entitled absolutely.

The order was as follows: This Court doth declare, that under the circumstances the plaintiff Julia Mary West, and the defendant William Robert West, are, according to the true construction of the will of the said testator, absolutely entitled to two third parts of his residuary real and personal estates, in equal moieties as tenants in common, and to the remaining third part thereof subject to the estate therein of their mother, the defendant Mary Halsey West, in equal moieties as tenants in common; and doth decree the same accordingly.

ROMILLY, M.R.
Nov. 19;
Dec. 2.

VERNON v. EARL MAN-
VERS.

*Inclosure Acts, 8 & 9 Vict. c. 118,
11 & 12 Vict. c. 99. — Power of Sale —
Application of Sale Monies.*

Trustees of settled estates with a power of sale and exchange under which the sale monies were made applicable in satisfaction of charges on the settled estates, and as to the surplus in the purchase of other lands, sold a portion of the settled estates and paid the proceeds to a tenant for life, who expended the greater part thereof upon allotments made under the Inclosure Acts in fencing, draining, road-making, &c., and died without creating any charge under the acts:—Held, that the money was not expended in accordance with the provisions of the settlement either in satisfaction of an existing charge or in the purchase of lands; but that, though the forms of the Inclosure Acts had not been complied with (1), any sums properly expended for the purposes mentioned in the acts, not exceeding

(1) See *Drinkwater v. Combe*, 2 Sim. & S. 340; s. c. 3 Law J. Rep. Chanc. 178.

5l. per acre, ought to be allowed to the executors of the tenant for life.

By a settlement, dated the 27th of November 1811, several real estates situate in the counties of Nottingham, Lincoln, Derby, York, and in the county of the town of Nottingham, were settled so that Charles Herbert late Earl Manvers, on the death of his father, became tenant for life, with remainder to his first and other sons successively in tail male. The settlement contained powers of sale and exchange by the trustees, with the consent of the late Earl and his father, or the survivor; and the trustees were to apply the proceeds arising from any sale or exchange in or towards satisfaction of any charge then affecting the settled estates; and they were also required to invest any surplus in the purchase of other hereditaments in fee simple or of lands of leasehold or copyhold tenure, convenient to be held therewith, to be held upon the same uses.

On the 20th of November 1832, recoveries of the several estates were suffered, and the estates were again settled, but the powers of sale and exchange and the other powers and privileges annexed to the life estate of Charles Herbert Earl Manvers, and exercisable during its continuance, were, by reference to the settlement of the 27th of November 1811, continued and restored.

By a settlement dated the 14th of June 1852, made on the marriage of Viscount Newark, now Earl Manvers, the estates, subject to the life interest of the then Earl, and to the then existing powers, were appointed to new uses, with a power of sale and exchange similar to that in the settlement of the 27th of November 1811.

By another deed, dated the 15th of August 1856, increased powers were given to the trustees of the settled estates, at the request in writing of the tenant for life for the time being, to lay out money arising from the sale or exchange of any part of his settled estates in improvements upon other parts of the property.

In June 1852 the trustees sold a piece of land at Sneaton, part of the settled estates, for 3,000*l.*; and on the 16th of September 1852, they paid the purchase-money to Charles Herbert Earl Manvers,

at his request, as he was in the habit of making additions to the settled estates, and calling upon the trustees to reimburse him.

Between 1849 and 1856 inclosures of waste lands were being made in Moorhouse, in the county of Nottingham, and Newbold, in the county of Lincolnshire, and the Earl gave up several plots of old inclosed lands in exchange for new allotments; there were also allotted to him in severalty in lieu of his common rights 143 acres of the waste, and in respect of these allotments he expended in fencing, draining, road-making, &c., sums amounting to 2,218*l.* 13*s.* 4*d.*, and he subsequently expended a further sum of 576*l.* 2*s.* in respect of the same inclosures, making in the aggregate 2,794*l.* 15*s.* 4*d.*

Charles Herbert Earl Manvers died on the 27th of October 1860, and this bill was filed by the trustees to ascertain whether the 3,000*l.*, or any part thereof, had been properly expended in pursuance of the trust comprised in the settlement of the 27th of November 1811, and if not, that so much as had not been properly expended might be repaid to them out of the late Earl Manvers's estate.

Mr. Dean, for the plaintiffs.

Mr. Kenyon, for Earl Manvers, the present tenant for life, and one of the executors of the will of the late Earl, contended that the expenditure by the late Earl was authorized by the settlement, because the exchange of the old inclosures was justified by the settlement, and because the allotments were to be regarded as purchases of new interests, or as removing charges upon that part of the settled estates over which third parties had existing rights, which in effect were incumbrances.

Mr. Hobhouse, for Messrs. Egerton and Wynn, the other executors.—The lands acquired under the inclosures were either in the nature of new purchases, or they must be considered as having been taken by the late Earl by way of exchange for his then existing estate, which, from being enjoyed with others in common, became, as a several inheritance, a new estate, and part of the settled estates. This was effected by the late Earl, who, as the agent of the trustees, was justified, under the settlement, in expending the trust monies in making the property available for cultivation.

Mr. Surridge, for Viscount Newark, the infant tenant in tail in remainder.—The inclosures were made, as regards Moorhouse, under the 11 & 12 Vict. c. 27, and as regards Newbold, by private agreement under the provisions of the 8 & 9 Vict. c. 118. ss. 16, 133, and the 11 & 12 Vict. c. 99. s. 8. The late Earl, as tenant for life, could only affect the estates under the provisions of those acts, and he had not charged the inheritance with the only sum he could impose, which was 5*l.* per acre towards the inclosure expenses. This could only be done by paying the money to the Commissioners, and by the tenant for life in possession executing a mortgage of the lands. No such charge could now be made by the trustees, who were neither in possession or in receipt of the rents. The 3,000*l.* was, therefore, a debt due from the trustees.

Mr. Kenyon, in reply.

THE MASTER OF THE ROLLS.—It is necessary to consider whether this sum of 2,794*l.* can be treated as paid for the purchase of another estate, purchased by the late Earl, as the agent and on the behalf of the trustees, and the purchase as having been adopted by them. This view cannot be entertained. No sum of money was paid; neither could it properly be paid as a consideration for the allotment which was made by the Inclosure Commissioners. It was, no doubt, a condition of such allotment that money should be expended in fencing, draining and road-making; but these expenses do not constitute a money consideration for the allotment: that is made simply in consideration of the relinquishment of the rights of common which belonged to the Earl over the land inclosed in respect of his adjoining property. In that case, then, can the 2,794*l.*, or any part thereof, be in equity deemed to have been an existing charge upon the settled estates?—and, if so, to what extent? This must be answered by the General Inclosure Act (8 & 9 Vict. c. 118. s. 133), which empowers a tenant for life, with the consent of the Commissioners, to charge the allotment with his proportion of the inclosure expenses, not exceeding 5*l.* per acre; and by the 11 & 12 Vict. c. 99. s. 8. the money so raised must be paid to and applied by the Commissioners. It does not appear

that the consent of the Commissioners to charge the allotments with inclosure expenses was ever obtained. The payment, however, of the 3,000*l.* by the trustees to the late Earl could only have reference to the money expended by the Earl for the inclosure expenses; and his application for the money must here be considered as clear evidence of his intention to charge the expenses on the allotments; and if he were now living he could make such a charge upon the allotments. By the settlement dated the 15th of August 1856 the powers given to the trustees for the application of the monies arising from the sale of the settled estates were enlarged; but those powers cannot apply to the 3,000*l.* which was paid to the trustees in 1852. But notwithstanding the provisions of the 8 & 9 Vict. c. 118. have not been, and cannot now, in consequence of the Earl's death, be complied with, still the Court, under the circumstances, has power to declare that so much of the 2,794*l.* 15*s.* 4*d.* as the Earl himself could have made a charge on the allotments, must be considered as an existing charge upon such allotments. So much, therefore, as was properly expended in effecting the inclosures, not exceeding 5*l.* per acre, must be allowed as a proper application out of the sum of 3,000*l.* It must, however, be to that extent only, and I will make a declaration to that effect.

ROMILLY, M.R. } Nov. 19; Dec. 3. }	VERNON v. EARL MAN- VERS.
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Will—Charge of Debts—Exoneration of general Residue.

The selection by a testator of a particular portion of his personal estate for payment thereof of debts will exonerate the residuary personal estate from its liability.

Charles Herbert Earl Manvers, by his will, dated the 24th of October 1860, directed that, after payment of all his just debts, all money of which he might die possessed might be divided amongst his three dear children. All his other personal property of every description whatsoever he devised to his dear son Newark, and he

appointed his said son and his two sons-in-law, Messrs. Egerton and Wynn, joint executors of his will.

The testator died on the 27th of October 1860, leaving issue three children, Sidney William Herbert, Earl Manvers, his only surviving son, and two daughters; and a question was now raised, whether the debts were charged upon the specific legacies, or whether they ought to be paid out of the residue.

Mr. Dean, for the plaintiffs.

Mr. Kenyon, for Earl Manvers.—The will of the testator contained two distinct gifts. One was a specific gift of the money after payment of the debts; this sentence expressly selected the fund out of which the debts were to be paid, and nothing was given until they were paid. The other was a gift of the rest of the personalty. Each sentence was altogether distinct from the other—

Choat v. Yeats, 1 J. & W. 102.

Browne v. Groombridge, 4 Madd. 495.

Mr. Hobhouse, on behalf of Mr. Egerton and Mr. Wynn, who, in right of their wives, are interested in the money specifically bequeathed by the testator, considered that the debts ought not to be paid out of "the money"; but that it was payable out of the general residuary estate which was given to the present Earl. The direction to pay debts, at the beginning of the will, was merely an expression of a general intention—

Holford v. Wood, 4 Ves. 76.

2 *Jarman on Wills*, 639, 3rd ed.

Mr. Surridge, for Viscount Newark, an infant.

THE MASTER OF THE ROLLS.—Upon considering the terms of the will, I think they come within the rule laid down in *Bootle v. Blundell* (1), which is, that when a will contains a direction to pay debts out of a particular fund, that is equivalent to a direction that they are not to be paid out of the general estate. Here the words of the will are, "I desire that, after payment of all my just debts, all money which I may die possessed of may be divided amongst my three children. All my other personal estate I devise to my dear son Newark." Now, if

(1) 19 Ves. 518; s. c. 1 Mer. 193.

the two sentences had been continuous, I should have held that the words "subject to the payment of my just debts," governed the whole; but, on behalf of the plaintiff, it was correctly pointed out that such is not the case, and that they are two distinct gifts and two distinct sentences; and consequently the meaning of the expression is within the rule followed in *Bootle v. Blundell*, that it is a charge upon the money, and consequently the rest of the personal estate is exonerated from the payments; and I shall make a declaration to that effect.

ROMILLY, M. R.

Dec. 10,
11, 12, 17.

HARMS v. PARSONS.

Contract — Sale of Business — Covenant not to carry on — Restraint of Trade.

Upon the sale by the defendant to the plaintiffs of a business of a horsehair manufacturer the defendant by written contract agreed not to buy, sell, manufacture, or directly or indirectly interfere in the trade or business of a horsehair manufacturer, except for the benefit of the plaintiffs; and subsequently in a deed of assignment (executed in pursuance of the previous contract) the defendant covenanted that he would not, directly or indirectly, carry on the business of a horsehair manufacturer within 200 miles from B. without the consent in writing of the plaintiffs, except for their benefit and at their request. The defendant, besides being a manufacturer of horsehair, was, at the time of the sale, a general dealer in unmanufactured horsehair; he also purchased and sold manufactured horsehair, which was usual both with dealers and manufacturers:— Held, upon evidence as to the mode of carrying on the business, that the limit of 200 miles was reasonable; and held also that the defendant had sold so much of the business as belonged to that of a horsehair manufacturer, though forming part also of the business of a horsehair dealer; and that he must be restrained from the purchase and sale of manufactured horsehair.

This bill was filed, by Henry Harms and William List, against Joseph Parsons, praying that an assignment, dated the 28th of

February 1859, might be rectified, so far as, through mistake or otherwise, it was contrary to the intention of the parties with the object on the part of the plaintiffs of preventing the defendant from dealing in horsehair; and praying also that the defendant might be restrained from carrying on the trade or business of a horsehair manufacturer at Birmingham, or within 200 miles thereof.

Joseph Parsons, for some time previous to August 1858, carried on the business of a horsehair manufacturer and dealer at 135, Moseley Street, Birmingham.

By an agreement, dated the 17th of August 1858, Messrs. Harms, List & Co. agreed to give the defendant 630*l.* for the goodwill of his business of a horsehair manufacturer at Birmingham and elsewhere, including the whole of the fixtures, implements and utensils in trade, fittings, steam-engine, dye-tank, &c., at the said premises. They also agreed to take all the manufactured stock, at a fair valuation, on the premises at the date of the agreement, and also about three tons of cocoa-nut fibre lying at the Grand Junction Wharf, Birmingham, except such portions as J. Parsons might manufacture between that date and the 29th of September next. They also agreed to take a lease of the premises, terminable at seven, fourteen or twenty-one years, at their option, at 90*l.* a year. The defendant agreed to be bound not to buy or sell, manufacture, or directly or indirectly to interfere in the trade or business of a horsehair manufacturer, except for the benefit of the plaintiffs, after the 29th of September then next, and except for the disposal of such of the unmanufactured stock which he might have on hand on the 29th of September. The defendant was to be at liberty to buy and sell Mexican fibre as a wholesale dealer, but not to manufacture it.

The plaintiffs paid 400*l.* for the goodwill and 230*l.* for the plant of the business, and they paid, further, 1,316*l.* 6*s.* 4*d.* for the stock at a valuation; they also executed a lease of the premises, and took possession on the 29th of September 1858.

By an indenture, dated the 28th of February 1859, reciting the facts above stated, the defendant assigned the goodwill of a horsehair manufacturer so carried on by him, and all the utensils, &c. and other

the fixtures of trade, to the plaintiffs, their executors, administrators and assigns, absolutely; and he covenanted with them that he the defendant would not at any time thereafter, either by himself or in connexion or by any other person or persons, directly or indirectly carry on the said trade or business of a horsehair manufacturer at any town, city or other place in the United Kingdom within the distance of 200 miles from the town of Birmingham without the consent in writing of the plaintiffs from time to time first had and obtained, except for their benefit and at their request, under a penalty of 1,000*l.*, to be paid to the plaintiffs, their executors, administrators and assigns. It was then declared that nothing therein contained should extend to prevent the defendant from buying and selling Mexican fibre as a wholesale dealer; but he should not, either directly or indirectly, be at liberty thereafter to manufacture the same. The defendant then covenanted that he would introduce the plaintiffs, their executors, administrators and assigns, to his customers, and use his best endeavours to promote the said trade or business, and give them the full advantage of his connexion and custom in the trade or business.

The evidence shewed that the business of a horsehair manufacturer was in very few hands; but that the business of a dealer was carried on by a large number of persons; that previous to the sale of the business, the defendant carried on both the business of a manufacturer and a dealer; and that since the execution of the assignment he had been in the employment of his brother-in-law, a horsehair manufacturer at Birmingham. The defendant, by his answer, also admitted that he had bought manufactured horsehair within the circuit of 200 miles from Birmingham for the purpose of selling it again, though not for the purpose of manufacturing it.

Mr. Baggallay, Mr. Karslake and Mr. F. Clifford, for the plaintiffs.—It would, no doubt, be argued that a covenant not to carry on business within a circuit of 200 miles was unreasonable and excessive; but considering the modern facilities of communication and the modern means of transport, it might safely be asked whether a general restriction without limit would be against public policy; and, considering the

altered state of trade, it certainly was not against public policy to covenant not to trade within 200 miles. The connexions of trade now extended to all parts of the world, and contracts were taken to be executed at most remote places. A general covenant, therefore, to retire from trade altogether might reasonably be taken from a telegraphic instrument-maker; Bass's and Allsopp's ales were known the world over, and Mudie made no difficulty in sending books round the kingdom, and even abroad; a general covenant might also be asked from them. The plaintiffs had purchased and paid the defendant for his business and his stock-in trade; they had stipulated for its sole enjoyment within 200 miles; and they were injured by the competition which, by his appearing in the market, they had to sustain.—

Tallis v. Tallis, 1 E. & B. 391; a.c. 22 Law J. Rep. (N.S.) Q.B. 185.

Bunn v. Guy, 4 East, 190.

Whittaker v. Howe, 3 Beav. 383.

Wallis v. Day, 2 Mee. & W. 273; a.c. 6 Law J. Rep. (N.S.) Exch. 92.

Avery v. Langford, Kay, 663; a.c. 23 Law J. Rep. (N.S.) Chanc. 837.

Mr. Selwyn and Mr. Druce, for Joseph Parsons.—There was a great difference between a manufacturer and a dealer in horsehair. The manufacturing business had been sold; and the bill did not allege that there had been any breach of the actual contract. The plaintiffs, however, had excluded the defendant from carrying on business within limits far larger than were reasonable or necessary for their protection. So far, therefore, the covenant was void; and the Court would not grant the injunction asked, and it would certainly not extend the terms of the deed so as to prevent the defendant from dealing in horsehair.—

Horner v. Graves, 7 Bing. 735; a.c. 5 M. & P. 768; 9 Law J. Rep. C.P. 192.

Price v. Green, 16 Mee. & W. 346; a.c. 16 Law J. Rep. (N.S.) Exch. 108.

Mallan v. May, 11 Mee. & W. 653; a.c. 12 Law J. Rep. (N.S.) Exch. 376; 13 Mee. & W. 511; 14 Law J. Rep. (N.S.) Exch. 48.

Mr. Baggallay, in reply, said that the contract with the plaintiffs extended not only to manufacturing, but also to dealing, whether in the raw material or in manufactured goods. The contract extended to

all the benefits to arise from the trade carried on by the defendant as manufacturer.

The MASTER OF THE ROLLS.—Restraints of trade, for which a consideration has been paid, are undoubtedly valid. It rests, however, with the discretion of the Court to say whether the restraint is reasonable or excessive. In *Whittaker v. Howe* a covenant for valuable consideration not to carry on the business of an attorney and solicitor in Great Britain for twenty years was considered good. The business of a horsehair manufacturer appears to be in few hands; still it cannot be considered that 200 miles is a restriction which can affect the contract the defendant has entered into. The defendant says that he had not broken the contract; that the business of a manufacturer is distinct from that of a dealer; and that he has not assigned the business of a dealer. Strictly, it is impossible to say that he has carried on the business of a manufacturer; but he has bought and sold on his own account manufactured horsehair within the proscribed limits after selling the whole of his stock to the plaintiffs. This was a part of the business of a horsehair manufacturer, and a part he had contracted to sell. It was also a part of the business of a dealer; but so much of it as appertained to the business of a manufacturer the defendant had assigned to the plaintiffs for value; and, so far, the deed must be construed most strongly against the grantor. The defendant, therefore, must be held to have sold all that belonged to the business of a horsehair manufacturer. His Honour accordingly granted an injunction to restrain the defendant from buying and selling manufactured horsehair, either by himself or any other person, directly or indirectly, or in anywise interfering with the trade or business of a horsehair manufacturer; but said the bill must be dismissed so far as it sought to restrain the defendant from carrying on the business of a dealer, as distinguished from the purchase and sale of manufactured horsehair; and as the plaintiffs had asked more than could be given to them, each party must pay his own costs. Further proceedings must also be stayed, and there must be liberty to apply.

Wood, V.C. }
Dec. 10, 12; } SIMPSON v. FOGO.
Feb. 13. }

Ship—Mortgage—Conflict of Laws—Comity of Nations—Judgment of Foreign Court in Rem and Inter Partes—Lex Loci Contractus—Lex Domicilii—Lex Fori.

The owners of a British ship mortgaged her in England, and she afterwards was taken by the mortgagors to New Orleans, where she was attached by creditors, who took proceedings in the Courts there for the purpose of making her available for their demands. The English mortgagees intervened in these proceedings for the purpose of asserting their rights; but their claim was wholly disregarded, the law of New Orleans not recognizing a mortgage of chattels; and, under an order of the Court, the ship was sold to a British subject. The ship having afterwards returned to England with a cargo, the mortgagees filed a bill to enforce their claim:—Held, that the judgment of a foreign Court of competent jurisdiction is conclusive inter partes on the merits of the matter in dispute, but may be reviewed by the Courts in England if any error appears on the face of the record.

Where a foreign tribunal acts in defiance of the comity of nations by refusing to recognize a title properly acquired according to the laws of England, its judgment will be disregarded by the English Courts.

In the distribution of assets the Lex fori prevails.

In this case the bill was filed, by the Bank of Liverpool, as mortgagees of the British ship *Warbler*. The ship had been sold at New Orleans to the defendant Fogo, a British subject, under a decree of the Courts there, they refusing to recognize the title of the mortgagees. The ship was now in this country, and this suit was instituted to ascertain and enforce the rights of the plaintiffs. The case is reported on demurrer in 1 Jo. & H. 18; and 29 Law J. Rep. (N.S.) Chanc. 657, and now came on for hearing on motion for decree. The facts of the case are fully set out in the judgment of the Vice Chancellor and in the above report.

Sir Hugh Cairns, Mr. Charles Hall and Mr. Milward of the common law bar, for

the plaintiffs, contended that this was a judgment *in personam* and not *in rem*; that, therefore, it was not conclusive as to the title to the ship; that the Courts in this country would examine the judgment of a foreign Court, not being a judgment *in rem*, if there appeared on the face of it an error sufficient to shew that the Court had come to an erroneous conclusion either of law or fact, or if the judgment itself was repugnant to the comity of nations. On these points the following authorities were cited:

The Duchess of Kingston's case, 2 Smith's Lead. Cas., 5th edit. 683, note.

Dalglish v. Hodgson, 7 Bing. 495; s. c. 9 Law J. Rep. C.P. 138.

Reimers v. Druce, 23 Beav. 145; s. c. 26 Law J. Rep. (N.S.) Chanc. 196.

Don v. Lippmann, 5 Cl. & F. 1.

Thuret v. Jenkins, 7 Martin's Louisiana Term Rep. 318, 353.

Livermore's Dissertations, 137, 140.

3 *Burge's Foreign and Colonial Law*, 763.

Mr. Giffard, Mr. Mellish, of the common law bar, and *Mr. W. F. Robinson*, for the defendant Fogo, contended that the sale was valid; that the law of Louisiana, not recognizing mortgages of chattels, was not a barbarous or unreasonable law, and that the judgment founded on that law ought to be upheld in the English Courts. On these points the following cases were cited:

Cammell v. Sewell, 5 Hurl. & N. 728; s. c. 29 Law J. Rep. (N.S.) Exch. 350: affirming the judgment below, 3 Hurl. & N. 617; s. c. 27 Law J. Rep. (N.S.) Exch. 447.

Castrique v. Imrie, 8 Com. B. Rep. N.S. 1, 405; s. c. 29 Law J. Rep. (N.S.) C.P. 321; 30 Law J. Rep. (N.S.) C.P. 177, 281.

Hope v. Hope, 4 De Gex, M. & G. 328; s. c. 23 Law J. Rep. (N.S.) Chanc. 682.

Mr. Aikin, for other defendants.

Sir Hugh Cairns, in reply.

Wood, V.C. (Feb. 13.)—In the year 1854 the plaintiffs acquired a title to the ship *Warbler* by an assignment in the nature of a mortgage, duly registered according to the laws of this country; and no

question has been raised as to the validity of that mortgage. The mortgagors, Messrs. Klingender, continued to navigate the ship, which they might well do without any impeachment of the title of the mortgagees; and in January 1858 the ship arrived at the port of New Orleans, in Louisiana, and was there attached by one of the creditors of the mortgagor, named Hyllested, first by way of process, and afterwards in a more formal manner, for the purpose of placing her in the hands of the sheriff that she might be sold. The plaintiffs in the mean time, and anterior to any decision with reference to the sale of the ship, sent out to Mr. Mure, their agent at New Orleans, a power of attorney to take possession of the ship on their behalf, which by the law of England he was entitled to do. Mure, finding the vessel attached as mentioned above, adopted a course pointed out by the law of Louisiana, presenting to the Court there his title to the ship, and claiming her by what is called a petition of intervention. The result of the whole case was, that the Court of Louisiana, having heard him, declined to recognize any title whatever in him, and sold the ship, but sold it under a process exactly analogous to our writ of *fi. fa.*; that is to say, they sold all the right and interest of the Messrs. Klingender in the ship.

Apart from the intervention, there can be no doubt what the result of this state of things would be. According to our law, a sale of all the right and interest of Messrs. Klingender in the ship would simply pass the equity of redemption, subject to the mortgage; the creditors would take, subject to any claim of the mortgagees, when they should proceed to sell the ship, and upon such sale would only be entitled to the surplus purchase-money after payment of the mortgagees. There can be no doubt that the words of the judgment are, that the sheriff shall sell all the right and interest of the debtor; and it appears from the evidence that had there been no intervention, the mortgagees would not have suffered; any right that the debtor had in the ship would have been secured to the creditors, and nothing more would have been done; and whenever the plaintiffs could obtain possession of the ship in any part of the globe, they would have been recognized as

the owners, and their right would have been admitted to the extent of their mortgage.

I have had considerable difficulty in extracting from the cases the principles by which this Court must be guided in reference to a foreign judgment like the present, supposing this Court to arrive at the conclusion that the foreign judgment is, on the face of it, contrary to the recognized principles of what is commonly called the "comity of nations"; dealing in a manner peculiar to the law of that foreign country, and not condescending to take any notice whatever of the law which exists in the country by which the title to the ship was originally regulated.

The general principle that has been established by the comity of nations, and in the interests of commerce, is this, that that title which a man has legally acquired in one country shall be a good title to him all over the world : of course, this is subject to the principle by which Courts are regulated with regard to the acquisition of a legal title. As to real estate, the legal title throughout the world can only be acquired according to the laws of the country in which the real estate is situated affecting the transfer of real estate the "*lex loci rei sitæ*." As regards the title to property of a moveable nature the question sometimes arises whether the *lex loci contractûs* or the *lex domicilii* of the parties shall prevail; but in this case it is unnecessary to consider that question, because undoubtedly both the *locus contractûs* and the domicile of the parties were British; and if as in some cases has been held, the *lex loci rei sitæ* is to be applied here, that would not affect the question, as the moveable also was in this country at the time of the contract. Therefore, in every conceivable case the plaintiffs have acquired a title to this ship, which, according to ordinary jurisprudence and the comity of nations, as recognized throughout the civilized globe, would have given them a title in every part of the world.

However, the ship goes to Louisiana, where a very peculiar law has been established; the Courts there say, with regard to creditors attaching property that comes within their jurisdiction, that they will be governed solely by the title which has been

acquired according to their own law; and that as regards the creditors, if the title be not acquired in such a manner as their law points out, that title will be by them utterly disregarded. In this state of the law there is great difficulty in deciding how far the general principle which I have referred to can be held to apply to a case where, as in the present instance, the purchaser at a sale in Louisiana has acquired a title which certainly, according to the law as there administered, has given him a good title, and it comes to be a contest between the prior title acquired in this country (which would be recognized in every country of the globe but Louisiana), and the title acquired in Louisiana in defeasance of that prior title. The Court of Louisiana could only deal, and so far as it directed a sale of the ship, only affected to deal with such title as the Messrs. Klingender possessed; there was no judgment *in rem*, but simply a sale of all their right and interest. It has been contended that this was not a judgment *inter partes*; but in consequence of the intervention by Mure it has been brought, I think, within the doctrine of a judgment *inter partes*, and I shall decide this case on the assumption that there has been a clear decision between the plaintiffs and the selling creditor. The Court having decided that the creditor is to prevail, and the right of the plaintiff is not to be recognized, I must take it that that is a decision *inter partes*; and if so, it appears to me that the defendant, who claims under what may be called the right of the creditor, claims through the act of the Court directing the sale, that is, through the right of the creditor setting the Court in motion, and may claim to have had the decision of the Court *inter partes*, as he derives his title from one of the parties to the litigation.

Since the case of *Ricardo v. Garcias* (1), in the House of Lords, the general law as to foreign judgments is so well settled that it presents but little difficulty. A foreign judgment, so far as regards the judgment *simpliciter*, with nothing appearing on the face of it with which a Court in this country, or in any foreign country, can deal, is conclusive upon the merits of the matter in

(1) 12 Cl. & F. 368.

controversy between the parties to the litigation, and that doctrine was followed in the recent case of *De Cosse Brissac v. Rathbone* (2), in which the Court said it was too clear a point for argument. There still remains the question how far the Courts can examine a foreign judgment with reference to anything that appears on the face of it. It has been decided that if anything manifestly contrary to natural justice (that is, contrary to the ordinary apprehension of justice) appears on the face of the record, the Courts here are entitled to disregard the judgment, as in the case of *Buchanan v. Rucker* (3); a case in which it appeared that a process had not been served, except by a notice posted on the Courthouse-door, the party being out of the jurisdiction, and not resident on the spot; it was held that such a judgment was not conclusive. It has also been held in several cases that any peculiar legislation of foreign countries with regard to a special subject-matter, (as, for instance, in matters of "prize," which has not been generally recognized or adopted, if it appears on the face of the record, is to be disregarded. This question has more often arisen with respect to policies of insurance than in any other mode. If during war a policy of insurance be effected on a ship, and the ship is declared to be neutral, and in one country there be any local legislation not recognized by the other countries of the world, by which particular ships are held not to be neutral if they contravene certain regulations, the Courts of all other countries are entitled to disregard such special regulations by which they have not consented to be bound; and in such a case even a judgment *in rem* (which is the strongest instance) will be held inoperative.

There is a third class of cases, of which *Novelli v. Rossi* (4) is an instance. If it appears on the face of the judgment, not being a judgment *in rem*, that the law of England was intended to be administered, but has been mistaken, the Court feels itself entitled to disregard the judgment. With these exceptions, the Courts have held the judgments of foreign countries

conclusive; and, *à fortiori*, the judgments of our own colonies, because they are subject to a special appeal to the Privy Council. I have always felt bound to adhere to this doctrine; and I think it right to mention one case in which I departed somewhat from that course; that is the case of *Hunter v. Stewart* (5), which went, on appeal, from this Court to the Lord Chancellor: in that case I thought the plaintiff was estopped from further proceedings here, he having filed a Bill in respect of the same subject-matter, but on a different ground, in Australia, a colony belonging to our own government. The Lord Chancellor was of opinion that the foundation of the claim being new, although in reference to the same subject-matter, (and although it was the foundation of a claim which he possessed, and knew that he possessed at the time he instituted the original proceedings,) he might file a new bill in relation to that equity, which he did not avail himself of in the former suit. Certainly I had supposed, erroneously no doubt, that the view which appears to be taken by Vice Chancellor Wigram, in a case of *Henderson v. Henderson* (6), prevailed in reference to the question whether or not you are entitled, being in full possession of all your rights to keep back some portion of them, file a Bill in respect of the other portion, and afterwards file a Bill in respect of the rights so kept back, upon different grounds when your first has failed. But here is a case of a foreign judgment, which distinctly, on the face of it, states our law, and says that it disregards it, giving reasons for so doing, which are entitled to great weight. I apprehend that I clearly have a right to look at these reasons assigned by the Judges as part of the judgment; (that question was gone into by the Master of the Rolls, in the case of *Reimers v. Druce*;) appearing, as they do, on the face of the record like the *jugements motivés*, which the French Judges frequently deliver, they must be taken to be a portion of the judgment itself.

The facts of the case appear to have been as follows. Hyllested attached the ship for a large debt, she being at that time in the possession of the mortgagee;

(2) 6 Hurl. & N. 301; s. c. 30 Law J. Rep. (N.S.) Exch. 238.

(3) 1 Campb. 63; s. c. 9 East, 192.

(4) 2 B. & Ad. 757; s. c. 9 Law J. Rep. K.B. 307.

(5) 31 Law J. Rep. (N.S.) Chanc. 346.

(6) 3 Hare, 100; s. c. 13 Law J. Rep. (N.S.) Q.B. 274.

very soon afterwards the mortgagees attempted to take possession through the medium of their agent Mure; and it is quite clear, according to the law of Louisiana, that Mure might have abstained altogether; and if he had abstained, this difficulty would not have arisen, but the title of the plaintiffs would have been clear. But Mure did "intervene," and claimed by two processes: first, on the 15th of January 1858, he puts in an "intervention" by way of petition, setting out his title and praying that Hyllested might be decreed to answer the petition, and that it might be declared that the petitioner was entitled to have the ship delivered up to him, to hold and dispose of the same for the purposes of the mortgage—that was claiming the ship; he also asked for damages. Then, on the 18th of January, he claimed by motion to be entitled to possession of the ship on giving a Bond, and on the hearing of that motion a rule was granted. On the 5th of February that rule was dismissed, the Court stating its reasons as follows: "This is a rule taken by W. Mure, agent of the Bank of Liverpool, intervening in this suit and claiming the property, to shew cause why he should not be permitted to bond the property herein seized by the act of 1852, p. 155, amendatory of the 259th of C. P.; 'the defendant may in every stage of the proceeding have the property released upon delivering to the sheriff his obligation for the sum exceeding by one-half the value of the property attached,' &c. There is no law authorizing an intervenor who claims the property attached to give such bond as the defendant can under article 259 C. P. The case of *Park v. Porter*, 2 Rob. 344, presents a different state of facts from the one at bar. In that instance the goods were consigned to a party who had made advances on them and was in possession of a bill of lading, which is *prima facie* evidence of ownership, and as such was entitled to the property seized. But the instrument by which the plaintiff in this rule has offered to prove title to the property seized and the possession thereof is nothing but a mortgage. The mortgagee is not entitled to the possession of the property mortgaged; his right is to be paid by preference out of the proceeds of the sale of the mortgaged property. For the reasons assigned

it is ordered, adjudged and decreed that the rule taken herein by W. Mure, on the 18th of January 1858, be dismissed with costs."

From this we can discern the fallacy in the peculiar course of proceeding adopted by the Courts of Louisiana: they treat this title, which, according to English law, is recognized as an absolute right in the mortgagee, entitling him and no one else without his consent to sell, as giving him simply a right to be paid out of the proceeds of the sale; assuming that the Court had a right as against the mortgagee to sell (which is not the case according to English law), but that the mortgagee was to be paid out of the proceeds of the sale. Now, all the authorities shew that with reference to the priority of creditors and distribution of assets, the *lex fori* prevails; but here we have no question of assets, but a question of title. The mortgagee, according to our law, is entitled to hold the ship against all the world, and was not bound against his will to sell and then to come in and make a title to such part of the purchase-money as he could claim.

On the 26th of January 1859, for the reasons assigned in the written opinion of the Court that day delivered and on the file, it was ordered that the petition of intervention and third opposition of the Bank of Liverpool be dismissed with costs. The reasons assigned by the Court were as follows: "The Bank of Liverpool claimed the ownership of the ship *Warbler* attached by the plaintiff in this suit as the property of the defendants. I regard the document relied on by the opponent as a mortgage for the security of a debt, and not as a bill of sale of the ship. The instrument being regarded in this light, it follows that the opponent is a mortgage creditor, and not an owner." Thus again the Court totally refuses to recognize our law by which the plaintiff clearly is owner, though by way of mortgage still clearly owner and entitled to say, no one but myself shall sell the ship.

On the 31st of January 1859, the appeal from the first order made on Mure's desiring to give a bond and get possession of the ship, was heard by the Supreme Court of Louisiana, and in the judgment there delivered the Court said as follows: William Mure desires to give a bond; "he bases his

application upon the allegation that during the litigation in these cases great expense will be incurred by the detention and custody of the ship, and produces an instrument executed by the owners in Liverpool, England, for the security of the bank, by which the ship is conveyed to Joseph Langton in trust, with authority to sell and pay the bank. The intervenor relies upon the cases of *Park v. Porter*, *The Ohio Insurance Company v. Edmondson*, 5 *Law Rep.* 296, and Article 21, C. C. in support of the motion. The instrument produced by the Bank of Liverpool does not purport to convey the ship to the bank, but to a trustee. The bank therefore is not the owner. At common law the instrument, we suppose, would be considered as between the parties at least to convey the legal title in the ship to Langton. The only rights the Bank of Liverpool could have would be a right in Chancery to enforce the execution of the trust. Hence the most favourable footing on which the claim of the intervenor can be placed is that of a creditor, with a privilege; he has therefore no right to the possession of the property, and must enforce whatever rights he may have upon the proceeds precisely as the attaching creditors are compelled to do. The law confers upon the defendant only the right to set aside the attachment by giving bond C. P. 259, Art. 1852, p. 165: it is not conferred upon the creditors. It is true the Courts have allowed, under an equitable construction of the article, an intervenor, having possession and claiming to be owner to bond in order to avoid the great injury which third persons might suffer, by the unjust seizure of their property." There, again, the Supreme Court seems to hold the same fundamental fallacy; they do not look to the English law to ascertain the rights of the plaintiff under this conveyance; but they consider it merely as a privilege giving the plaintiff a certain degree of priority which is to be settled according to Louisiana law. If they are right in their view, it is merely a question of distributing assets, in which case the Court which has jurisdiction over the assets has a right to say that they shall be distributed according to the law of the country where the distribution is asked for; but here the plaintiffs were claiming as owners, and utterly disputing the right of the

Court to deal with the assets in any way.

Then we come to the decision of the Supreme Court on the main case. The case appears to have been argued before the full Court, and at great length. The Court in its judgment states the case thus: "The Bank of Liverpool, as vendee and trustee, claims the legal title to the ship. The petition of intervention was dismissed on the trial in the lower Court, and the intervenor appeals. The case merits perhaps a synopsis of the instrument upon which the intervention is founded. It (the instrument) is of great length and is under seal. It is signed by the defendants alone, and purports to have been executed on the 25th of September 1854, in consideration of 5s., and to secure the Bank of Liverpool, Klingender Brothers nominally sell to Joseph Langton, chief manager of said bank, his executors, &c., the ship *Warbler*, in trust, that the same may be a continual security to the bank for the payment of costs, and for all sums of money due or to become due by said Klingender Brothers and for loans, &c. Another clause authorizes Langton, the trustee, to sell the ship, and directs him to apply the proceeds, first, to costs, secondly, to amount due to the bank, and, thirdly, the remainder to Klingender Brothers. Another clause obliges the trustee, on satisfaction of the trust, to reconvey; the instrument contains other covenants on the part of Klingender Brothers, warranting title relative to policies of insurance, &c. The instrument is, no doubt, executed in conformity to the Act of Parliament and the English law. Under that law (the English law) the intervenor would have been able in the English Courts to protect himself against subsequent purchasers and creditors and the effects of bankruptcy. If it be admitted that the intervenor has such rights upon the ship by the English law, the question naturally arises, why are not those rights entitled to be respected in Louisiana, particularly as all parties to this controversy have their domicile in England, &c.? It is not surprising that the question is repeated, and that the Courts are again and again called upon to answer it. The comity of nations extends only to enforce obligations, contracts and rights under those provisions of

law of other countries which are analogous or similar to those of the state where the litigation arises. The instrument offered in evidence has no analogy to any mode known to our law of affecting personal property for the security of debts. It purports to sell to one man, to protect the rights of a third person, and yet the vendor is to retain possession. The contract is not a sale nor a pledge; for there is no delivery which our law deems essential in order to perfect either contract as to third persons. As our law would not enforce a similar contract between our own citizens if made here, it will not enforce it to defeat rights already acquired by the attachment under our own laws."

There are some other reasons given, but that really contains the whole principle of the judgment. They say our law would not allow a mortgage without a delivery; and the utmost that could be done under this instrument would be, to say there was some sort of right by way of mortgage or security, but nothing in the shape of title; and therefore we will not allow any such thing as against our citizens; we could not do it in favour of citizens of our own, and therefore we will not allow it as between foreigners, although the law of the foreign country does allow such a contract. Then they proceed to say—"In the case of *Malcolm and another v. the Schooner Henrietta* this Court refused to recognize a mortgage upon a ship executed in the form of a conventional mortgage under our law, and declared that our law only admits of the hypothecation of ships according to the laws and usages of commerce."

They say further on—"The same doctrine was re-affirmed in *Hill v. Phoenix—Two Boat Company*, 2 Rob. 35, in which the Court mentions as the only valid hypothecation, that made to secure the necessary supplies for ships which happened to be in distress in foreign ports where the masters and owners are without credit; if assistance could not be procured by means of such instruments, the vessels and their cargoes must perish. The subject was again fully considered in the case of *Harned v. Churchman*, and it was there said, 'It is the duty of Courts in all commercial nations to extend the rule of national comity to bottomry bonds, and such other marine

hypothecations as are recognized by the general assent of the commercial world. But the public policy of recognizing implied hypothecations or liens of following property from foreign countries may well be questioned.' In the case of *Wickham v. Levistone* the effect of a common law mortgage executed in Cincinnati, and registered in accordance with the acts of Congress was considered, and this Court refused to give it effect, because such a mortgage is not recognized by our laws. In the case of *The succession of Broderick* we refused likewise to give effect to an act purporting to be a mortgage of steamboat." They mention several other cases, in all of which they refused it, and then they say "It may also be remarked, that the hardship of the rule adopted by the Courts is not so great when it is considered that, in the case of ships, it usually happens that the parties holding liens and mortgages in the home port have had the opportunity of enforcing the same, and have voluntarily permitted the ship to depart without so doing. It may be also further remarked, that the statute of 1858, page 111, bans privileges upon ships after the lapse of six months. The instrument, therefore, cannot be viewed in any other light than as a security for money. There is a prayer on the part of the appellees for an amendment of the judgment in their favour against the intervenor, so that the same shall be considered final; and in order to avoid all doubt, we will make the amendment."

Mure is, then, dismissed from the proceedings, and there seems to be a clear decision as between him and the creditor that the property is available to the creditor and not to the mortgagee; finally, they hold that the mortgagee has no right in the ship, and in the distribution of assets they give him no share.

The evidence as to the laws of Louisiana only amounts to this: that according to the laws there "the persons who have possession of a ship as owners are for all purposes deemed to be the true owners." But that does not carry the case a step further. The law of Louisiana says that the man who has a perfectly good title, who is complete owner according to the law of the country to which the contract belongs, ceases to be so the moment he arrives at

Louisiana with reference to any creditor who may attach the ship. It was argued, by the defendant, that there was nothing contrary to natural justice in so holding, and reference was made to cases of reputed ownership; but this is not a case of reputed ownership; there cannot be a question that the State of Louisiana might, if so minded, pass a special act, and give all the world notice, as we have, by passing our Bankruptcy Act, that, as regarded property brought within their jurisdiction, the apparent owner should be owner to all intents and purposes in order to pass the property to creditors. Mr. Justice Story, when commenting on this class of cases, with great dissatisfaction, says it might be very well for the legislature to lay down such a rule; but he thinks it contrary to sound jurisprudence for a Judge to say such is the state of things, for there has been no positive law of Louisiana to that effect. But the Judges displace the title of ownership altogether; on the face of the judgment they treat the plaintiff as absolute owner according to the law of England, but they say that going there he is not entitled to be treated so by their Courts. The principle of this jurisdiction, assumed by the Courts of Louisiana, is given at length in Story's book on the *Conflict of Laws*, p. 561, and Mr. Burge in his *Commentaries*, vol. 3. p. 764, expresses the same views as Mr. Justice Story. I have endeavoured to inform myself of the views of American authorities on this subject, and I find that both Mr. Livermore and Mr. Justice Story have expressed themselves very strongly. Mr. Justice Story (p. 638) refers to the case of *Sill v. Worswick* (7), before Lord Loughborough: a judgment extremely able, but we must remember that at that time the doctrine of foreign judgments was not so well settled as it now is. This question was also to a certain extent considered in the case of *Castrique v. Imrie*, which, being a judgment *in rem* has no immediate bearing on the case before me. The real principle of a judgment *in rem* I apprehend to be this, that a person who acquires a valid title by the law of any country either to a chattel or to realty shall be deemed all over the world to be owner of such chattel

or realty. If, therefore, the Court has absolutely the disposal of the *res*, and it is in its power, as it is in the case of a judgment *in rem* in the Admiralty Court, it does not matter who is owner; all the Courts assume that the thing has been fairly litigated, that the man brought before the Court is owner, and had such an interest as entitled him to raise the contest, and that the judgment *in rem* bound the whole. Of course, as regards a matter *inter partes* the case would not stand in so strong a position; but even in a judgment *in rem* it seems that, although some of the learned Judges thought that so strong a circumstance that it would prevent their looking at even the perversity on the face of a decision, yet other Judges were of opinion that if the foreign Court did utterly disregard our proceedings we could not allow the title of our citizens to be defeated by a decision of that Court which decision could only be arrived at by a total disregard of the comity of nations according to which the title of our own citizens would be respected. I must say with respect to a passage quoted from my judgment in *Simpson v. Fogo* that I think I may have been a little misunderstood. In the passage as it stands in the citation it is as if I had intended to say it would be a species of vindictive proceeding with regard to the conduct of another country who refused to recognize the proceedings of our own. Of course all I could mean to say was that our own citizens must be so far protected that they shall not be in a worse situation in Louisiana than they are in China or any other part of the civilized world. If you find a course of proceeding there which is not recognized by any other country of the civilized world, our own citizens must be protected from the loss of their property which would be inflicted by decisions so arrived at.

Now, the case of *Castrique v. Imrie*, as I said before, has no bearing, it being there a clear decision upon the *res*; and the decision in *Cammell v. Sewell* appears to me to have no bearing, because the person who sold had power to confer a good title. I have only one more case to mention in reference to the Courts of Louisiana, that is where the chattel is not originally in their jurisdiction, but is transferred, as in this case, before it entered their jurisdiction. I

(7) 1 H. BL 698.

allude to the case of *Thuret v. Jenkins* (8), in which the transfer had been made while the ship was on her voyage. There had been no delivery; there, as here, the mortgagor was in possession, and when the ship arrived in Louisiana she was attached. The Judge there says, "In the case of *Mecker v. Wilson* Judge Story says that by the common law of England a grant or assignment of goods or chattels is valid between the parties without actual delivery, and the property passes immediately upon the execution of the deed, but as to creditors the title is not considered as perfect unless possession accompanies the deed. But the learned Judge continues: An exception to the rule is where the possession of the grantor is consistent with the deed, or where the property conveyed is at the time of the conveyance abroad and incapable of delivery. In the latter case the title is complete provided the grantee takes possession in a reasonable time after the property comes within his reach. The laws of Louisiana do not, it is true, recognize the last exception; property does not pass here by contract, but by delivery, *traditionibus, non pactis*. If the ship had been within the State at the time of the sale the rule in *Norris v. Mumford* would have regulated the decision of this Court; but as at that time she was not within the State the sale ought not to be tested by our laws, but by those *loci contractus*, against which that of no other country ought to prevail. In the present case the ship, the subject of the sale, was at sea, was a New York ship, and the vendor and vendee residing in New York. If, therefore, according to the *lex loci contractus*, that of the domicile of both parties, the sale transfers the property without a delivery, it did so *eo instanti*, or not at all. In transferring it, it did not work any injury to the rights of the people of another country: it did not transfer the property of a thing within the jurisdiction of another government. If two persons in any country choose to bargain as to the property which one of them has in a chattel not within the jurisdiction of the place, they cannot expect that the rights of persons in the country in

which the chattel is will there be permitted to be affected; but if the chattel be at sea or in any other place, if any there be, in which the law of no particular country prevails, the bargain will have its full effect *eo instanti* as to the whole world, and the circumstance of the chattel being afterwards brought into a country, according to the laws of which the sale would be invalid, would not affect it." Every word of that applies to the case before me.

Under these circumstances, having to come to a decision in a case which is entirely new *in specie*, and one which, as it seems to me, will never happen in any country except Louisiana, I confess I yield to those Judges constituting the Court in *Castrique v. Imrie*, who considered that, even as regards a judgment *in rem*, if there were, on the face of the judgment, a perverse and deliberate refusal to recognize the law of the country which had conferred the property, everything having been rightly done to acquire the property, that, in such a case, it would be the duty of a Court to refuse to recognize the efficacy of such a judgment.

Since I find the Courts of Louisiana saying, we will deal with this as the property of A. where A. had already transferred it to B, that seems to me to be so contrary to the law, and to that which is required by the comity of nations, that I can only hold that the title acquired by the plaintiffs must prevail against any sale of the right and interest of the mortgagor, or any notion entertained by the Court of Louisiana that as between mortgagor and mortgagee the right of the mortgagor is paramount, and the mortgagee's interest is to be wholly disregarded.

LORDS JUSTICES.

Jan. 12, 13,
14, 16;
Feb. 14;
March 4.

LADY MARY ELIZABETH
TOPHAM v. THE DUKE
OF PORTLAND.

Power of Appointment—Undue Exercise of—Re-settlement by Appointee—Fraud on the Power—Law of Scotland—Statute 22 & 23 Vict. c. 63.

The donee of a power cannot delegate its exercise to any other person; and where the Court sees that the purposes for which it is

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(8) 7 Martin's Rep. of Louisiana.

reserved have not been observed, but the appointment has for its object to effect intentions not in accordance with those of the donor of the power, it will treat that appointment as a fraud on the power; and it makes no difference whether the power is created by another person, or by the donee himself, without valuable consideration, the same rule of equity applying equally to both cases.

The intentions of the donor of a power are to be collected from the instrument creating it, and not from parol evidence; but such evidence is admissible to shew the purposes for which the power is exercised, although those purposes do not appear from the instruments by which it is exercised; therefore, where it appeared from such evidence that an appointment was made in favour of an object of the power, in order that other deeds might be executed by the appointee to raise inducements for a daughter of the donee of the power, who was herself an object of the power, to abstain from marrying a person objected to by the father, the appointment was set aside as not having been made for a purpose contemplated by the donor of the power.

Where a power of appointment was created by a Scotch deed over a sum of money charged on estates in Scotland, the Court of Chancery in England declined to decide the validity of appointments made under it without first ascertaining the law of Scotland on the subject; and for that purpose directed a case to be stated for the opinion of the Court of Session, pursuant to the provisions of the statute 22 & 23 Vict. c. 63. (An Act to afford facilities for the more certain ascertainment of the law, &c.)

This was an appeal, by Lady Mary Elizabeth Topham, and also an appeal, by Lord Henry Bentinck, against parts of a decree of the Master of the Rolls (reported *ante*, p. 81).

The facts, fully stated in the former report, and more elaborately set forth in the judgment of Lord Justice Turner, where the evidence, oral and documentary, is detailed, were as follows.

The bill was filed to set aside, so far as the plaintiff, Lady Mary Topham, formerly Lady Mary Bentinck, was affected, various deeds, settling two sums of 16,000*l.* each in favour of Lord Henry and Lady Mary Bentinck; an annuity of 2,720*l.*; and the

income of a fund, originally consisting of 52,000*l.*, 3*l.* 10*s.* per cent., but since increased and varied by accumulations and changes of security, in favour of Lady Mary and her sister, Lady Harriett Bentinck, but subject to certain conditions, and under the following circumstances.

Upon the marriage of the late Duke and Duchess of Portland in 1795, the English estates of the Duke and the Scottish estates of the Duchess were respectively charged with the sum of 40,000*l.* each in favour of the younger children of the marriage, who, by the death of Lord George Bentinck, in 1848, were reduced to five. Many years before 1848 a mutual attachment existed between Lady Mary Bentinck and Sir William Topham; but the late Duke was opposed to their marriage, and Lady Mary came to a determination that she would not marry Sir William Topham during her father's lifetime, except with his consent; she considering her father's control over her on that subject ought not to extend beyond his lifetime. She expressed her intention, when freed from that control, to marry that gentleman. The late Duke, anxious that his control should extend beyond his life, resolved to place her in such a position, with respect to her share of the portion to younger children, that she must make a choice between 16,000*l.* and marriage with straitened means. Accordingly, in 1848, the Duke executed two deeds, appointing two sums of 16,000*l.* to Lord Henry Bentinck, one half of those sums being intended for the benefit of Lord Henry himself, and the question raised by the plaintiff related to the other half. Lord Henry, on the day of the receipt of the second sum of 16,000*l.*, invested it in the names of the present Duke and Mr. Ellis (the man of business of the late Duke), upon trust for accumulation until the Duke of Portland for the time being should assign it to Lady Mary Bentinck. The late Duke also, in 1843, assigned 52,000*l.* to the present Duke, Lord George and Lord Henry Bentinck, upon trust for Lady Harriett and Lady Mary, in such shares as the Duke for the time being should appoint; and in 1848 charged his Marylebone estates with an annuity of 2,720*l.* during the joint lives of the two ladies, to be paid in such shares as the Duke should appoint.

The late Duke died on the 27th of March 1854; and on the 5th of November 1858 the plaintiff married Sir William Topham. Dispositions thereupon were made of the several sums, depriving Lady Mary Topham of any interest therein. Lady Mary Topham, in this suit, insisted that all the appointments were, as far as regarded one-half of the funds, and the incomes therefrom, made for her benefit, and claimed one moiety of each respectively. The Master of the Rolls held, that by no construction of an ordinary power contained in a marriage settlement for distributing portions among younger children could the late Duke have a right to saddle such appointment with any fancies affecting the social relations of those who were to derive benefit from it. Lady Mary, as one of the younger children of the marriage, had a right to come in under the covenant of the late Duke's marriage settlement; and it was not for her father to invalidate such right by the imposition of these conditions. But his Honour considered that this invalidity affected not only the moiety of the two sums apportioned under the marriage settlements, but the entire appointment, and declared that the whole two sums of 16,000*l.* each must go as in default of appointment. The deeds of 1848 would therefore be declared void. With respect, however, to the annuity of 2,720*l.* and the sum of 52,000*l.*, his Honour held that the funds therein settled were out of the Duke's own money, which he had a right to saddle with conditions, provided they were not illegal. Lady Mary appealed against that part of the decree which declared valid the disposition of the 52,000*l.* and the annuity of 2,720*l.*, and Lord Henry appealed against the declaration rendering invalid the entire appointment of the two sums of 16,000*l.*

The following counsel appeared upon the appeal.

The Solicitor General, Mr. Roll, Mr. Charles Hall and Mr. Rowcliffe were for Lady Mary Topham.

Sir Hugh Cairns, Mr. Hardy and Mr. Alfred Bailey, for the Duke of Portland.

Mr. Baggallay, Mr. Osborne and Mr. Frederick P. Morris, for Lord Henry Bentinck.

Mr. G. M. Giffard, Mr. T. Stevens and Mr. Freeling, for Lady Harriett Bentinck.

Mr. Lloyd and Mr. Hobhouse, for Mr. G. H. Ellis.

Mr. Selwyn and Mr. Bardswell, for Sir W. Topham and the trustees of the marriage settlement.

On the appeal it was argued for the plaintiff, that the appointment under the English settlement of the whole 16,000*l.* in favour of Lord Henry Bentinck for his own benefit was void, so far as he was concerned, and to the extent of 8,000*l.* for Lady Mary it was valid, the declaration of trust only being invalid as not warranted by the words of the power. On behalf of the defendant, Lord Henry Bentinck, it was contended that, unless pressure exercised on the appointee were so excessive that the Court would, on his behalf, set aside the appointment, it would refuse to interfere, and it made no difference that the appointment was made by two instruments instead of one; but if it appeared that the two instruments contained any provisions exceeding the authority conferred on the donee of the power, the Court would exercise its discretion in supporting so much as was warranted by the words of the power, rejecting only what was invalidly attempted to be done. It was as obvious that a parent was as much morally bound to provide against a daughter contracting an improvident marriage, as to take care that she made a provident one; and so long as he confined himself to avoiding a corrupt motive (and here no corrupt motive could be charged), he only laid himself open to the charge of having acted in excess of his authority, and so far only could what he had done be at all interfered with. For Lady Harriett Bentinck it was argued that the appointment in her favour was absolute, and if she had died before signing the order, which had been signed, her representative would have been entitled absolutely; and it was denied that it was a fraud upon a power to appoint to one object of a power for the benefit of another such object: and for the present Duke of Portland it was urged that no rule of law prevented a parent from using a power of appointment to further his own wishes so long as he confined the benefit he conferred to the objects of the power. The argument of some of the litigants besides the plaintiff was, upon the instrument operating upon the Scotch pro-

perty, that although in point of fact it was a foreign instrument, it must be construed as if it had been English.

Besides the great majority of the cases cited at the hearing at the Rolls, the following authorities were relied on and observed upon on the appeal:—

Ring v. Hardwick, 2 Beav. 352.

Lassence v. Tierney, 1 Mac. & G. 551; s. c. 2 Hall & Tw. 115.

Monypenny v. Dering, 2 De Gex, M. & G. 145; s. c. 22 Law J. Rep. (N.S.) Chanc. 313; 7 Hare, 568; 20 Law J. Rep. (N.S.) Chanc. 153.

Beard v. Westcott, 5 Taunt. 393; s. c. Turn. & R. 25.

Lane v. Page, Ambl. 233.

Lee v. Fernie, 1 Beav. 483.

Hinchinbroke (Lord) v. Seymour, 1 B. C.C. 395.

Agassiz v. Squire, 18 Beav. 431; s. c. 23 Law J. Rep. (N.S.) Chanc. 985.

Salmon v. Gibbs, 3 De Gex & Sm. 343; s. c. 18 Law J. Rep. (N.S.) Chanc. 177.

Aleyn v. Belchier, 1 Eden, 132.

Askham v. Barker, 12 Beav. 499.

Farmer v. Martin, 2 Sim. 502.

Fearon v. Desbrisay, 14 Beav. 635; s. c. 21 Law J. Rep. (N.S.) Chanc. 505.

Alexander v. Alexander, 2 Ves. sen. 640.

Tee v. Ferris, 2 Kay & J. 357; s. c. 25 Law J. Rep. (N.S.) Chanc. 437.

Stroud v. Norman, Kay, 313; s. c. 23 Law J. Rep. (N.S.) Chanc. 443.

Smith v. Warde, 15 Sim. 56; s. c. 15 Law J. Rep. (N.S.) Chanc. 105.

White v. St. Barbe, 1 Ves. & B. 399.

Goldsmid v. Goldsmid, 2 Hare, 187; s. c. 12 Law J. Rep. (N.S.) Chanc. 113.

Carter v. Green, 3 Kay & J. 591; s. c. 26 Law J. Rep. (N.S.) Chanc. 845.

Briggs v. Penny, 3 Mac. & G. 546; s. c. 21 Law J. Rep. (N.S.) Chanc. 265.

Moss v. Cooper, 1 Jo. & H. 352.

Fisher v. Brierly, 1 De Gex, F. & J. 643; s. c. 29 Law J. Rep. (N.S.) Chanc. 477.

LORD JUSTICE KNIGHT BRUCE (Feb. 14).

—In this cause heard originally at the Rolls, the plaintiff, Lady Mary Topham, one of the daughters of the late Duke and Duchess of Portland, claims to be entitled to certain pecuniary provisions under settlements executed at different times by the late Duke of

Portland, one at least of which was also executed by the late Duchess.

The first question in the cause is as to the title to a sum of 16,000*l.*, which by a deed of the 13th of October 1848, the late Duke of Portland, in execution or exercise, or as in execution or exercise, of a power given or reserved to him by a settlement dated the 4th of August 1795, appointed or professed to appoint in favour of the defendant, Lord Henry Bentinck, a younger son of the late Duke and Duchess of Portland, that sum having been a part of a sum of 40,000*l.* provided for the daughters and the younger sons of the late Duke and Duchess of Portland by that settlement, subject however to the power which in part at least he professed to exercise by the deed of the 13th of October 1848 already mentioned. That instrument and a deed of the 24th of November 1848, executed by Lord Henry Bentinck, which is stated in the Bill, must I think on the evidence before the Court be considered, so far at least as that sum of 16,000*l.* is concerned, to have been parts of a single transaction; and the two deeds being thus viewed must, as I conceive, be deemed to be void in equity, so far as relating to a moiety of the 16,000*l.* professed to be appointed by one of them to Lord Henry Bentinck.

The power conferred by the settlement of the 4th of August 1795, which the late Duke professed to exercise by the deed of the 13th of October 1848, was incapable of being delegated by him. He had a discretion as to the shares to be taken by the children, objects of the power, and as to excluding any of them in favour of any other or others of them, which discretion could be exercised only by himself; and if he had in terms appointed the 16,000*l.* to Lord Henry Bentinck and Lady Mary Topham, in equal shares, with an express authority to the present Duke of Portland and Lord Henry Bentinck, or either of them, to deprive Lady Mary in Lord Henry's favour, and to make a gift to Lord Henry of the whole or any part of her share of that sum, the authority, at least, if not the whole appointment of her half would in my judgment have been plainly void. Again, the plaintiff is admitted to have attained her majority before the year 1848, and does not appear to have been

between her majority and her marriage under any disability of any kind; and I apprehend, therefore, that if in the year 1848, her father had, as under the settlement of the 4th of August 1795, appointed in her favour 8,000*l.*, part of the 40,000*l.* settled by it, but had so appointed the 8,000*l.* subject to a provision that the interest of that sum should be withheld and accumulated as the deed of the 24th of November 1848 directs, the income of the fund purporting to be affected by that deed to be withheld and accumulated, the provision at least, if not the whole appointment, as to the 8,000*l.* would have been void as transgressing his power. But the evidence before us appears to me to establish that the deed of the 24th of November 1848, must as to the moiety of 16,000*l.* be read and treated as if it had been incorporated in that of the 13th of October 1848 already more than once referred to, and as if to both of them the late Duke of Portland had been a party, and they had been executed by him simultaneously, though in point of form he was not a party to the later of the two.

Thus regarding the matter, I consider that as to a moiety of the 16,000*l.* there has not been a valid appointment to any extent or of any kind, and such was the conclusion of the Master of the Rolls.

But his Honour thought not any portion of the 16,000*l.* well appointed, and as to this, I for some time doubted. I have however, ultimately, formed an opinion that the whole of the 40,000*l.*, except that sum of 8,000*l.*, has been well appointed, and that the defendant, Lord Henry Bentinck, is entitled, for his own benefit, to the other 8,000*l.*, part of the 16,000*l.*; for, according to my present view, the intention in his favour, as to the latter 8,000*l.*, was not so connected with the wrong intention and error as to Lady Mary Topham, was not so associated with that intention or error, or so dependent on it, as to be vitiated by it. The point however seems to me, I acknowledge, one of some difficulty.

The next question is, as to the title to another sum of 16,000*l.*; that, namely, which by an instrument of the 28th of October 1848 the late Duke of Portland, in execution or exercise, or as in execution or exercise, of a power given to him by a

settlement in Scotch form, relating to Scotch property, dated the 3rd of August 1795, appointed in favour of Lord Henry Bentinck this sum, being part of another sum of 40,000*l.* or more provided for the daughters and younger sons of the late Duke and Duchess of Portland by that settlement, subject however to the power which, in part at least, he professed to exercise by the instrument of the 28th of October 1848 already mentioned. That instrument of the 28th of October 1848, and the deeds of the 13th of October and the 24th of November 1848 before referred to, must I think, on the evidence, be viewed and treated as parts of a single transaction; that transaction took place in England, as I collect, where, unless I mistake, each of the three deeds was prepared and executed; and if the principles of English law ought to be considered as applicable to this question, the case of Lady Mary Topham as to the last-mentioned sum of 16,000*l.* is subject to the same considerations exactly or substantially, and stands exactly or substantially on the same footing as her case with respect to the first-mentioned sum of 16,000*l.*: the instrument of the 28th of October 1848 and the deed of the 24th of November 1848 being in my judgment, on that hypothesis, void in equity as to a moiety of the second sum of 16,000*l.*, for the reasons applicable also to a moiety of the first sum of 16,000*l.*

Accordingly, had the English law to regulate this part of the dispute, I should hold 8,000*l.* of the Scotch portions to be unappointed, and the rest, not exceeding 32,000*l.*, to be in favour of others than the plaintiff, well appointed. But, as it seems to me, the rights of the parties to this contest under the Scotch settlement (the settlement of the 3rd of August 1795) must, to a great extent at least, if not wholly, be governed and decided by the principles and the rules of the law of Scotland, as to which, so far as this department of the case is concerned, we ought, I think, to have recourse to evidence or to the means afforded by the statute of the 22 & 23 Vict. c. 63, unless the parties can arrange the matter for themselves.

Then comes the question as to the property settled by the deed of the 24th of June 1843, stated in the pleadings, and the

annuity of 2,720*l.* per annum, created and settled by a deed dated in 1848, stated in the 37th paragraph of the re-amended bill — these two settlements were certainly voluntary on the part of the Duke of Portland; were mere matters of bounty from him; but, with great deference to the Master of the Rolls, if he thought otherwise, that circumstance appears to me not of importance. It is contended, on the part of the plaintiff, that the two deeds of September 1854 and those of December 1854, stated in the bill, which were executed by the present Duke of Portland, under or as under powers conferred by the two last-mentioned settlements of 1843 and 1848 respectively, were invalid, and are void as against her; and the evidence appears to me to shew plainly that not one of the four instruments of September 1854 and December 1854 was a record of truth, was a representation of truth. The evidence satisfies me that Lady Harriett Bentinck, one of the defendants, a daughter of the late Duke and Duchess of Portland, was not intended by the present Duke of Portland to take beneficially the whole of what any one of the four instruments purported to appoint in her favour beneficially, and that the main and governing view which he had in executing them was to enable the income, at least of portions of the property, subjected to the powers of 1843 and 1848 last mentioned to be applied, employed or withheld in a manner not warranted by either of those powers. It was competent to the present Duke of Portland to discourage by any lawful means the marriage of Lady Mary Topham with her present husband, however reasonably unobjectionable it may have been, and possibly was; nor could it have been unlawful for the present Duke of Portland, after the marriage, to shew practically his disapproval of it within not improper bounds. But it was not, I think, competent to him to deal, as he is in my opinion proved to have dealt, with the powers vested in him by the settlement of 1843 and 1848 last mentioned, or either of them. I consider the deeds of September and December 1854 to have been mere frauds on those powers and good for nothing.

It has been contended for, or as for, Lady Harriett Bentinck, who by her counsel

has been a very earnest and zealous opponent of the plaintiff on the present occasion, that there was not any privy on the part of Lady Harriett Bentinck to the view and design (an irregular view, and an unjustifiable design, as I conceive) with which those deeds respectively were executed, and that she understood their meaning and intention to be in accordance with their tenor. Whether, if that contention had appeared to me to have a foundation in fact, I should have thought it material, I do not say, for in my judgment it had not any foundation in fact, that is to say, the evidence, as viewed by me, precludes or defeats the contention, and proves that Lady Harriett Bentinck throughout understood and knew the true intention and real object of the four deeds, was throughout well aware that not one of them was a record of truth, was throughout well aware that during the joint lives, or a portion, probably considerable, of the joint lives of herself and the plaintiff a moiety of the income under the deeds was to be kept back and accumulated for reasons connected with the marriage intended before and solemnized in October 1854 between Sir W. Topham and the plaintiff. That accumulation, whether Lady Harriett Bentinck was aware or unaware of the law, could not by law, as I understand the law, be effectually directed under either of the powers; and the deeds of September and December 1854 were, and are, in my judgment, void, not merely as to a moiety, but as to the whole of what purports to be appointed by them respectively; for, as I conceive the purpose of the present Duke of Portland as to those deeds was single and entire; nor, in my opinion, ought it be considered that he would have executed any one of the four but for reasons connected directly with the marriage intended before and solemnized in October 1854. The main object of the four deeds was, I think, that of operating on the plaintiff, and though in the case of Lord Henry Bentinck, as I have said, there appears to me to have been on his father's part an intention to a certain extent in Lord Henry Bentinck's favour, apart from considerations belonging merely to the disliked marriage, the case as to the appointment of September and December 1854 seems to me to be materially different. I think that every

part of them was and is affected by the wrong intention to which in my judgment their existence is to be attributed, and that not one of them conferred any, the slightest right, on Lady Harriett Bentinck, the great and able exertions made on whose behalf against her sister must, I conceive, fail.

LORD JUSTICE TURNER.—The questions raised by these appeals relate to the operation and validity of appointments made, as to some of them, by the late, and as to some of them, by the present, Duke of Portland, under powers vested in them respectively.

The first appointment in question is that made by the late Duke of Portland, under a power contained in a settlement dated the 8th of June 1814, which was founded upon a settlement made upon his marriage with the late Duchess in the year 1795. At the date of this settlement of 1814 there were eight daughters and younger sons of the marriage, and by the settlement a sum of 40,000*l.* was secured upon some estates in the county of Nottingham belonging to the Portland family, for portions of younger children. The estates were limited to trustees for a term of 1,000 years, for securing the portions, and the trusts of the term were declared to be after the decease of the Duke to buy and raise for the portion or portions of the eight daughters and younger sons, and any children thereafter to be born, the sum of 40,000*l.*, and to pay and divide the same between the daughters and younger sons and future children respectively, or any one or more of them respectively, entire or in such parts, shares and proportions as the Duke and Duchess by deed should jointly appoint; and in default of such joint appointment, then as the survivor of them should, after the death of the other, by deed or will appoint. And in default of any appointment, or in case the same should not extend to the whole of the 40,000*l.*, then as to the whole or such portion whereof there should be no appointment to go equally between and amongst the daughters and younger sons and future children.

By another settlement, made upon the marriage of the late Duke and Duchess, another sum of 40,000*l.* was provided for portions of younger children, and was

secured upon estates in Scotland belonging to the late Duchess, and a power of appointment similar to the power contained in the settlement of 1814 was given to the late Duke.

One of the eight younger children mentioned in the settlement of 1814 having afterwards become the eldest son, there were in the result seven younger children of the late Duke and Duchess, all of whom attained twenty-one. Of these younger children two afterwards died, and their interests in this suit are represented by the defendant, the Duke of Portland. Two others of them married, and one-sixth of each of the sums of 40,000*l.* was appointed to each of them, thus disposing of 13,333*l.* 6*s.* 8*d.*, part of each of those sums. The three other younger children were the plaintiff, Lady Mary Topham, then Lady Mary Bentinck, the defendant Lord Henry Bentinck, and the defendant Lady Harriett Bentinck. No further appointment of any part of either of the above-mentioned sums of 40,000*l.* was made until the month of October 1848, and 26,666*l.* 13*s.* 4*d.*, part of each of those sums, was therefore then remaining unappointed.

It is necessary, however, here to state what had occurred before this month of October 1848. Some time in or before the month of June 1843, the plaintiff Lady Mary Topham, then Lady Mary Bentinck, became engaged to marry the defendant Sir William Topham, now her husband, and the proposed marriage was much objected to by the late Duke. On the 29th of June 1843, the late Duke and Duchess executed a deed of that date, by which certain sums of money and stock were assigned and covenanted to be transferred to the present Duke of Portland and Lord George Bentinck: Upon trust to pay the income to the Duchess for her life and after her death upon trust to set apart so much and such portion of the trust fund, the annual dividends, interest or income arising wherefrom, would realize not less than 800*l.* sterling, to be held upon the trusts thereafter declared; and then the trusts of that fund were declared to be these: Upon trust that the trustees should stand possessed of it during the life of Lady Mary Topham, and provided the Duke of Portland during her

life or after his decease, the person who thenceforward and for the time being during the life of Lady Mary Topham, should be Duke of Portland by any deeds sealed and delivered by him, and with or without power of revocation and new appointment, shall so direct or appoint, but not otherwise, to pay and apply an annual sum not exceeding 800*l.* sterling out of the dividends and annual income to arise or become payable out of this trust fund, or if necessary by resort to the capital, unto or for the benefit of Lady Mary Topham during her life, to be payable and paid to her at such times and in such manner, and from and under and subject to such provisos, restrictions and limitations as should be expressed or declared in or by such appointment, and subject to the aforesaid trust and power and to the exercise thereof upon trust, during the life of Lady Mary, to stand possessed of the dividends for Lord Henry.

Then there are provisos in the event of Lord Henry dying before Lord George, and other provisions not material to the question. We have therefore certain sums of stock, producing 800*l.* a year, settled upon trust, if the Duke of Portland for the time being shall so appoint, to pay the income to Lady Mary for her life, but not to make any payment to her, except such appointment shall be made by the late Duke of Portland.

All this was subject to a prior life interest in the Duchess; and in the year 1844 the Duchess died. Soon after her death it appears by the evidence the late Duke sent the defendant Lord Henry to the plaintiff Lady Mary, to use his *influence* to induce her to break off her proposed marriage and to tell her that if it took place he should leave away from her everything in his power; and Lady Mary then or before that time agreed not to marry during the late Duke's life. The late Duke, however, was not satisfied with this agreement on her part; and, on the 4th of August 1844, he wrote to Mr. Heaton Ellis, the manager of his property in England, a letter in which, with reference to the trusts created by the deed of the 29th of June 1843, he expressed himself thus: "Lord Titchfield (meaning the present Duke of Portland) and I are both of opinion that Lord Henry ought to sign a memorandum, shewing his under-

standing of the nature of the trust and the intended application of the accumulations, and the contingency on which it depends."

Mr. Ellis then drew up a memorandum to be signed by Lord Henry Bentinck, and which was accordingly signed by him. This memorandum was in these terms: "Memorandum—Having given an order on Messrs. Drummond to invest half-yearly in November and May 400*l.* in my name, in the new 3½*l.* per cent. stocks and to accumulate the dividends, I hereby declare that I will stand possessed of the fund to be so produced during the life of my sister Lady Mary Bentinck (meaning the plaintiff) in trust, to be paid to her or applied for her benefit at such time and in such manner as my father or the Duke of Portland for the time being may in writing direct. It is understood, in case of no such direction in the lifetime of my said sister, that the fund produced by such investments is to belong to me or my representatives absolutely." The order on Messrs. Drummond mentioned in this memorandum was taken by Mr. Ellis to Messrs. Drummond and was, of course, acted upon by them.

Matters stood thus until about the month of September 1848, when the late Duke entered into communication with Mr. Ellis on the subject of appointing the unappointed part of the 40,000*l.* secured by the English settlement of 1814, and expressed to Mr. Ellis his wish (as appears upon the evidence) to appoint a double share to one of his children, by which one of his children who was to be excluded might benefit. A correspondence then ensued between the late Duke and Mr. Ellis. On the 27th of September 1848, Mr. Ellis wrote to the late Duke a letter, in which I find these expressions: "With respect to the division of the 40,000*l.* charged on the English estate for younger children's portions (and this is a guide, too, to what would be done in Scotland), I have cleared up every doubt on my mind and will now submit the facts." Then he mentions the appointments which have been made in favour of Lady Charlotte Denison and Lady Howard de Walden, and then he states that in that result there would be a claim on the part of the Duke to the 13,333*l.*, and there would be a residue unappointed of 26,666*l.*, which, he says, would be divided into five equal parts:

one-fifth to the executors of the Duke as representative of Lady Caroline, another fifth to the executors of the Duke as the representative of Lord George, and to Lady Harriett, Lady Mary and Lord Henry, each one-fifth, or 5,333*l.*; but he adds: "But your grace has the power of dividing the remaining 26,666*l.* 13*s.* 4*d.* in any way you please among your children. If the same course be pursued as before, a further sum of 1,333*l.* 6*s.* 8*d.* each would be appointed to Lady Charlotte Denison and to Lady Howard, and to secure an equal division an appointment should be made of 8,000*l.* to Lady Harriett, to Lady Mary and to Lord Henry."

The late Duke answered this letter in these terms, on the 4th of October 1848: "I understand this to be the state of affairs on which I have consulted you—English funds: First, that there is now divisible a sum of 26,666*l.* 13*s.* 4*d.* Second, that I may divide it in any manner I please. Third, that in order to make an equal division, 8,000*l.* should be given to my two married daughters each, and to Lord Henry an equal sum, amounting in the whole to 24,000*l.* Fourth, that the remainder of the 26,666*l.* 13*s.* 4*d.* should be divided between my two married daughters. This being the case, I would propose now to give the last-named sum immediately to them. With respect to the other 24,000*l.*, I propose to follow the same course with respect to it as was pursued in 1843, and on the same principle, that is, I would give 8,000*l.* to Lady Harriett, and two shares of 8,000*l.* each to Lord Henry, of which he should hold one in trust, as in the former case, subject to any distribution which the Duke of Portland for the time being might direct. I do not know whether you will see any objection to pursue a different course on this occasion from what was pursued on the last. If there is none, I would propose to do this rather by deed than by will." Then he refers to the Scotch settlement, and says he supposes it not to have been touched.

On the 6th of October 1848 Mr. Ellis again wrote to the late Duke in these terms: "All your Grace's wishes can be fulfilled. There will be an appointment of 1,333*l.* 6*s.* 8*d.* to Lady Charlotte Denison; the same to Lady Howard (the money in these two cases to be paid at once); an appoint-

ment also by deed of 8,000*l.* to Lady Harriett, and of 8,000*l.* to Lord Henry, payable at your decease; and, lastly, the appointment by deed of 8,000*l.* on the same principle as in the deed of 1843, subject to the direction of the Duke of Portland for the time being. This last has alone, as to form, required consideration and care, as all acts do when in execution of a power not quite simple. It will, however, be made perfectly safe. The precise form which is preferable is not yet settled. Lady Margaret Harriett (not Henrietta) and Lady Mary are, I believe, the correct names. Greater exactness is desirable in a deed than in a will. These appointments will be prepared at once, and may be ready, I think, by the middle of next week." Then he refers to the charge of 40,000*l.* on the Scotch estates. The late Duke and Mr. Ellis were at the same time corresponding with Mr. Melville, the Duke's Scotch agent, on the subject of appointments to be made of the unappointed part of the 40,000*l.* charged on the Scotch estates. On the 8th of October 1848 the Duke wrote to Mr. Melville thus: it appears that he had received some deeds from Mr. Melville. He says, "The deed No. 2 is not drawn up according to my intentions. My intention is to do this: to make up the sums already given to Lady Charlotte Denison and Lady Howard to the amount of 8,000*l.* each, thus adding to each 1,333*l.* 6*s.* 8*d.*; to give 8,000*l.* to Lady Margaret Harriett, 8,000*l.* to Lord Henry Bentinck, 8,000*l.* to Lord Henry Bentinck, on trust to accumulate, and the funds to be applied in such manner as the Duke of Portland for the time being may direct. I propose to pay down these sums. A deed to the same effect is in preparation in London, and I will direct Mr. Heaton Ellis to send you a copy of it, in order that the deed to be prepared in Scotland may be in conformity to it, supposing always that there may be no objection to it."

On the 16th of October 1848 Mr. Ellis also wrote to Mr. Melville in these terms: he says, "I must endeavour to be very distinct myself. His Grace not long since wrote to me; I think it would be right, and Lord Titchfield is of the same opinion, that the 40,000*l.* charged on the Scotch estates (for younger children) should be settled in the same way as the English sum,

and to make of it an immediate distribution. As to the English 40,000*l.*, the Duke having appointed and paid 6,666*l.* 13*s.* 4*d.*, some time since, to Lady Charlotte Denison, he now appoints and pays to her 1,333*l.* 6*s.* 8*d.* Then there is the same remark as to Lady Howard de Walden; and then he says, "And he now appoints and pays 8,000*l.* to Lady Margaret Harriett Cavendish Bentinck, and 16,000*l.* to Lord Henry William Cavendish Bentinck, taking assignments to himself in each case, as on former occasions, from Lady Charlotte Denison and Lady Howard. The simple and correct course will, therefore, I conceive, be (the two sums of 6,666*l.* 13*s.* 4*d.* having been also already appointed and paid to the married daughters in respect of the Scotch 40,000*l.*), for you to prepare absolute and unconditional appointments from the Duke of 1,333*l.* 6*s.* 8*d.* to Lady Charlotte Denison, of 1,333*l.* 6*s.* 8*d.* to Lady Howard de Walden, of 8,000*l.* to Lady Harriett, and of 16,000*l.* to Lord Henry, and assignments from the several parties of the respective sums to the Duke. You had better not prepare any settlement or declaration of trust whatever, but simply these appointments and assignments. When Lord Henry gets the two sums of 16,000*l.* in respect of the English and Scotch estates, he will dispose of all or any part as he pleases, both sums being his absolute legal property."

This correspondence was followed by the execution by the late Duke of three several deeds of appointments bearing date the 13th of October 1848. By the first two of these deeds the late Duke appointed 1,333*l.* 6*s.* 8*d.* to Lady Charlotte Denison and Lady Howard de Walden respectively, making the whole sum appointed to each of them 8,000*l.* By the other of these deeds, being the appointment we have now in question, the late Duke appointed 8,000*l.* to Lady Harriett and 16,000*l.* absolutely to Lord Henry. The two sums of 1,333*l.* 6*s.* 8*d.* and the sums of 8,000*l.* and 16,000*l.*, constituting together the unappointed part of the 40,000*l.*, secured for the younger children by the Scotch settlement, were, in like manner appointed to Lady Charlotte Denison and Lady Howard de Walden, Lady Harriett Bentinck, and Lord Henry Bentinck respectively, by another deed of appointment, dated the 28th of October 1848.

It appears from the evidence before us, that before these appointments in favour of Lord Henry were made, Mr. Ellis told the late Duke that there must be no agreement whatever with Lord Henry beforehand, that the benefit for the child to whom no appointment was made must be Lord Henry's own act, and that neither the late Duke nor Mr. Ellis, nor any one ought to have any communication with Lord Henry beforehand, and Mr. Ellis states that he so told the Duke to avoid all legal difficulties and to steer clear of the law. The two sums of 16,000*l.* thus appointed in favour of Lord Henry were dealt with in the following manner. On the 14th and 30th of October 1848, a few days after the appointment, they were paid to Lord Henry's account with Messrs. Drummond, who gave notice to Lord Henry of the sums having been paid to his account. On the 23rd or the 30th of October 1848, but on which of those days is not quite clear upon the evidence, although the weight of evidence is, I think, in favour of its having been upon the 30th, Mr. Ellis took to Lord Henry an order on Messrs. Drummond for his signature, which order, when filled up, was in these terms—"Messrs. Drummond, please to lay out 16,000*l.* in the purchase of 3*l.* 5*s.* per cent. stock in the joint names of the Marquis of Titchfield and Mr. Charles Heaton Ellis, the dividends to be placed in the joint names to account M.," meaning by "account M" the plaintiff. Lord Henry signed the order accordingly, but it appears from his evidence that when he signed it, it was in blank both as to the date and as to the account to which the monies were to be placed. This, however, does not seem to me to be material in any other point of view than as affecting the conduct of the parties, if I am right in having considered the order to have been signed on the 30th, for there can be no doubt that Lord Henry must be taken to have acceded to everything which was provided for by the memorandum when completed. Lord Henry's account of the transaction is this (as appears on his evidence): that he had notice from Messrs. Drummond of the two sums of 16,000*l.* having been placed to his credit; that he was then entirely ignorant of the appointments; that when Mr. Ellis brought him the order to sign, Mr. Ellis told him

that the money was to be put in trust, and also told him why it had been previously placed to his account without any notice, that this had been done because it had been found necessary to place it at his absolute disposal, and that Mr. Ellis also told him that the Duke's wishes were that he should lay out the money as mentioned in the order. He further states that in all these matters, including the trust deed next to be mentioned, he was a complete "dummy"; that the whole of the matters were exclusively controlled by the Duke, and that he could do nothing which the Duke did not wish to be done; that everything was entirely in the Duke's hands. Not only did Lord Henry sign the above-mentioned memorandum, but he afterwards executed a declaration of trust which was prepared by the late Duke's solicitors without any instructions from Lord Henry, and which was to this effect. It is dated the 24th of November 1848, made between Lord Henry of the one part, and the present Duke and Mr. Ellis of the second part. It recites the investment of 16,000*l.*, in the purchase of 18,686*l.* 2*s.* 8*d.* 3*l.* 5*s.* per cent. annuities, in the names of the present Duke and Mr. Ellis, with the intent (from the natural love and affection which Lord Henry had for his sister Lady Mary) that a provision might be made for her upon such contingency as thereafter expressed, and that he, Lord Henry, had accordingly requested the Duke and Mr. Ellis to concur with him in the declaration of trust thereafter contained. Then Lord Henry declares that the Duke of Portland and Mr. Ellis should stand possessed, and they agree to stand possessed of this 18,686*l.* upon trust thenceforth, and until the expiration of the term of twenty-one years from the decease of Lord Henry, or until, previously thereto, any such appointment should be made as would entitle Lady Mary to the transfer of the whole of the funds then intended to be settled, and of the accumulations therefrom which were thereafter provided to be made, or until Lady Mary should previously die without the appointment of the whole thereof, having been made to her, or for her benefit; that the trustees should accumulate the dividends, interest, and income of these funds. And upon further trust at the expiration of the period for accumulation or at any time

previously thereto, when, and as such one of them the Duke and Lord Henry as for the time being, might be the Duke of Portland, should by writing so direct, transfer, assign, and pay all or any part of these funds and the accumulations unto or for the benefit of Lady Mary in such manner as the Duke for the time being might direct. And subject to the trusts or purpose aforesaid, or when and as the same should be no longer capable of taking effect, and as to the trust monies, funds, stocks, securities, and accumulations, and the dividends, interest, or income thereof, of which respectively there might have been no such appointment to Lady Mary, to stand possessed of the same upon trust for Lord Henry absolutely; then in the event of any partial appointments being made, the accumulation was to continue as to the residue of the trust funds.

It is under these circumstances that the Master of the Rolls has held the appointment under the settlement of 1814, to be bad as to the whole of the 16,000*l.* thereby appointed to Lord Henry Bentinck, and this is the first point we have to consider upon these appointments.

The appeals raise three questions, as to His Honour's decision upon this appointment. First, it is contended on the part of the plaintiff, that there is a valid appointment to her of 8,000*l.*, part of the 16,000*l.* appointed to Lord Henry. Secondly, it is contended on the part of Lord Henry, that the appointment to him is valid as to the whole of the 16,000*l.* Or, thirdly, it is contended that it is at all events valid as to the 8,000*l.*, part of that sum.

As to the first of these points, that contended for by the plaintiff, that there is a valid appointment to her of 8,000*l.* part of the 16,000*l.*, I am of opinion that it cannot be maintained. It was argued in support of this view that the trust deed of the 24th of November 1848 ought to be read and taken as part of the appointment, and that what would be bad under the appointment so constituted ought to be rejected, and there would then be left, as it was said, a valid appointment to the plaintiff of the 8,000*l.* The cases of appointments to children accompanied or followed by settlements extending to grandchildren and others not objects of the power, and the

cases of appointments with void conditions were referred to in support of the argument. But whatever else may have been intended in this case, this at least is clear, that it was not intended that the trust deed should form part of the appointment. The trust deed was in fact resorted to for the very purpose of carrying into effect the object in view otherwise than by the appointment, and to unite the two together in the manner proposed would be therefore, in truth, to constitute an appointment contrary to the intention of the donee of the power. The cases of appointment and settlement which were referred to have not as it seems to me any bearing upon the present case, for in those cases the intention is that the children should take under the appointment, and effect is given to the settlements by the children so taking. But in this case the intention was that Lady Mary should not take under the appointment. Supposing, however, that this difficulty could be got over and the trust deed be read as part of the appointment, I do not think that what would be bad under the appointment so constituted could be separated. The case of *Sadler v. Pratt* (1), which was so much relied on on the part of Lady Mary as to this part of the case, is I think clearly distinguishable. There was in that case an absolute appointment to each child, and the condition was distinct from and independent of the appointment.

Passing, then, from the question whether there is a valid appointment in favour of Lady Mary of the 8,000*l.*, we come next to the point contended for on the part of Lord Henry, that the appointment to him is valid as to the whole of the 16,000*l.* That it is so upon the face of the deed, there can be no doubt; but the appointment is impeached, upon the ground that the purpose appearing by the deed was not the real purpose, and that the real object was to effect a purpose which was not warranted by the power, and was a fraud upon it. The first question, therefore, to be considered on this part of the case seems to me to be, what was the purpose of this appointment, and was it, or was it not, within the scope of the power? Now, I have already stated the evidence bearing upon

this point; and looking to that evidence, I think it clear beyond all doubt that the purpose of this appointment was not to give the whole 16,000*l.* to Lord Henry, but to subject one-half of it to the same discretionary power in the Duke of Portland for the time being as had been given to him by the deed of the 29th of June 1843. Was this, then, a purpose warranted by the power? I am of opinion that it was not. The absolute owner of property may, no doubt, subject the property to whatever power of appointment he may think fit, keeping, of course, within the proper limits; but the donee of a power is not the absolute owner of the property which is subject to the power. He cannot delegate the authority which is given to him. In considering his acts regard must be had to the relation in which he stands, both towards the author of the settlement and towards the objects of the power. As to the relation in which he stands towards the author of the settlement, the purpose of the author of a settlement by which a power is created is to benefit the objects within the range of the power; and if the power be exercised beyond that range, his intention is, that the property, the subject of the power, shall go to those who are entitled in default of appointment. As to the relation in which he stands towards the objects of the power, powers such as those contained in the settlement, by which the power in this case was created, are given to parents upon the faith of the parental relation between them and the objects of the power. They are given to enable the donees of the power to exercise parental control over the objects of it, and to provide for their wants and necessities. The limitations in default of appointment are of themselves sufficient to shew the purpose of such powers; and if authority were wanting to support this view of them, there is Lord Hardwicke's authority upon it. The donees of such powers, therefore, take them clothed with parental duty; the powers are connected with the duty, and the donees can no more transfer the power than they can transfer the duty. When, therefore, it is asked that effect may be given to an appointment, which has for its object to go beyond the power, it is, in truth asked that the unauthorized purpose

(1) 5 Sim. 632.

of the donee may be preferred to the authorized purpose of the donor, and that to the prejudice of those who would be entitled, but for the donee's unauthorized purpose; and it is further asked that effect may be given to the severance of the power from the duty with which it is connected.

It was attempted, however, to maintain the claim on the part of Lord Henry to the whole of the 16,000*l.* upon the ground that however unauthorized the purpose of the late Duke may have been, and whatever fraud upon the power it may have been, his intention to commit this purpose was not communicated to Lord Henry, and he became absolute owner of the fund, and was competent to dispose of it as he pleased. But in the first place the disposition which Lord Henry made was not in truth his disposition. It was upon the evidence before us, the disposition of the late Duke in continued prosecution of the fraud upon the power. Lord Henry, as he states, was a mere "dummy" in the transaction. In the second place, Lord Henry, in giving effect to this disposition, was concurring in the fraud upon the power; and in the third place, whether Lord Henry is to be taken to have concurred in the disposition or not, his title was at all events derived under the fraud upon the power committed by the late Duke; and I take it to be clear that no person, however innocent he may himself be, can, where there is no valuable consideration, derive a title under the fraud of another—*Huguenin v. Baseley* (2) has settled that. This argument, therefore, on the part of Lord Henry is founded upon a false hypothesis, that of his having become the owner of the fund. The circumstances of the case render it unnecessary for me to say what in my opinion would have been the result of this case if there had been no accession on the part of Lord Henry to the fraudulent purpose of the Duke, and no disposition made by him in aid of that purpose; but certainly I am not prepared to admit that even in that case the appointment in favour of Lord Henry could have been upheld. I am very much disposed to think that it could not. The Court sets aside appointments made by parents in favour of their children,

where the appointments are connected with agreements by the children for the benefit of the parents. It also sets aside appointments made by parents to children with a view to the benefit of the appointments ultimately accruing to the parents. These, it may be said, and it was said in the course of the argument, are cases in which there is moral fraud. But surely the powers of Courts of Equity are not to be measured by the nature of the fraud. If such purposes were warranted by the power, it would be difficult to say that there could be fraud in so exercising it. What therefore the Court acts upon in such cases is, as I conceive, the fraud upon the power in the exercise of it by the parents for purposes foreign to those for which it was created. And if the Court in such cases looks to the purpose with which the power was exercised, it must as I apprehend look to that purpose in all cases and the question in each case must be, what was the purpose with which the power was exercised? as to which there is in this case no doubt at all.

It may not be unimportant to refer upon this subject to the case of *Scroggs v. Scroggs* (3). In that case the consent of the trustee was necessary to the exercise of a power, and the donee of the powers procured the trustees' consent by a false representation as to the character of the eldest child, to which the appointee does not appear to have been in any way a party, yet the Court set aside the appointment.

We were much pressed in the course of the argument before us with the danger and inconvenience which may be attendant upon examining into the motives in which the donees of powers may have been influenced in the exercise of them, and I agree that there would be both danger and inconvenience in such an examination, but it is one thing to examine into the purpose with which an act is done and another thing to examine into the motives which led to that purpose; and what we have to do in this case is to look to the purpose of the act which was done, and not to the motive which led to it. Whether the late Duke was right or wrong in the objection which he had to Lady Mary's proposed marriage, and which led to the appointment under

(2) 14 Ves. 273.

(3) Ambl. 272.

consideration, is a question which I do not think it is competent to this Court to entertain, and which I desire to be understood as having wholly disregarded. My judgment rests upon the ground that, whether the motive was right or wrong, the course adopted for giving effect to it was not warranted by the power.

For the above reasons, I fully agree in the opinion of the Master of the Rolls, that Lord Henry's claim to the whole of the 16,000*l.* under this appointment cannot be maintained.

It may be that there are other views of this appointment which seem to me to be equally fatal to it as to 8,000*l.* First, to that extent the purpose having been not to give to Lord Henry but to suspend the beneficial enjoyment and accumulation with a view to a future appointment, and no further appointment having been made, the accumulated fund would, as I apprehend, go as in default of appointment. And, secondly, that although the rights of the parties entitled in default of appointment may of course be defeated by an exercise of the power, they can be defeated only by a *bond fide*, and not by a merely formal execution of it; and that in this case there was a mere formal execution of the power.

The Master of the Rolls, however, has held this appointment to be bad as to the whole of the 16,000*l.* upon the general rule that where an appointment is made for a bad purpose, the bad purpose affects the whole appointment. And his Honour has relied upon *Daubeney v. Cockburn* (4) in support of this view. That this general rule is correct when applied to cases in which the evidence does not enable the Court to distinguish what is attributable to an authorized from what is attributable to an unauthorized purpose I feel no doubt. But if the evidence enables the Court to make this distinction, the foundation on which the rule rests, the impossibility of distinguishing what is attributable to one purpose from what is attributable to another, wholly fails, and the general rule, therefore, cannot, as it seems to me, apply. Sir William Grant has, I think, in *Daubeney v. Cockburn*, pointed to this view, for he said that he could not collect from the evi-

dence that, but for the assent of the daughter, the appointee in that case, any appointment would have been executed in her favour. Now, the evidence in this case satisfied me that one of the purposes of this appointment was that Lady Charlotte Denison, Lady Howard de Walden, Lord Henry Bentinck and Lady Harriett Bentinck should all be placed upon the same footing, each taking 8,000*l.*; and I find myself, therefore, reluctantly compelled to dissent from the Master of the Rolls' opinion that this appointment is bad as to the whole of the 16,000*l.* appointed to Lord Henry. The conclusion at which I have arrived as to this appointment is, that Lord Henry is entitled to 8,000*l.* under it, and that it is bad only to the extent of 8,000*l.*

The case being thus disposed of, as to the appointment made by the late Duke of Portland of the 16,000*l.*, we have next to consider the other appointments, made by the defendant, the present Duke of Portland. On the 24th of June 1843 the late Duke of Portland vested in the present Duke and Lord Henry the sum of 52,000*l.* 3*l.* 10*s.* per cent. annuities, and it was agreed and declared that the Duke of Portland, Lord George (one of the trustees) and Lord Henry, should stand possessed of this sum, upon trust to invest the dividends to accumulate during the life of the late Duke, and after the decease of the late Duke, then upon trust to invest the stock and accumulations and the income to be derived from the trust fund, upon trust for Lady Harriett and Lady Mary, or for one of them exclusively of the other who should be living at the time of the appointment, and the issue then living of both or either of them, Lady Harriett and Lady Mary, or all or any one or more of the objects of the power, in such priorities, and so on, as the late Duke, during his life, or after his decease the person who thenceforward and for the time being, during the lives of Lady Harriett and Lady Mary, or the lives of the survivor, should be Duke of Portland for the time being should by deed appoint, and in default of such appointment, and as to such part or parts of the trust funds, and the dividends, interest and annual income to arise therefrom to which such appointment, if made, should not extend, then upon trust, during the joint lives of Lady Harriett and Lady

(4) 1 Mer. 626.

Mary, to pay the interest and annual income to Lady Harriett and Lady Mary in equal shares, for their absolute use and benefit, and after the decease of either of them upon trust to pay the whole of the interest and annual income to the survivor, and then, subject to these trusts, the trust was for the Duke of Portland, for his own absolute benefit. It is to be observed that in default of the power being exercised there is an immediate trust to pay the income to Lady Mary and Lady Harriett in equal shares.

By another deed of the 24th of November 1848 the late Duke conveyed the Marylebone estate to Mr. Ellis, upon trust after his decease, among other things, to raise an annuity of 2,720*l.* during the joint lives of Lady Harriett and Lady Mary, and to pay that annuity so raised to the Duke of Portland and Lord Henry, to the intent that the Duke of Portland and Lord Henry should pay the same annuity, when payable, to Lady Harriett and Lady Mary, in such parts and so on as the Duke of Portland during his life, and after his decease, Lord Henry during his life, or after the decease of the survivor of the Duke of Portland and Lord Henry as the personal representatives of the survivor of the Duke and Lord Henry from time to time should direct and appoint. And in default of and until such direction or appointment, and as to such part or parts of the annuity of 2,720*l.* of which for the time being there should be no appointment, then to pay the annuity unto and between Lady Harriett and Lady Mary in equal proportions. Then follow various provisions for events that have not happened of Lady Mary or Lady Harriett dying in the lifetime of the late Duke, and provisions as to what was to take place in the event of one dying before the other. There is a like trust in default of appointment of the other sum.

The late Duke of Portland died on the 27th of March 1854. Soon after his decease, the present Duke had an interview with Lord Henry Bentinck upon the subject of Lady Mary's fortune, and what then passed between them is thus stated by Lord Henry. He says, "The present Duke made a proposal to me with regard to withholding her income unless she became a widow, and for increasing her income in case of a

legal separation. I objected to the latter, but assented to the former. This was after the late Duke's death and before the marriage. It related generally to all Lady Mary's income, the particulars of which I was ignorant of. The direct proposition of my brother was, that as his health was thought by some to be very precarious and they calculated on his death to know if I would back him up in the course he was going to adopt in case I succeeded to the title. He told me that the object was not absolutely to take away her income, but to suspend it to accumulate, in order that it might be dealt with afterwards as circumstances might arise. He did not say to me that the intention was not to give it to anybody else, but to retain it for Lady Mary conditionally. He did not go into that point. My opinion and his, I believe, would have been different upon that. He did not go into the details of how it was to be done. This was the only interview I had with the present Duke on the subject."

About the month of June 1854 the Duke appears also to have been in communication with Mr. Ellis upon this subject, and what passed between them is thus stated by Mr. Ellis. About June 1854 I had some communication with the present Duke in reference to "guarding" Lady Mary's income. The word "guarding" meant preventing Lady Mary from having any absolute interest in the money at that time. The conversation was with a view that she might have an interest in the money at a future period if the Duke chose. It was with a view of preserving the money, subject to a future control of the Duke. I do not mean that the word "guarding" was used in the conversation between me and the present Duke. Our conversation referred to the interest of Lady Mary in the annuity of 2,720*l.* and in the 52,000*l.* fund. When I said above that the conversation was with a view that Lady Mary might have an interest in the money at a future period if the Duke chose, I meant to say, if Lady Harriett chose; and when I said that the conversation was with a view of preserving the money, subject to a future control of the Duke, I meant to say the future control of Lady Harriett. I think, from the conversation between me and the present Duke, that he thought that Lady Harriett would

not touch the money for her own use. I communicated with Lady Harriett on the subject, but only once. I do not remember seeing her on the subject. I think the only communication I had with her on the subject was by my letter of the 4th of October 1854. I think that my communications with the present Duke on the subject began about June. I think that the marriage of Sir W. Topham with Lady Mary was then imminent. The Duke would have preferred that the money should accumulate, subject to his future orders, for one or the other sisters, without Lady Harriett's intervention."

On the 22nd of June 1854 Mr. Ellis wrote thus to the Duke: "The draft appointments, until revoked or varied, of the fund, which was originally 52,000*l.*, 3*l.* 5*s.* per cents., and of the 2,720*l.* annuity, have been prepared, and are ready to be transcribed for execution. One witness (your Grace's valet) to your signature will be sufficient. The appointment of all the dividends and interests in the first case, and of the whole annuity in the last, is unavoidably made to Lady Harriett; and no bargain or arrangement should be made with her beforehand lest the appointment be vitiated. I dare say it will occur to her Ladyship afterwards, or it can prudently be suggested to her, that one-half the interest and dividends, and one-half of the annuity, as it is paid, should be laid out to accumulate, as she would not like, in the present state of things, to benefit personally beyond her own moiety."

This letter related, it appears, to a proposed appointment of all the dividends and interest of the 52,000*l.* 3*l.* 10*s.* per cents., and of the whole of the annuity of 2,720*l.* to Lady Harriett; and with reference to that subject Mr. Ellis makes this further statement in his evidence. He is asked, "Were there not several modes discussed between you and the Duke of carrying out the Duke's wishes?" His answer is, "There were several discussions on the subject, but I do not remember that there were any between me and the Duke. I do not remember whether or not I spoke to the Duke as to these modes. I cannot say whether or not I had seen the Duke on the subject of my letter to him of 22nd June 1854 before I wrote that letter. I do not

mean to say that my letter of 22nd June was the first introduction of the subject between him and me. The Duke must have written or spoken to me, saying that he wished to exercise his power to the exclusion of Lady Mary, and that Lady Harriett was to decide, considering her father's wishes, as to the distribution of the fund." Then the question is asked, "Was not the Duke most loth to use the agency of Lady Harriett?" The answer is, "He was averse to it. I did not suggest any plans to avoid that, but counsel considered it. I did not attend consultations with counsel on the subject. I saw (a gentleman whom he names) once upon the subject, I think. I believe there were many consultations between counsel and the Duke's solicitor upon the subject. I think I communicated to the Duke the difficulties which counsel raised in carrying out his wish, and that they one and all were of opinion that his wish could not be carried out with perfect safety. I think that the Duke had no communication with Lady Harriett upon the subject."

In the result the appointment referred to in that letter seems not to have been executed, and a case was laid before counsel containing the following statement, which the Duke in his evidence says was a correct representation of his intentions. It is an A. B. case. C. D. representing the Duke of Portland, J. K. representing Lady Harriett, and L. M. representing Lady Mary: "C. D. (meaning the Duke of Portland) is desirous of appointing the interest and annual income to arise from the trust funds, so that one-half of the income shall be payable to J. K. (meaning Lady Harriett) for her absolute use, and that the remaining half shall (at least for the present and until it shall be seen what events are likely to happen) be withheld or kept in abeyance, or otherwise dealt with, so that they might according to the course of such events be, if it were thought right, ultimately payable to L. M. (meaning Lady Mary) or her issue, or otherwise to J. K. (meaning to Lady Harriett). In a word, to keep by the appointment an effectual control over this moiety of the trust fund, so as for it to be dealt with according to circumstances. It has been suggested that it is not competent for C. D. (meaning the

Duke) so to deal with the trust funds; but as the settlor directed that the interest from the trust fund should be accumulated during his life, and which has been carried out, that all power of accumulation is gone, and that an actual and present ownership of and in the trust funds, or of the dividends or annual interest to be derived therefrom, must, if the appointment be exercised, be given at once and immediately to both or one of the two objects of the power, and therefore that for Lady Mary for the present to be excluded from all participation of the beneficial interest until further appointment by the Duke, must be given to Lady Harriett absolutely. The fear, however, is, that if such an absolute interest be appointed to Lady Harriett in the dividends and annual income of the trust funds, she, Lady Harriett, will promise and give over to her sister, Lady Mary, one-half of the dividends or annual income, and thus defeat the intention of the settlor (her father), and which intention the son of the Duke is most anxious to carry out."

Counsel, it appears, were unable to agree on any safe mode of carrying the Duke's wishes into effect, and it was accordingly determined that a provisional appointment as well of the dividends of the 3*l*. 10*s*. per cents. as of the annuity, should be made to Lady Harriett. Accordingly, on the 20th of September 1854, Mr. Ellis wrote to the Duke as follows: "I could have much wished that the agency of Lady Harriett could, under the circumstances, even at a trifling risk, have been dispensed with, but after much anxious consideration, the present appointments will be pretty much what were first proposed, with this little difference, that Mr. Loftus Wigram considered it advisable that the appointment of the annuity should apply to the next accruing payment, and so be made from time to time (thus the end of this month another appointment might be signed applicable to the quarter which will become due the 27th of December). It was originally considered that no appointment could be valid unless an absolute interest were given by the very act to one or other of the donees of the power, in other words, that ownership must be conferred at once on one or both of the ladies, and not kept in suspense." Then he refers to what had passed with counsel, and

he says, "Under these circumstances, the only course admitted by all to be clearly legal was for the emergency adopted; and the whole of the next accruing payments are appointed to Lady Harriett, as nothing would be more irksome than that an appointment executed by your Grace should, if disputed, be set aside; and one cannot tell if T. should be desperate that he might not have recourse to litigation. The present appointments can, at least, be relied on. Possibly a slight risk may be run at a future time, if it be sanctioned by a first-rate man." Then, he says, "To come to Lady Harriett. The quarter's annuity is due the 27th instant, and the next dividends in October, so that about the end of this month it would be desirable that her ladyship should sign an order directing Drummonds to invest half in the funds, in the names of trustees (say your Grace and Lord Henry). Probably the order had better, when drawn ready for signature, be sent to your Grace. There remains one more point: in fact, the dividends of the accumulated fund due on the 5th of April last belonged, not to the executors, but to the ladies, and Drummonds having no order to the contrary, invested it as before in the purchase of additional stock. There will then be two orders for your Grace's selection: one marked No. 1, by which Messrs. Drummond will be directed by yourself and Lord Henry to retain half till further orders. The other, numbered 2, is the strictly legal one, giving the half to Lady Mary, as there was no appointment to the contrary in existence. I rather expect that your Grace will sign No. 1. The sisters will, I think, take a good part for the honour of the family."

On the 21st of September 1854, accordingly, two deeds of appointment were executed. Those were temporary appointments of accruing dividends on the 52,000*l*. consols and the accruing payments of the annuity. After the execution of these appointments, and on the 4th of October 1854, Mr. Ellis wrote to Lady Harriett Bentinck as follows, that is, immediately following the appointments: "I have the honour to inclose an order for your Ladyship's signature, and, in doing so, I should explain that the Duke lately executed deeds, revocable at any time, under which no payments beyond 600*l*. a year can for the

present be made to Lady Mary. The half-year's dividend on about 21,400*l.* 3*l.* 5*s.* per cents. will this month be paid to your credit by the trustees, as well as 680*l.*, less property-tax, for the quarter's double annuity; the arrangement made, which will be completed by the inclosed order setting aside and making a fund for future disposal, has appeared to be the best, if not the only mode of faithfully carrying into effect the late Duke's views and wishes." The order inclosed in that letter to Lady Harriett is an order which was not confined at all to the dividends which had been actually appointed, but was general, and was in these terms :

"Messrs. Drummond,—Please to invest one-half of the payments in future to be made to my credit from the joint account of the Duke of Portland and Lord Henry Bentinck (marked S) in the purchase of 3*l.* per cent. consols in the names of the Duke of Portland, Lord Henry Bentinck and myself."

This order was signed by Lady Harriett and returned to Mr. Ellis on the 18th of October 1854. Mr. Ellis then took the order to Drummonds', and, on the 19th of October 1854 a quarterly payment of the annuity, and some further monies, arising as it would appear from the dividends of the 3*l.* 10*s.* per cents., which had in the mean time been standing to an account with Messrs. Drummonds, in the names of the Duke of Portland and Lord Henry Bentinck, were transferred from that account to the account of Lady Harriett; so that, in truth, Lady Harriett received no part of the monies appointed by the deeds of the 21st of September 1854 until she had signed the above-mentioned order. On the 20th of October 1854 one moiety of the amount thus transferred to Lady Harriett's account was invested in consols in the joint names of the Duke of Portland, Lord Henry Bentinck and Lady Harriett Bentinck; and on the 28th of October 1854 they gave a power of attorney to Messrs. Drummond to receive the dividends, and an order to invest and accumulate them. The annuity and the income of the 3*l.* 10*s.* per cent. annuities, or of the funds representing that stock, appear from this time to have been carried to Lady Harriett's account; and, as to one moiety, with some slight exception

arising from an accidental oversight not material, invested and accumulated in the manner above mentioned.

Lady Mary, it appears, married the defendant Sir William Topham, on the 4th of September 1854; and the above-mentioned appointments of September 1854 being provisional merely, a further consultation appears to have been had with counsel in November 1854, and on the 10th of that month Mr. Bailey, the solicitor of the Duke of Portland, wrote to Mr. Ellis in these terms: "I have had a long conference with Mr. Loftus Wigram, and the result is, that we have finished where we began. He is of opinion, as placing the appointment beyond all question, the whole of the annuity and the whole of the dividends of the 52,000*l.* should, subject to revocation, and until revocation, be appointed to Lady Harriett during the joint lives of herself and Lady Mary; then, for Lady Harriett of her own free will, and as her own act, to give a running order to Messrs. Drummond to invest one-half of the funds as paid to her account, in the names of the Duke of Portland, Lord Henry Bentinck and herself, and to accumulate the dividends of the investment, and also to execute a declaration of trust that all such investments and accumulations should be subject to the appointment of the Duke, Lord Henry and Lady Harriett, or the survivors or survivor of them, unless the declaration of trust be executed, the funds, or those standing in the names of the three, would still remain the property of Lady Harriett, and she might at any time dispose of them in any way she thought proper, or in case of her death without any disposition, they would form part of her personal estate, and be dealt with accordingly."

Accordingly, on the 19th of December 1854, two other deeds of appointment were executed by the Duke, by which the whole of the income of the 52,000*l.* consols, and the 3*l.* 10*s.* per cents. and the whole of the annuity of 2,720*l.* were appointed to Lady Harriett, subject to a power of revocation. These appointments and those of September 1854 seem to me to be open to the same objections as the appointment in favour of Lord Henry, on which I have already commented; there is the same intention to put the appointed fund under a control not autho-

ized by the power, that of Lady Harriett—the same accession on her part to that purpose,—the same intention to accumulate and suspend the enjoyment,—the same resort to a mere contrivance to effect those objects,—and the same absence of *bona fides*; and having already stated my views upon those points, it is unnecessary for me to say more upon them. The Master of the Rolls, however, has held these appointments to be valid, upon the ground, as I collect from the judgment, that they were made for the purpose of carrying into effect the intentions of the late Duke, the author of the powers expressed in the deeds by which the powers were created. But with all deference to the Master of the Rolls, the intentions of the late Duke are to be collected only from the deeds which he executed; and after the execution of those deeds, both he and the donees of the powers created by him were as much bound to keep within the limits of the powers as they would have been if those powers had been created by any other person. The case of *Daubney v. Cockburn* has settled that point.

These appointments, therefore, are, in my opinion, clearly bad as to a moiety of the appointed income. It is, perhaps, open to more doubt whether they are or are not bad *in toto*, as there was not as to these appointments, as there was in the case of Lord Henry, any intention of benefiting Lady Harriett to any definite extent. The appointments could not have been made for the purpose of giving her a moiety of the income, for she would have been entitled to it under the limitations in default of appointment, if no such appointments had been made. They were made, as I am satisfied upon the evidence, for the sole purpose of defeating the limitations in default of appointment, by a fraudulent exercise of the power. And I am of opinion, therefore, that these appointments are wholly void. *Daubney v. Cockburn*, which the Master of the Rolls has (though in my humble judgment erroneously) applied to the case of the appointment in favour of Lord Henry, seems to me to apply directly to these appointments in favour of Lady Harriett.

As to the appointment affecting the 40,000*l.* charged upon the Scotch estates, I say no more than that the Scotch law

being a question of fact, I do not think that we can properly come to any decision upon it in the absence of evidence or of the opinion of the Scotch Court.

March 4.—This day the LORDS JUSTICES gave leave to the plaintiffs to file a supplemental bill for the purpose of making Lady Howard de Walden and Lady Charlotte Denison parties to the suit (if they objected to appear voluntarily), subject to any objections from them. The minutes of the decree as to the English property to be settled, and as to the Scotch property a case to be stated and to be settled in chambers for the opinion of the Court of Session.

STUART, V.C. }
Nov. 7. } *Re BROWN'S TRUST ESTATE.*

Practice—Petition under Section 2. of Confirmation of Sales Act (25 & 26 Vict. c. 108.)—Consent of Beneficiaries.

Upon all applications to the Court under section 2. of the act to confirm sales, &c. by trustees, with an exception or reservation of minerals (25 & 26 Vict. c. 108.), the beneficiaries must appear and consent thereto.

This was a petition under the act “for the confirmation of sales, exchanges, partitions and enfranchisements by trustees” (25 & 26 Vict. c. 108. s. 2), praying that the Court would order and sanction the sale and disposal of the trust estate comprised in the will of the late William Brown (who had devised his real estate to trustees upon trust for sale,) with an exception or reservation of the minerals and rights and powers of or incidental to the working, getting, and carrying away of such minerals, and that it would also order and sanction the sale and disposal of the minerals, and such rights and powers as aforesaid, separate and apart from the residue of the land, “without prejudice to any future exercise of the authority with respect to the excepted minerals or the undisposed-of land.”

Mr. T. A. Roberts, for the petitioners, the trustees for sale.

Mr. Mounsey, for the beneficiaries who had been served with a copy of the petition, consented to the order.

STUART, V.C., made an order as prayed, and said that, although the act was silent on the subject, he thought that the appearance and consent of the beneficiaries was necessary for their protection, and that he should require such consent on all similar applications.

ROMILLY, M.R. }
1862. } LECHMERE v. CLAMP.
Nov. 20. }

Mortgage—Foreclosure—Repayment of Money—Attendance to receive.

Under a decree of foreclosure the solicitor of the mortgagee attended at the place named for payment before the time fixed; the mortgagee did not attend until after the commencement of the time, but both remained until the time had expired; the mortgagor did not attend, and as the money remained unpaid the decree was made absolute.

A decree of foreclosure had been made in this suit, *Lechmere v. Clamp* (1). The accounts had been taken, and on the 2nd of May 1862 the chief clerk by his certificate fixed the 3rd of November following for the mortgagor to attend at the Rolls Chapel between the hours of twelve and one and pay the redemption-money to the plaintiff.

The plaintiff's solicitor, though he had no power of attorney to receive the money, attended as his agent before twelve, the plaintiff himself arrived at thirty-five minutes past twelve, and they both remained till after one. The mortgagor did not appear, and the money due in respect of the mortgage was not paid.

Mr. T. A. Roberts asked that the foreclosure might be made absolute, and submitted that the attendance to receive the money was sufficient. A decree absolute had been made in a case where the mortgagee did not attend until twenty minutes after the time fixed by the order—

Anonymous, 1 Coll. 273.

Gurney v. Jackson, 1 Sm. & Giff. App. xxvi.

The MASTER OF THE ROLLS thought the attendance sufficient, and made the order.

(1) 29 Beav. 259; s. c. 30 Beav. 218; 30 Law J. Rep. (N.S.) Chanc. 651.

[IN THE HOUSE OF LORDS.]

1863. { WALL v. COCKERELL AND
Feb. 10, 12, 26. { OTHERS.

Mortgage—Solicitor and Client—Fraud—Acquiescence and Confirmation.

A sum of 15,000*l.* was intrusted to the solicitors of the respondents for the purposes of investment. The solicitors appropriated 5,000*l.* to their own use and invested 10,000*l.* on mortgage, representing to their clients that the whole of the 15,000*l.* had been duly invested. Afterwards, being pressed by the respondents for the securities, they fraudulently and without consideration procured from the appellant, for whom they were also acting as solicitors, the execution of two deeds, mortgaging his equitable interest in certain estates which they handed over to the respondents as the securities for the 5,000*l.* The solicitors soon afterwards became bankrupt, and nearly three years afterwards the appellant first discovered from the assignees in bankruptcy the particulars of the transactions between the solicitors and the respondents, whereupon he filed a bill against the latter to set aside the mortgages, and the Master of the Rolls made a decree in his favour, which was reversed by Lord Chancellor Campbell, on the ground of acquiescence and confirmation by the appellant:—Held (affirming the decision of the Master of the Rolls and reversing that of Lord Chancellor Campbell), that the appellant was entitled to the relief sought by his bill.

This was an appeal by the plaintiff from a decree of Lord Chancellor Campbell, reported 30 *Law J. Rep.* (N.S.) Chanc. 417, reversing a decision of the Master of the Rolls, reported 29 *Law J. Rep.* (N.S.) Chanc. 816. The object of the suit was to set aside a deed of mortgage dated the 1st day of March 1853, and a deed of further charge dated the 1st day of August 1853, the execution of which by the appellant was obtained by the fraud of his solicitors, Messrs. Henry Hall and Cheslyn Hall, who were at the same time also solicitors for the respondents.

The facts of the case fully appear in the previous reports and in the judgments of the learned Lords in this House, and it is therefore unnecessary to recapitulate them.

The Solicitor General and Mr. J. Pearson, for the appellant, contended that the Messrs. Hall being the solicitors for the respondents as well as for the appellant, the respondents were not entitled to treat the existence of a debt due to themselves from the Messrs. Hall as equivalent to the payment of the consideration-money for the mortgages by themselves to the Messrs. Hall as agents for the appellant; that there had been no confirmation or delay on the part of the appellant as he had filed his bill as soon as he had ascertained the true state of the case; and that the respondents had all along had notice of the material facts of which the appellant was ignorant.

They cited—

Todd v. Reid, 4 B. & Ald. 210; s.c. 3 Stark. 16.

Bartlett v. Pentland, 10 B. & C. 760.

Scott v. Irving, 1 B. & Ad. 605.

Young v. White, 7 Beav. 506; s.c. 13

Law J. Rep. (N.S.) Chanc. 419.

Young v. Guy, 8 Beav. 147.

Vandaleur v. Blagrove, 6 Ibid. 565.

Lord Chesterfield v. Janssen, 2 Ves. sen. 125.

Wood v. Downes, 18 Ves. 120, 128.

Croze v. Ballard, 3 Bro. C.C. 117.

Roche v. O'Brien, 1 Ball & B. 330.

Murray v. Palmer, 2 Sch. & Lef. 486.

Life Association of Scotland v. Siddal, 3 De Gex, F. & J. 58, 74.

Kennedy v. Green, 3 Myl. & K. 719.

Mr. Selwyn and Mr. Surrage, for the respondents, contended that the case stated for the appellant was different from that alleged by his bill. The Messrs. Hall had sufficient authority from the appellant to raise loans for him; and the respondents were justified in paying the mortgage money to them as the agents of the appellant; and the appellant knew the money was paid. *Perry v. Holl* (1), *Todd v. Reid* and *Bartlett v. Pentland* were distinguishable from the present case. They further submitted that there was no equitable ground for interference—*Protheroe v. Forman* (2); and that the appellant had confirmed the deeds and the judgment, and that the position of the respondents had been altered.

Mr. J. Pearson, in reply.

(1) 2 De Gex, F. & J. 38; s.c. 29 Law J. Rep. (N.S.) Chanc. 684.

(2) 2 Swanst. 227.

THE LORD CHANCELLOR.—My Lords, the respondents are the trustees of the marriage settlement of Mr. and Mrs. Grieve. They employed as their solicitors Messrs. Henry and Cheslyn Hall, who were brothers, in partnership, as solicitors, in London. A sum of 15,000*l.* having become payable to the respondents, as such trustees, they directed it to be paid to Messrs. Hall. The money was accordingly, on the 4th of February 1854, paid into the banking-house of Messrs. Dixon & Co., the bankers of Messrs. Hall, to the credit of their private account. The money was not in any manner separated or distinguished from the monies belonging to the Messrs. Hall. No particular securities were in contemplation at the time of such payment; the sum of 15,000*l.*, therefore, became in law a debt due to the respondents from Messrs. Hall.

The first use which Messrs. Hall made of part of the money so acquired was to apply about 5,000*l.* in discharge of a debt due from them to their bankers. They then invested 10,000*l.* upon mortgage of an estate belonging to a Mr. Commerell, and represented to their clients, the respondents, that the whole of the 15,000*l.* had been duly invested, and that upon one security. Interest on the 15,000*l.*, as if it had been so invested, was paid by the Messrs. Hall to the parties entitled under the trust. In the year 1854 the respondents became dissatisfied with the Messrs. Hall, and in July of that year they were discharged from being solicitors to the respondents, and the securities for the 15,000*l.* were demanded. Messrs. Hall were the confidential solicitors of the appellant, who was a very young man, entitled for life to large real estates, of which the Halls had the entire management. They were also the trustees and executors of the will of the appellant's uncle, and had the whole control of the property which the appellant was entitled to under that will. The appellant was entirely in their power, and placed in them the most absolute confidence. The Halls, therefore, formed the design of getting the appellant to execute deeds which they might hand over to the respondents as the securities for the 5,000*l.* which they had appropriated to their own use. Accordingly, they prepared two deeds of mortgage of the life interest of the appellant in the Worthy Estate, one for the sum of 4,000*l.* and another for the sum of

1,000*l*. The mortgage for 4,000*l*. is made to bear date on the 1st of March 1853; the mortgage for 1,000*l*. bears date the 1st of August 1853. Policies of insurance on the life of the appellant are included in both securities, but the policy included in the mortgage for 4,000*l*. was effected in 1849, and that included in the mortgage for 1,000*l*. was not effected until the 5th of July 1853, which appears to be the reason why that deed was made to bear date the 1st of August 1853.

The respondents having become very peremptory in their demands for the securities, the Messrs. Hall, on the 1st of September 1854, delivered the mortgage deeds for 10,000*l*. together with the mortgages for 4,000*l*. and 1,000*l*. and the policies of insurance, to the solicitors of the respondents. They were accepted without difficulty, and no inquiry appears to have been made. And yet the circumstances were such as should have awakened very grave suspicion on the part of the trustees, who had already seen fit to discharge Messrs. Hall from being their solicitors. On the 9th of February 1853 the Messrs. Hall had written to Mr. Grieve that they had "concluded the arrangements as to the new mortgage," namely, the mortgage for the 15,000*l*. On the 20th of April 1853 Mr. Cheslyn Hall had written to Mr. Grieve in these words: "The 15,000*l*. was lent in one sum to one party." These definite statements were contradicted by the securities delivered.

When the appellant executed the deed of the 1st of March 1853 is not clearly ascertained, but it certainly was not until long after the date of the instrument. As to the deed dated the 1st of August 1853, it is proved that it was not even prepared until the latter end of August 1854, when the Messrs. Hall, no longer able to evade the demands of the respondents, were compelled to complete the making up of securities for the 5,000*l*. that was due from them.

The appellant swears that he knew nothing of the mortgage deeds, and that he must have executed them on the representation of Messrs. Hall that they were instruments of a different nature. But it is not necessary for him to put his case so high; it is sufficient to suppose that he executed the deeds in the faith that the respondents had paid, or would pay, the consideration-mones

to the Messrs. Hall, as his solicitors and agents.

The legal estate in the property comprised in the mortgage deeds was and is outstanding, and the deeds would operate in equity only upon such equitable interests as the appellant was entitled to. But no interest whatever would pass to the respondents until the consideration-mones were either actually paid or applied unto or for the use of the applicant, or paid by the respondents under such circumstances as would estop the appellant from denying that he had received them.

On the question of payment, the case is exceedingly plain and simple. No payment of the 5,000*l*. can be pretended to have been actually made by the respondents, except the payment of the 15,000*l*. on the 4th of February, which was a deposit by them in the hands of their own agents, Messrs. Hall, for the purpose of being invested on proper securities. The 5,000*l*. was misapplied by their own agents, who were intrusted with it long before the appellant's securities; and it is not pretended that one shilling of the 5,000*l*. was subsequently paid or applied by the Messrs. Hall unto or for the use of the appellant.

The respondents rely on the fact that the deeds with receipts for the consideration-mones, signed by the appellant, were, on the 1st of September 1854, delivered to the solicitor of the respondents, and they contend that the appellant is thereby estopped from denying the receipt of the money; and if the respondents were in a condition to prove that they had ever paid any sum of money to Messrs. Hall for the use of the appellant or (as already observed) that the Messrs. Hall had applied any part of the respondents' money for the benefit of the appellant, the respondents would be so far entitled to retain the benefit of the mortgage. But these are the particulars in which their case is wanting. When the mortgage deeds were handed over to the respondents, on the 1st of September 1854, they paid nothing on the faith and credit of the appellant's receipts, but took the deeds, trusting to the representations of Messrs. Hall, to whom they had confided their money, and by whom that money had been spent before the mortgages were thought of. And they now want to convert this payment to the Messrs. Hall, as their own

agents, into a payment to them as the agents of the appellants.

But the decree which the respondents have obtained from the Lord Chancellor is rested on the ground of acquiescence and confirmation by the appellants of the respondents' title. The words of the Lord Chancellor are, "I proceed upon the ground that the plaintiff has confirmed the validity of the mortgages with the knowledge, or means of knowledge, of the material facts of the case." Now, the material facts of the case are the facts which constitute the appellants' equity or title to relief. It is for the sake of clearly explaining the true nature of the appellants' equity that I have made the antecedent full statement of the case. The material facts that constitute the plaintiffs' title are, that no sum of money was ever paid by the respondents to the appellant or his agents on the credit or for the purpose of these mortgages, and that all which the respondents have done has been to abstain from demanding repayment of a sum of 5,000*l.* which they had intrusted to their own agents, Messrs. Hall, on the faith of the assurances of Messrs. Hall that they had paid that sum to the appellant, whereas, in truth, the Messrs. Hall had never paid or given credit for any part of that sum to the appellant.

It is most clear that these facts were not known to the appellant until the month of April 1859. The respondents knew from the beginning that unless the Messrs. Hall had paid or applied for the use of the appellant the debt which, on the 4th of February 1853, became due from them to the respondents, no consideration had been given for the mortgage; and the appellant, until some time in April 1859, had reason to believe, both from the demands of the respondents and the assurances of Messrs. Hall, that the 5,000*l.* had been *bond fide* paid by the respondents to Messrs. Hall on the credit and for the purposes of the mortgage. The bill is filed within a month after the right is discovered. Under these circumstances, it is impossible to impute to the appellant either *laches* or acquiescence, or an intention of confirming the respondents' title. The onus of proving such a case would lie on the respondents, and could not be discharged except by proving that the appellant was aware of the time and manner in which the respondents' money

was deposited with the Messrs. Hall, and of the fact that no part of it had been applied for his own use or benefit. The case is plain and simple as soon as the true nature of the appellants' equity is rightly apprehended. I shall therefore move your Lordships to reverse the decree of Lord Chancellor Campbell, and to direct that the petition of rehearing presented to him be dismissed with costs.

LORD CHELMSFORD.—My Lords, I agree entirely in the opinion which has just been delivered. The questions to be decided upon this appeal are, whether the appellant is entitled to have certain deeds of mortgage and further charge delivered up by the respondents (the mortgagees) to be cancelled, or whether the respondents have any superior equity which ought to prevail over the right of the appellant to impeach the deeds in question as having been obtained from him by fraud.

No doubt can exist as to the fraud which was practised upon the appellant by his agents, the Messrs. Hall, they having procured him to execute the deeds for the purpose of their being used by them as securities for money of the respondents which they had previously misapplied. The respondents urge two grounds in opposition to the appellant's claim. First, they say that the money to be laid out upon the mortgages in question was given by them to the Messrs. Hall, the appellant's solicitors, with his knowledge; and whether it was paid over to him or not, he is equally bound by the deeds which he afterwards executed; and, secondly, that if not originally bound by the deeds, the appellant has since ratified and confirmed them with full knowledge of the facts.

Upon the first question, if it had appeared that at the time of the execution of the deeds the Messrs. Hall had the money of the respondents in their hands for the purpose of investing it upon securities, and had afterwards applied the money to their own purposes, even though the appellant had been ignorant of the fact of the Messrs. Hall having received the money, the respondents' case would have been very different.

The learned counsel for the respondents endeavoured to establish that Messrs. Hall had authority to borrow on mortgage for the appellant, and that 5,000*l.*, part of the

15,000*l.* received by them from the respondents, was paid for the use of the appellant. No other proof of this, however, was suggested, except the signing of the deeds and the receipts for the consideration-money by the appellant, and his handing over the deeds to the Messrs. Hall. But to give to these acts the retrospective effect contended for would be to make the instruments of the fraud the proof of authority to commit it.

I think it clearly appears, that at the time of the execution of the deeds by the appellant there was no money of the respondents in the hands of the Messrs. Hall which could have been paid over upon the execution of the securities. On the 4th of February 1853 the 15,000*l.* which had been received from the respondents by the Messrs. Hall for the purpose of being invested on securities was paid into their private account with their bankers, Messrs. Dixon & Co. At this time Messrs. Hall owed Dixon & Co. 5,091*l.* upon their overdrawn account and upon two promissory notes. They afterwards, and before the several times when the appellant executed the deeds, invested the sum of 10,000*l.* upon mortgage to Mr. Commerell, and applied the residue in payment of their debt to the bankers; so that at the time when the deeds were executed, no part of the 15,000*l.* remained in their hands.

This cannot, therefore, be said to be a case in which the agents of the appellant had received money for him, and had merely omitted to perform their duty by not paying it over. But the money of the respondents which had been given to Messrs. Hall, not to invest in a specific security, but generally for investment, had been misappropriated by them before the transactions with the appellant. The appellant's equity is, that the Messrs. Hall procured him to execute deeds for a supposed consideration of 5,000*l.* in the whole, and handed these deeds over without receiving any value in respect of them from the respondents, who continue to hold the deeds without having given any consideration for them, although they were deceived and supposed that they had done so by means of their money placed in the Messrs. Hall's hands.

This view of the case appears to me to dispose of the respondents' equity upon the first question, without rendering it neces-

sary to consider whether the communications which were made to them in the course of the transaction ought not to have put them upon their guard, and prevented their accepting the appellant's deeds when offered to them by the Messrs. Hall, as securities for part of the money which they had received to be invested.

But, secondly, it is said, that whatever may have been the original equity of the appellant to have the deeds in question delivered up to him, he has waived it by acquiescence and confirmation of the deeds, with full knowledge of all the circumstances.

Of the recognition by the appellant of the validity of the deeds, there can be no doubt; but I think it was a recognition resulting from entire ignorance of the most important fact in the case. It is impossible to believe that the appellant could have known that at the time he executed the deeds the Messrs. Hall had no money of the respondents in their hands to pay over to him; and yet, this is the sole fact upon which his right to set aside the deeds depends. The appellant does not say that he had forgotten the execution of the deeds, or that the notice of October 1855 did not fully inform him of the respondents' claim for 5,000*l.* But he would of course be advised that, if his agents had received, and had the money in their hands at the time of the execution of the deeds, the respondents' claim could not be resisted. The Lord Chancellor Campbell assumes that, from the time of the notice till the filing of this bill, the appellant acted upon the supposition that the 5,000*l.* had been paid by the Messrs. Hall as his agents, and that they were his debtors for the amount; and that he must be considered as having made repeated representations to the trustees, that by his agents he had received the money from them. I venture to think that these representations furnish the strongest proof of the appellant's ignorance of the truth of the case, and therefore entirely disable the effect of the acquiescence upon which the respondents rely, and upon which the decree of the Lord Chancellor proceeded. I agree with the noble and learned Lord on the woolsack that the decree ought to be reversed.

Decree appealed from reversed.

[IN THE HOUSE OF LORDS.]

1863. } FISHER AND OTHERS
Feb. 20. } v. BRIERLEY AND OTHERS.

*Statute of Mortmain, 9 Geo. 2. c. 36.—
Deed of Gift—Reservation of beneficial Interest—Resulting Trust.*

A piece of land was conveyed to trustees upon trust to permit a church and schools to be built thereon. The deed of conveyance was sought to be set aside, on the ground that there was an antecedent agreement between the donor and the trustees that the donor should have a life interest in the land, and it appeared that part of the produce of the land had been applied for her benefit, but the existence of any such agreement was denied by the trustees:—Held, that in the absence of clear evidence of an agreement that the deed should not take effect in possession, but that the beneficial interest should be retained by the donor, the deed was valid.

In such a gift the conveyance to the trustee creates a right on the part of the charity to have the intermediate profits applied to the purposes of the charity, and there is no resulting trust in favour of the donor.

This was an appeal from a decree made by the Lords Justices (1) overruling a decree made by the Master of the Rolls (2), by which decree (of the M.R.) it had been (amongst other things) declared that an indenture dated the 14th of May 1851, executed by Mary Winfield Lambert, late of Boarbank House, in the parish of Cartmel, in the county of Lancaster, spinster, deceased, was void, as being contrary to the Statute of Mortmain (9 Geo. 2. c. 36).

The facts of this case already fully appear in the previous reports, but may be briefly re-stated as follows:

The said M. W. Lambert, in 1851, being desirous of making her will and of devising a certain close of ground in Cartmel, containing about two acres, and which was worth about 80*l.*, as a site for the erection of a church, a parsonage-house, and schools, for the building and endowment of which she intended to make provision by her will, instructed her solicitor to prepare such will

accordingly, who informed her that she could not effect her object by will, but that she must execute a deed of conveyance of the land, and she thereupon instructed him to prepare a deed reserving to herself the profits of the field during her life. He prepared a deed in accordance with such instructions, and sent it to a conveyancer to be settled, who advised that the reservation of a life interest to the donor would invalidate the deed, and the deed was consequently prepared not reserving a life interest. This deed was executed by Miss Lambert on the 14th of May 1851, and duly enrolled, and at the time of the execution her solicitor explained to her that she was to make an absolute grant of the piece of land. On the 30th of July 1851, Miss Lambert executed a will, whereby she bequeathed legacies for building a church, parsonage-house and schools on the field comprised in the conveyance and for the endowment of the church. The deed was shortly after its execution, at the suggestion of one of the trustees, handed over to Miss Lambert for safe keeping, and she retained possession of it till November 1857, when she handed it to her solicitor to assist him in making her a new will. The new will was dated the 6th of November 1857, and, after reciting the deed of gift, contained various pecuniary bequests to trustees similar to those contained in her old will.

Miss Lambert died in the month of November 1857.

The appellants, the residuary legatees under the will of Miss Lambert, contended that the deed of gift was void by the Statute of Mortmain, by reason of a secret compact which they alleged existed between the testatrix and the trustees, that she should be entitled to the beneficial enjoyment of the piece of land for her life, and by reason of such enjoyment in pursuance of such compact. The trustees denied that there was any such compact. No appropriation of the piece of land to the trust had been made, but no rent was ever received for it. It appeared from the evidence that after the date of the deed of gift the piece of land had occasionally been manured from the testatrix's stables, and that sometimes the produce had been used in her stables.

Mr. Rolt and Mr. Speed, for the appellants, contended that there was an under-

(1) 1 De Gex, F. & J. 643; s. c. 29 Law J. Rep. (N.S.) Chanc. 477.

(2) 29 Law J. Rep. (N.S.) Chanc. 477.

NEW SERIES, 32.—CHANC.

standing that the testatrix should hold and enjoy the land during her life, and that she did in fact so hold and enjoy it; that any jury would come to such a conclusion, and that the deed was intended by the testatrix to take effect only at her death in connexion with her will, in contravention of the provisions of the Statute of Mortmain, and cited—

The Attorney General v. Lord Weymouth, Amb. 23.

Jefferies v. Alexander, 8 H.L. Cas. 594.

The Judgment of Lord Justice Turner in Alexander v. Brame, 7 De Gex, M. & G. 538.

Doe v. Pitcher, 3 M. & S. 407.

The Attorney General v. Poulden, 8 Sim. 472.

Way v. East, 2 Drew. 44; s. c. 23 Law J. Rep. (N.S.) Chanc. 209.

Wallgrave v. Tebbs, 2 Kay & J. 313; s. c. 25 Law J. Rep. (N.S.) Chanc. 241.

Russell v. Jackson, 10 Hare, 204.

They further submitted that as the deed contained no provision as to the rents until the church and other buildings should be erected, there was therefore a resulting trust of such rents for the benefit of the testatrix, and the deed was void under the Mortmain Act—*Limbrey v. Gurr* (3). And that if the deed was void under the Mortmain Act, it could not be supported under the provisions of the 43 Geo. 3. c. 108.

Sir H. Cairns, Mr. B. L. Chapman, Mr. Eddis and Mr. Wickens, for the respondents, were not called upon.

The LORD CHANCELLOR said the appellants in this case contended that a deed of gift of a piece of land for the purpose of permitting a church and school-house to be erected thereon, ought to be treated as invalid, on the ground, that, although the deed appeared to comply with the provision of the Statute of Mortmain, it was in reality a contravention of that statute, because it was accompanied with an agreement in favour of the donor; and was so worded that it admitted of a resulting trust in her favour. He would not stop to inquire whether the agreement alleged by the appellants would come within the meaning of

the words in the 1st section of the statute, because he saw no reason for coming to the conclusion that there was such an agreement. There was no direct evidence of any such agreement, and the appellants contended that it must be inferred from other facts and circumstances. It was material to observe, that two gentlemen, parties to the original transaction—the one a trustee and formerly the solicitor of the donor, the other also a trustee, a clergyman—joined in saying that there was no such agreement as contended for. It would require, therefore, very strong circumstances to arrive at a conclusion by inference, and without such testimony he should be of opinion that the circumstances were insufficient to warrant such a presumption. The facts were, that this lady, being desirous of building and endowing a church, was at first desirous of doing it by will, but was told by her solicitor that this could not be done legally, so far as the site of the church was concerned. She, therefore, consented to make a conveyance of the land. It was originally proposed to prepare a conveyance, reserving to her a life interest. Instructions were sent to the London agents of the solicitor to prepare a draft of the conveyance. Their advice corrected the error of the country solicitor, who was informed by a reference to the statute that no life interest could be reserved. The result was, that a deed of absolute grant and of immediate effect and operation was prepared in conformity with the statute. It was quite clear that knowledge of the law was possessed by the solicitor of the donor, and acted upon by him in the preparation of the deed; and he stated that he had communicated his knowledge to the donor. It would be very unreasonable to presume that the donor, having been so informed, should have had any secret intent in so small a matter to reserve a life interest to herself. What were the facts from which such a conclusion was required? The land could not be worth more than 3*l.* a year for the purposes of letting; and it was not probable that the risk would be incurred of making the grant invalid for so small a sum. Their Lordships were desired to infer, nevertheless, that this lady and the trustees entered into an agreement defeating the grant. A more improbable conclusion could scarcely

be formed. What were the facts on which the appellants relied? The object of the conveyance was to have a chapel and school-house erected on the land. Until then the trustees could not find an immediate tenant for this piece of land, nor could they make any lasting demise. Meantime it was occasionally used for the benefit of the donor. Sometimes the grass was cut, sometimes her horses were fed upon it. There was nothing to warrant the conclusion that the trustees had ever parted with any interest in the land, much less that what was afterwards done shewed that they had entered into any antecedent agreement that the land was to remain with the donor.

In the next place, their Lordships were desired to arrive at this conclusion because, by her will, a sum of money was given for the purpose of building on this land; but the land had been given, and if the conveyance was made in conformity with the statute, it could not be affected by reason of the testamentary gift.

But they were told that the conveyance was invalid because upon the face of it there was a resulting trust. The language of the statute was very peculiar: conveyances to charitable uses were required to be made to take effect in possession; that was, they must be so expressed that the conveyance should take effect in immediate possession. It was not enacted that possession *de facto* should accompany the deed; but it was sufficient if the deed were made to take effect in possession. That was the effect of this deed; the land was conveyed out-and-out to the trustees and vested in them. As to the argument that the charity could not have the immediate use and that some time must elapse before the erection of the church, and that there was no direction as to the intermediate application of the rents, that was a misapprehension of the effect of the deed. The deed would carry the land and the profits of it, and the immediate conveyance to the trustees *in presenti* would create a right on the part of the charity to have every shilling of the intermediate profits of the land applied to the purposes of the charity; and the Court of Chancery would see that no intermediate profits should fail of being so applied. As to the law, there was no room whatever for avoiding the operation of the deed, unless

it was clearly shewn that an agreement had been made, antecedently to the deed, between the donor and the trustees, that it should not take effect in manner therein mentioned, but that the beneficial interest should be retained by the donor. There was no evidence of such an agreement or of the contemplation of such an agreement; there was nothing to disjoin the possession of the land from the estate vested in the trustees. There was no ground for differing from the decision of the Lords Justices; and he should advise their Lordships to affirm their decision, and dismiss the petition of appeal with costs.

LORD WENSLEYDALE said he was entirely of the same opinion. The sole point was whether the Statute of Mortmain had been complied with or not, and the act of the 43 Geo. 3. was immaterial. He thought that the case was brought within that section of the Statute of Mortmain which required indentures to be "made to take effect in possession," which this deed clearly was. Was there evidence then that the deed was coupled with an agreement that the donor should have the benefit of the land for her life? There was evidence that she was in possession of the land and the deed. Her possession of the deed he did not under the circumstances regard as very material; there were several widely-separated trustees, and there was a natural desire on her part to retain the deed to secure its not being lost, and the deed was of no use to authorize her present possession. Was there any other evidence leading to the conclusion that there was any agreement? He was himself of opinion that any verbal understanding or agreement would have brought the case within the statute, but the trustees said there was no such understanding. He agreed with the view taken by the Lords Justices rather than with that of the Master of the Rolls. They gave a true verdict upon the evidence. As to the meaning of the deed, he agreed with the Lord Chancellor that all profits would have to be applied to the building of the church, and he thought the decision appealed from should be affirmed.

LORD CHELMSFORD entirely concurred.

Decree affirmed, and appeal dismissed with costs.

STUART, V.C. }
 March 16. } CHARLTON v. COOMBES.

Solicitor and Client—Privilege—Pleading.

Where relief is sought in respect of a fraud, there must, in order to take the case out of the rule of privilege, be at least a specific allegation in the bill connecting with the fraud the solicitor of the person who was a party thereto, although such person be now deceased.

Where therefore a bill alleged that a person now deceased had been party to a fraud and prayed relief in respect thereof, and the solicitor of such person, being called as a witness, demurred to certain questions put to him before the examiner upon the ground of privilege, the Court allowed the demurrer, there being no specific allegation in the bill connecting the solicitor with the fraud complained of.

Semble—A mere allegation in the bill connecting the solicitor with the fraud, where he is not made a co-defendant, and the issue of privilege is not distinctly raised is insufficient.

Whether communications made by a client to his solicitor in relation to business transacted for the former by the latter are privileged after the death of the client—quære.

Thomas Alchin, by will, gave 2,500*l.* to the plaintiffs John Sills Charlton and Thomas Charlton, whom he also appointed his executors, upon trust for investment, and as to 1,000*l.*, part thereof, to pay the income to his niece Mary Anne Andrus, then the wife of William Andrus, for her life, and after her death for her children as therein mentioned. The testator also gave his real estate and the residue of his personal estate to the plaintiffs, upon trust to pay the income of one-fourth part thereof respectively to Mary Anne Andrus, for her sole and separate use, without power of anticipation, and after her death upon trust as in his will mentioned.

By a codicil to his will, dated the 13th of December 1852, after stating that William Andrus was then dead, leaving Mary Anne Andrus his widow, the testator thereby declared that in case and when Mary Anne

Andrus should marry again without having the previous consent of both his executors and trustees, the interest, dividends and other monies, and all other benefit given to her by his will should cease, and that in lieu and instead thereof she should have for her separate use for life the yearly sum of 50*l.*, and the testator directed that the surplus dividends, interest and proceeds, over and above the sum of 50*l.*, which she would have been otherwise entitled to had she remained a widow, should be applied amongst her children as in the said codicil mentioned.

The testator died on the 6th of March 1854. On the 25th of September 1854, Mrs. Andrus intermarried with the defendant Edward Coombes, without having previously obtained the consent of the plaintiffs, the testator's executors and trustees; and the plaintiffs, believing her still to be a widow, continued to pay to her the income of the legacy and share of residue bequeathed to her by the testator's will. In January 1856, Mary Anne Coombes, representing herself to be still the testator's widow, applied to the plaintiffs to give their consent to her marriage with Edward Coombes, but they refused to give the consent asked for.

In February 1856, a suit of *Andrus v. Charlton* was instituted by Edward Coombes, in which Mary Anne Coombes was made plaintiff by the name and description of Mary Anne Andrus, widow, against the executors and trustees of the testator for the administration of his estate. The testator's estate was dealt with in that suit as though his widow had not been married again.

In March 1862, Mary Anne Coombes died, and on the 25th of the same month this bill was filed, the plaintiffs having only a few weeks previously learnt that Mary Anne Coombes had been married to Edward Coombes as above mentioned.

The bill in the present suit charged that the concealment of the marriage was a fraud upon the plaintiffs, upon the children of M. A. Coombes by her former marriage who were made defendants, and upon the Court, and that E. Coombes colluded with his late wife therein.

The 25th paragraph of the bill was as follows: "The defendant Edward Coombes

sometimes pretends that until recently he was ignorant of the terms or effect of the said third codicil to the said testator's will, and that before the said bill in the said suit of *Andrus v. Charlton* was filed, he and the said Mary Anne Coombes informed their solicitors of their marriage, and that the said bill was filed in the name of Mary Anne Andrus, as if she was still the widow of the said William Andrus, with their knowledge or privity, and he pretends that he is therefore not responsible for the said proceedings, nor for the erroneous bequests that have been made. The plaintiffs, however, charge the contrary of such pretences to be truth." The bill prayed for a declaration that the before-mentioned concealment was a fraud upon the plaintiffs, and for an account as against Edward Coombes, on the footing of the over-payments which had been made to Mary Anne Coombes out of the testator's estate.

Mr. James Lewis, of Rochester, the solicitor for the plaintiff in the suit of *Andrus v. Charlton*, the bill in which was, as above stated, filed in the name of Mary Anne Andrus, was *subpoenaed* before the examiner as a witness on behalf of the plaintiffs in the present suit, and of the children of Mrs. Coombes by her former marriage; and being asked on behalf of the plaintiffs to produce his books containing entries relating to Mrs. Coombes's affairs and also the letters which he had received from her, he objected to do so, and demurred upon the ground that the entries and letters were privileged from discovery as having been made and received by him when Mrs. Coombes was his client. Having insisted on his objection, when examined on behalf of the children and demurred again, (notwithstanding an offer on the part of the children to waive their deceased mother's privilege as a client,) the demurrers of Mr. Lewis to the above questions were set down for hearing, and the two demurrers now came on for argument.

Mr. J. N. Higgins, for Mr. Lewis.—If Mrs. Coombes had been alive, the only ground upon which the rule of privilege would not have been allowed to prevail would have been fraud; but in order to prevent the rule from taking effect the fraud must have been at least alleged against the solicitor, if indeed he ought

not to have been made a party to the suit and to have been distinctly charged as participating in the fraud. In the present case there was no such charge, nor was there any such allegation. The necessity of charging or alleging the participation by the solicitor in the fraud, in respect of which relief was sought, was equally applicable where the client was dead.

He referred to—

Sandford v. Remington, 2 Ves. jun. 189.
Cholmondeley v. Clinton, 19 Ves. 261.
Wilson v. Rastall, 4 Term Rep. 753.
Parkhurst v. Lowten, 1 Mer. 391.
Morgan v. Shaw, 4 Madd. 57.
Taylor v. Blacklow, 3 Bing. N.C. 235;
 s. c. 6 Law J. Rep. (N.S.) C.P. 14.
Herring v. Cloberry, 1 Ph. 91; s. c.
 11 Law J. Rep. (N.S.) Chanc. 149.
Greenough v. Gaskell, 1 Myl. & K. 102;
 s. c. Coop. t. Brough. 96.
Pearse v. Pearse, 1 De Gex & Sm. 27;
 s. c. 16 Law J. Rep. (N.S.) Chanc.
 153.

Mr. Malins and *Mr. Speed*, for the plaintiffs and the children of Mrs. Coombes by her former marriage.—Privilege existed for the benefit of the client and not of the solicitor—*Herring v. Cloberry*; and it was unnecessary where, as in the present case, fraud was alleged against the client, either to charge or to allege participation in it by the solicitor in order to take the case out of privilege—

Parkhurst v. Lowten, 2 Swanst. 221,
 note (a).
Regina v. Avery, 8 Car. & P. 596.
Regina v. Hayward, 2 Car. & K. 234.
Follett v. Jefferyes, 1 Sim. N.S. 3;
 s. c. 20 Law J. Rep. (N.S.) Chanc.
 65.
Russell v. Jackson, 9 Hare, 387; s. c.
 21 Law J. Rep. (N.S.) Chanc. 146.

[STUART, V.C., in the course of the argument said, that there appeared to be no case in which the point whether the death of the client made any difference in the rule of privilege. The only case which touched upon that point was that of *Herring v. Cloberry*, where the question seemed to have incidentally arisen, but was not touched upon in the judgment of Lord Lyndhurst. In the present case, however, it was on other grounds not necessary to decide that question.]

STUART, V.C.—There can be no doubt that if a solicitor is a co-conspirator with a defendant in a cause, in concocting a fraud, in respect of which the suit seeks relief, privilege does not cover such a case; because, as Lord Cranworth said in *Follett v. Jefferyes*, “No Court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor.” But in that case privilege was accorded, and Lord Cranworth overruled the exceptions taken to the answer. Now, in *Follett v. Jefferyes* the bill sought relief in respect of a fraud, and charged that the defendant Taylor, an annuitant, and his wife, and the defendant Jefferyes, a residuary legatee, with a view to his own interest and also with a view to the interests of the other residuary legatees, took counsel together, and with their respective solicitors, in order to devise some means for defeating the title of the plaintiffs to the annuity. In that case there was a strong charge introduced advisedly into the bill, for the purpose of raising the question of co-conspiracy and of obtaining discovery. But the Court held that the transaction, according to the account given of it in the bill and answer, was not a fraud, and, therefore, that the defendant was not bound to set forth the contents of the letters.

It was admitted, by the counsel for the plaintiffs in the present case, that there was no allegation in the bill connecting the solicitor who claims the privilege with the fraud in respect of which relief is sought. The solicitor was employed by the client in the ordinary way. The bill, no doubt, says, that the client of the solicitor committed a fraud; but in order to take the case out of the rule of privilege, there must be some specific charge in the bill connecting the solicitor with the fraud. There is no such charge in this bill. In the absence of any allegation of fraud on the part of the solicitor, the death of the lady, as has been very properly said, makes no difference. In support of the case made by the bill, the solicitor of the lady has been examined, and after stating that he could not recollect the particulars of any conversation with her in the defendant Coombes's presence, and that he had frequently had letters from her, he is asked, “Will you produce her letters?” He answers, “I decline to pro-

duce those letters on the ground that she was my client at the time I received them.” There is no particular charge in the bill as to those letters, and I think, therefore, that the solicitor very properly refused to produce them. The witness must have the costs of both demurrers.

ROMILLY, M.R. }
Dec. 3, 4, 9. } COTCHING v. BASSET.

Ancient Lights—Easement—Alterations—New Windows—Right to obstruct—Adjoining Owner—Acquiescence.

If an adjoining owner knowingly permits a messuage and premises to be rebuilt of an increased size and height, with the alteration of ancient lights, and the opening new lights upon an additional floor, he cannot object to them after they are complete, or assert a right to raise a party-wall, and build upon his own property so high as to render the new buildings less accessible to light and air than they were at the completion of the work.

The plaintiffs, Messrs. Cotching & Middleton, were lessees under a renewed lease, dated the 19th of April 1861, of premises situate on the east side of Wood Street, in the city of London, being No. 32 in that street, for thirty-nine years from Christmas 1860, with a right to require a further lease for forty years less ten days, to commence from the expiration of the first lease.

This lease empowered them to take down and rebuild the messuage and buildings then standing on the premises.

John Swinford Basset, the defendant, was the owner in fee of No. 33, Wood Street; which premises adjoined the premises of Messrs. Cotching & Middleton on the north, and down to Michaelmas 1861 were held by the plaintiffs as tenants to the defendant.

The premises, No. 32, consisted at the time of the lease of a main building on the west side thereof, fronting towards Wood Street; and of an additional building at the eastern or rear end thereof, of less height than the main building (comprising, in fact, only basement and ground-floors

and a one-pair floor); and the upper portion of this additional building was distant about 6½ feet from the party-wall between Nos. 32 and 33, which party-wall towards the east or rear of the premises was of the height of only 14 feet 10 inches above the level of the pavement in Wood Street.

Negotiations took place between the plaintiffs and the defendant for the grant by the latter to the former of a renewed lease of the premises No. 33, but they could not agree upon terms.

The plaintiffs originally proposed to pull down the old additional building and rebuild it from the basement to the height of the main building, at about four feet from the party-wall between the premises Nos. 32 and 33, upon a scheme or arrangement, according to which the additional buildings of Nos. 32 and 33 were to receive light and air from a common well or inclosed space, to be situate equally within the two premises respectively. Plans were accordingly prepared by Charles Laws, architect, on behalf of the plaintiffs; these were submitted to Messrs. Tillott & Chamberlain, the architects of the defendant; they, however, refused to concur in them, and insisted that the plaintiffs' new additional building should not be carried above the line of light having access to a skylight of the defendant's over the top of the party-wall between Nos. 32 and 33, and the top of the party-wall between Nos. 31 and 32, (which was about 47 feet above the level of Wood Street,) meaning the line of light drawn between the tops of the two walls.

Mr. Laws, in consequence, prepared fresh plans, and proposed to rebuild the additional building with skylights in a lead flat over the ground-floor, and to build the upper part so as not to be above the line of light having access to the skylight of the defendant's premises; he also proposed to place the back-front wall of the main building at right angles to the party-wall between Nos. 32 and 33.

The plaintiffs being desirous of retaining possession of No. 33 during the rebuilding of No. 32, arrangements were accordingly made with that view; and by a memorandum of agreement dated the 4th of October 1861 the defendant agreed that the plaintiffs should continue tenants from Michaelmas 1861 to Lady-day 1862; and

the plaintiffs, in consideration, agreed that they would forthwith pull down and rebuild the party-wall between Nos. 32 and 33 in accordance with the plans and sections there-to annexed, on a solid concrete foundation; it being at the same time understood that the east end of the party-wall should be of the same thickness in extent as the portion of the party-wall adjacent to it westward; and, further, that they would build up all flues, jambs and chimney-breasts, and make all other alterations consequent on such rebuilding, and generally reinstate all the then present external and internal works, and leave the entire premises perfect; but it was declared that the agreement should not prejudice the claim of the defendant under the expiring lease for dilapidations and waste, and that the plaintiffs would not encroach upon or attempt to interfere with any legal or other right of the defendant, and that they would not interfere with the defendant's legal rights (if any) to raise the eastern portion of the party-wall between the then present lead flats. Further provision was then made for the payment of rent and for the delivering up of possession to the defendant.

The plaintiffs, a few days after Michaelmas, 1861, began to pull down the old additional buildings of No. 32; and on the 1st of March 1862 they completed the new buildings. During their progress the work was frequently inspected by the defendant's architects, but they made no objection either to the plans or to the mode in which they and the work were being carried out. The deviations, however, from the buildings pulled down were great: an old counting-house on the one-pair floor, which had been used for a museum, was replaced by a floor on the same level; the new room was about two feet higher, and extended nearly two feet nearer to the party-wall than the old room. The new windows were not only nearer to the party-wall, but on this floor they were more than a foot higher than the old windows, but they were reduced in number from three to two windows, and commanded a view over the parapet of the party-wall of more of the room under the skylight of No. 33 than could be seen from the old windows. The old additional building had no higher floor than one pair; the new building contained a two-pair floor,

with a room therein containing a window opposite to the position of the intended new party-wall. On the other hand, the skylight which lighted the ground-floor was replaced by a smaller skylight, owing to the room on the one-pair floor being advanced nearer to the party-wall. The party-wall, as rebuilt by the plaintiffs, was at its eastern end of the same height as before, viz., 14 feet 10 inches above the pavement of Wood Street.

On the 9th of May 1862 the plaintiffs were requested by the defendant to remove an iron guard or railing, so far as it rested on the wall between the houses Nos. 32 and 33, Wood Street, as it was the defendant's intention to raise the party-wall. The plaintiffs complied so far that they altered the railing so as not to project over that half of the party-wall which stood upon the defendant's premises. This led to other communications between the parties, but with no satisfactory result.

On the 16th of July 1862, the defendant gave the plaintiffs a formal notice under the Metropolitan Buildings Act, 1855 (1), that he intended immediately after the expiration of three months from that date to raise the eastern portion of the party-wall between the premises Nos. 32 and 33, Wood Street, at the rear or hinder part of the premises. This letter contained a plan or section, from which it appeared that it was intended to raise the whole eastern portion of the party-wall 20 feet above its present height, which would make it 34 feet 10 inches above the level of the paving in Wood Street, so as to form the wall of two new stories intended to be erected by the defendant in the place of and over the lead flats and skylight at the rear of his premises. The result of this was that the party-wall would be higher than the top of the window on the new two-pair floor of the plaintiffs' premises. This again led to correspondence; but as the defendant was making preparations to raise the wall, this bill was filed, charging that the rebuilding of No. 32 was done with the knowledge and acquiescence of the defendant and his architects, and that the new buildings were accepted by them in lieu of the skylights, windows and lights in the old back-front of the plaintiff's pre-

mises, and they claimed the right of access of light and air for the premises so rebuilt as fully as if the old buildings remained standing. But rather than the defendant should execute the proposed work, the plaintiffs offered to alter the skylights, windows and lights, and the new buildings, and to restore in every substantial and material particular the skylights, windows and lights of the plaintiffs' old buildings; and they prayed that the defendant might be restrained from raising the party-wall or doing any act to prevent the free access of light and air to the skylights, windows and lights of the plaintiffs' new buildings in as full and ample a manner as it was then enjoyed.

The bill also asked for damages against the defendant for his wrongful conduct.

A motion for an injunction was made in the first instance, and an *interim* order having been granted, the cause was brought on upon a motion for a decree.

The evidence of the architects was conflicting. Mr. Tillott denied the allegation in the bill that he made no objection, but that he acquiesced in the proposals submitted to him by Mr. Laws, and said that he always objected to the plaintiffs raising their buildings above their original height, and that he informed Mr. Laws distinctly that if the plaintiffs should open any additional lights in the building, the defendant would raise the party-wall higher.

Mr. Laws, however, swore distinctly to the correctness of the allegations in the bill.

Mr. Southgate and *Mr. A. G. Marten*, for the plaintiffs, argued that the acquiescence of the defendant precluded him from objecting to the new buildings or the lights. The agents of the defendant had inspected the work during its progress and saw all that was going on without making any objection; the defendant, therefore, could not be permitted to obstruct the lights. The plaintiffs had been allowed to complete their works, and there was not a pretence for saying that they were aware that the defendant did not sanction what was being done, or that he intended to raise the party-wall. If the plaintiffs had opened new lights, it was under the impression that it was sanctioned by the defendant and his architects; the defendant, therefore, could not avail himself of that law which

allowed him to obstruct both old and new lights, if he could not obstruct the one without the other; at any rate, however, the acts of the defendant had been such, that the plaintiffs would be allowed to restore the premises to their former state, and in that case the Court would restrain the defendant from raising the party-wall, and give the plaintiffs damages for the injury they would sustain.

On acquiescence:

The East India Co. v. Vincent, 2 Atk. 82.

Clare Hall v. Harding, 6 Hare, 273; a. c. 17 Law J. Rep. (N.S.) Chanc. 301.

Clavering's Case, 5 Ves. 690.

Short v. Taylor, 2 Eq. Cas. Abr. 522, pl. 3.

Bankart v. Houghton, 27 Beav. 425; a. c. 28 Law J. Rep. (N.S.) Chanc. 473.

On the right to obstruct the new lights: *Hutchinson v. Copestake*, 9 Com. B. Rep. N.S. 863; a. c. 31 Law J. Rep. (N.S.) C.P. 19.

Jones v. Tapling, 11 Com. B. Rep. N.S. 289; a. c. 31 Law J. Rep. (N.S.) C.P. 110, 342.

Binckes v. Pash, 11 Com. B. Rep. N.S. 324; a. c. 31 Law J. Rep. (N.S.) C.P. 121.

Cooper v. Hubback, 30 Beav. 160; a. c. 31 Law J. Rep. (N.S.) Chanc. 123.

Renshaw v. Bean, 18 Q.B. Rep. 112; a. c. 21 Law J. Rep. (N.S.) Q.B. 219.

Mr. Bagge and *Mr. De Gez*, for John Swinford Basset.—The intention of the defendant not to permit any encroachment upon his rights was brought fully to the attention of the plaintiffs, both by the architects and by the special contract stated in the agreement continuing their tenancy; they had therefore full notice of what was intended. If after that they chose to carry out plans which had been objected to, the plaintiffs could not complain that the defendant claimed to abate a nuisance which had been imposed upon him. There was no pretence for saying that there had been an acquiescence in the acts of the plaintiffs; they had acted on their own responsibility, knowing the consequences, and they could not claim immunity from their encroachments. No terms could be made with the

defendant upon any undertaking of the plaintiffs; they had forfeited all right to consideration, and it might be doubted whether their easements could be recovered by their reinstating the building upon the plan of that which had been pulled down.

Garritt v. Sharp, 3 Ad. & E. 325.

Moore v. Rawson, 3 B. & C. 332.

Mr. Southgate, in reply.—The defendant was bound to shew that he gave the plaintiffs notice not to proceed with their works. His acts had induced them to believe they were building with his consent—*Dann v. Spurrier* (1). The defendant also could not use the party-wall, unless he paid the plaintiffs, who built it, for the extra support which would be afforded by it to his proposed new buildings.

THE MASTER OF THE ROLLS.—The defendant says that the plaintiffs, by the course they have adopted, have given him a right to raise the party-wall between their respective premises. If he is entitled to any such right, he must clearly shew that he informed the plaintiffs that he should exercise it. The defendant referred to the agreement of the 4th of October 1861, stipulating the conditions for rebuilding the party-wall, and for the plaintiffs not interfering with any of the rights of the defendant to raise the eastern portion of the party-wall between the lead flats then existing, and intimated that they were introduced to meet the case that has arisen. But if the defendant then contemplated the assertion of rights he might become entitled to in consequence of the alterations the plaintiffs were proposing to make, the agreement should have stated distinctly what was meant. Upon this, however, neither the plaintiff nor his solicitor had given any evidence; it depended upon Mr. Tillott's evidence alone: and he was contradicted by Mr. Laws. The words of the agreement, however, could not bear the meaning placed upon them, and no such right as that now set up by the defendant formed a part of the communications between them. Mr. Tillott's evidence in this respect was, at least, ambiguous; and when contrasted with the admitted facts, no reliance could be

placed upon it. The conclusion therefore must be, that no statement of the right of the defendant to raise the party-wall was ever made in a manner which could give the plaintiffs the least idea of the course the defendant intended to pursue; the facts were not consistent with it. The plaintiffs asked for a continuance of their tenancy at 33, Wood Street, during the time the works were likely to continue. The plans of the alterations had then been shewn to the defendant's architects; they specified the intention of the plaintiffs not only to alter the ancient lights, but also to add a story to the old additional building. If the defendant considered that the acts of the plaintiffs would confer upon him a new right, he ought to have stated it before they had in any way committed themselves to the works. Had they been made acquainted with the fact that they might be compelled to pull down all they had built, they probably would not have done more than restore the building as it was. What use also was there in substituting new plans for those first drawn, to limit the height of the plaintiffs' new building so as not to interfere with the line of light, if the defendant had the right to raise his building, and exclude all light? Of what use also was the meeting of the surveyors on the ground, and the execution of the work under inspection, if the defendant could legally claim a right to destroy or render useless the entire works of the plaintiffs? The right asserted by the defendant, if claimed, ought to have been expressed on the agreement of the 4th of October 1861; if not claimed then, the agreement gave him no such right as he now claimed. This right, if any, must have existed at the time; it could not have been acquired from the manner in which the plaintiffs dealt with their property. In *Dann v. Spurrier* Lord Eldon said, "I fully subscribe to the doctrine of the cases that have been cited, that this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using terms of encouragement; a lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive he would not have done, but upon

an expectation that the lessor would not throw an objection in the way of his enjoyment." This applied in every respect to the plaintiffs; the facts came within the rule there laid down. The plaintiffs were therefore entitled to a perpetual injunction to restrain the defendant from doing any act to put the party-wall in any other condition than that in which it stood in the month of May 1862. The defendant also must pay the costs of the suit.

ROMILLY, M.R.	} CLARK v. LEACH.
Dec. 3, 4.	
WESTBURY, L.C.	
Jan. 28, 30.	

Partnership—Expired Articles—Continuance—Dissolution—Notice agreed on for a Term.

If a partnership entered into by articles for a term of years be continued without special agreement after the expiration of the term, the new partnership is a partnership at will only, and those provisions only of the articles which are applicable to a partnership at will are to be considered as binding on the new partnership.

Articles of partnership for a term of years contained a clause authorizing either partner in case of the negligence of his co-partner to dissolve the partnership by notice, and thereupon the negligent partner was to be considered as quitting the business for the benefit of the partner giving notice. The term expired and the partnership was continued without special agreement:—Held, that the clause referred to could not be considered as imported into the new partnership contract.

John Clark and Robert Leach carried on the business of merchants and general agents, under the style of "Leach & Clark," from the 1st of July 1839 to the 30th of June 1862. The articles of partnership were dated the 17th of July 1839, and provided that the partnership should continue for seven years from the 1st of July then instant, that the partners should bring in an equal amount of capital and be entitled to the profits of the business in equal proportions; and among other things it was

provided that if either of the partners should neglect or refuse to attend to the business of the partnership, or do or omit divers other acts specifically mentioned in contravention of the articles of partnership, then, and in any of the said cases, the other of the partners, if he should think fit, should be at liberty to dissolve the partnership by giving to the partner who should offend in any of the particulars aforesaid, or leaving at the place of business for him notice in writing declaring the partnership to be dissolved; and it was declared that the partnership should absolutely cease and determine from the time specified in the notice, and that the partner to whom the notice should be given should be considered as quitting the business for the benefit of the partner who should give the notice. That in case of the death of either of the partners before the expiration or other sooner determination of the partnership, then the surviving partner should, within the six calendar months next, settle the accounts of the partnership with the representative of the deceased partner; and if the surviving partner should be desirous of purchasing the share of the deceased partner in the property, credits and effects of the partnership, the value thereof should be ascertained by arbitration, and the surviving partner should thereupon become the purchaser of the share at such valuation, and should execute a bond for payment of the amount of the valuation by four instalments, at six, nine, twelve and fifteen calendar months next after the decease of the said partner without interest; and also a bond for indemnifying the estate and effects of the deceased partner against the debts and demands due from the partnership, on having a proper assignment executed for vesting in the surviving partner the share of the deceased partner, and enabling such surviving partner to collect and get in all the credits and effects due, owing and belonging to the partnership. But in case the surviving partner should decline to purchase the share of the deceased partner, then the effects of the partnership were to be converted into money, and the surplus, if any, was to be divided between the surviving partner and the representatives of the deceased partner as provided by the articles. But in case either of the partners should determine the part-

nership by notice, the partner giving the notice should have the like option of purchasing the share of the partner to whom the notice should be given as is hereby given to the surviving partner, upon the decease of either of the partners, and upon the like terms; and if such partner should decline to purchase the share upon the terms aforesaid, then the partnership accounts and affairs should be adjusted and wound up in the manner provided, in the event of the death of either of the partners and the surviving partner declining to purchase the share of the deceased partner.

The partnership expired by effluxion of time, but Messrs. Leach & Clark continued to carry on the business, and settled the accounts to the 31st of December 1861.

On the 30th of June 1862, John Clark served Robert Leach with a notice, which contained the following passage: "In consequence of your continued neglect to attend to the business of our partnership, I hereby give you notice that I declare the partnership to be dissolved and determined as from and after this date."

This was accompanied by a letter, in which, after expressing regret at the course he had been forced to resort to, he said, "In thus terminating our business connexion, and whilst entitled to the benefit of the business, I am desirous of shewing you every consideration in accounting to you for your share and interest in the business up to this date. By the articles I am entitled to take over and become the purchaser of your share in the property, credits and effects of the partnership, to be ascertained by arbitration, and this I am desirous and prepared to do in the mode provided by the articles. At the same time I think we shall have no difficulty in dispensing with arbitration to ascertain the value. I am further prepared on having an assignment of the partnership assets to indemnify you from all liabilities of the partnership. I would suggest, in order to carry out an amicable adjustment of matters, you should depute some friend to meet me upon the subject and thus relieve me from the necessity of availing myself of the powers given me by the articles."

Mr. Leach, after consulting his solicitor, disputed the right of the plaintiff to give

the notice of dissolution; he was, however, willing to acquiesce in an immediate dissolution on the terms usual in cases of a partnership at will, the assets being realized and divided between the parties.

On the 4th of August 1862, R. Leach opened a counting-house at 95, Bishopsgate Street, and issued cards and circulars soliciting business under the style of Leach & Co., late Leach & Clark.

Mr. Clark, while he admitted the right of Mr. Leach to carry on business on his own account, objected to his using the name of the late firm, on the ground that under the articles the whole business of the late firm was exclusively his own. Under these circumstances Mr. Clark refused to wind up the affairs of the partnership, and he filed this bill, alleging that the defendant had admitted the validity of the notice of dissolution and that he had unconditionally accepted the terms of liquidation offered; and he insisted that the defendant had quitted the partnership business for his benefit, and that he the plaintiff had become entitled to the benefit of the business and connexions of the firm of Leach & Clark, and that the defendant's setting up business was in contravention of the terms upon which the partnership had been dissolved. The bill prayed that the partnership might be declared dissolved from the 30th of June 1862, and the affairs wound up. It also prayed for the appointment of a receiver, and that the defendant might be restrained from resuming or carrying on the business of a merchant and general agent, either alone or in partnership with any other persons under the style of Leach & Clark, and from the further use of the name of the late firm on the circulars which had been issued holding out that he was continuing in succession the business of the firm of Leach & Clark. It also prayed that he might be restrained from soliciting the custom of any parties customers of the late firm. It also prayed that the damages sustained by the plaintiff might be ascertained and made good.

Mr. Selwyn and *Mr. Druce*, for the plaintiff, insisted that a continuing partnership was bound by the articles to which the parties had originally assented, that the default of the defendant justified the plaintiff in dissolving the partnership, and

that in effect the defendant had quitted the business in favour of the plaintiff, that he had no right to use the name of the late firm, and that his resuming and soliciting business from its connexions was in contravention of the agreement between them. They cited *Burrows v. Foster*, before the Lords Justices, the 8th of May 1862, an unreported case.

Mr. Baggallay and *Mr. Knox Wigram*, for the defendant, contended that all the special provisions in the articles in the partnership deed had no application beyond the term of the partnership; if they were intended to have any especial control over the subsequent dealings of the parties, it was essentially necessary that they should be renewed. Sleeping restrictions could never be made available by one party to gain advantage over another. Before giving the notice, the plaintiff ought to have recalled his assent to the absence of the defendant from business, and not to have waited till it was convenient to give a notice. The plaintiff certainly had full right to dissolve the partnership, but only upon the same terms as a partnership at will, and he certainly could not claim the benefit of a forfeiture or prevent the defendant from carrying on the business or describing himself as a member of the late firm of Leach & Clark.

Hawkins v. Parsons, 31 Law J. Rep. (N.S.) Chanc. 479.

Parsons v. Hayward, 31 Law J. Rep. (N.S.) Chanc. 666.

Churton v. Douglas, Johns. 174; s.c. 28 Law J. Rep. (N.S.) Chanc. 841.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS.—My impression is that no injunction can be granted, and that upon the construction of the articles this clause was only to continue in force and be available during the partnership term. When, after the expiration of the term, the partnership was carried on at will upon an assumption that the articles were in force, this form and mode of enabling one partner to give notice to the other, and the consequences upon it, were no longer applicable to the altered state of circumstances. I do not mean to bind myself by these observations. I will, therefore, state my conclusion to-morrow.

THE MASTER OF THE ROLL.—After the expiration of the term fixed for the continuance of the partnership, the articles and all the provisions continued to bind the parties carrying on the business, but so far only as they were applicable to the altered circumstances. How far then were the provisions applicable to the new state of things? There was a proviso respecting notice to dissolve. In certain events one partner might give a notice to dissolve the partnership during the seven years they continued to be partners, but after that no new term of seven years could arise; that clause, therefore, was not applicable to the new state of things. There is much, however, to which the provisions in the articles do apply, such as the division of profits, the bearing the loss, the drawing out money, the manner in which the books are to be kept and the accounts settled, these apply to a partnership after it becomes a partnership at will. Is then the power of giving notice applicable to the partnership carried on after the expiration of the term? It is one of the incidents of a partnership at will that any partner may give notice to dissolve; no provision for that purpose is necessary; and had the articles contained a provision that six months' notice should be necessary to dissolve a partnership after it became a partnership at will, it would have been inconsistent with the incidents of such a partnership, and inapplicable to the then present state of things. By the articles the two parties were bound together for seven years: one might neglect the business from the very beginning; in that case it was intended that the active partner should have power to give the negligent partner notice to dissolve the partnership, and claim a right to carry on the business for his own benefit during the remainder of the term. A partnership at will could not exist with such a clause, since either party would be at liberty to terminate the partnership immediately upon notice. There is also this inconsistency in the argument, that if the negligent partner gives notice, the partnership is to be wound up in the ordinary way; but if the notice is given by the active partner, the partnership is to be wound up in accordance with this penal provision. It is scarcely possible that this could have been the intention of the parties. The result might have been

that one partner might have been extremely active during the first six years of the partnership, and that he ceased to attend after that time, and that he expressed his intention not to do so any longer, could the other partner two or three months previous to the expiration of the term of the partnership have given notice to the negligent partner so as to secure a cessation of the whole business for an indefinite period of time? It is clear that the articles related only to the seven years; and it is impossible to suppose an intention that upon a failure of duty by one partner towards the termination of the seven years, that the other partner should by giving a notice to him obtain the benefit of the business, not for the remainder of the term merely, but for so long as he should live, or desire to carry it on. That is not the proper construction of the articles; the proviso as to notice is not applicable to a partnership at will, and it applies only to a case in which a partner has bound himself to continue a business for a term which he has no means to get rid of, if his co-partner neglects the business, unless a compulsory power is given to him for that purpose.

The question is apparently new. I can find no similar cases. *Burrows v. Foster* does not affect this question: in that case a firm had been wound up, and the business and all benefit to arise from it had been exclusively sold to strangers for a valuable consideration; after the sale the members of the original firm attempted to derogate from their own sale, they set up the same business, and by letters, cards and circulars were endeavouring to take away the customers from the firm that had purchased the business. The decision in that case explains the meaning of the word "benefit" to be, that if partners give up a business for the benefit of another, they will be restrained by the Court from sending any circular or letter to the former correspondents and connexions of the firm soliciting their business or endeavouring to obtain its continuance for themselves, or from seeking to divert the former correspondents and connexions of the firm from the parties to whom the business had been given up, or doing anything directly or indirectly which might prevent them from carrying on the business. I adopt this definition of the word "benefit," but can

this defendant be considered as quitting for the benefit of the plaintiff within the meaning of the articles? Had the circumstances there provided for strictly arisen, the case of *Burrows v. Foster* would have been beneficial to him, but that case does not shew that this notice which related to a partnership for years has any relation to a partnership continued at will after the expiration of the term. It also leaves untouched the question for what time the benefit to be given to the active partner is to be continued against the negligent partner. If the notice had been given shortly after the commencement of the partnership, it would, no doubt, extend through the term over which the partnership was to run: but why is it to go beyond that? The negligent partner may say, I never intended to continue the partnership for more than seven years; after that time I contemplated carrying on the business alone. If, then, the benefit can only continue during the term of the partnership, it follows as regards a partnership at will that it may be terminated at any moment by a notice to dissolve. As, therefore, the proviso respecting notice had no reference to a partnership at will; and as a partnership at will must, as regards notice, be governed by its own particular rules, which are incidental to it; and as this proviso could give no benefit beyond the then term of the partnership, I think that the plaintiff's claim to the sole benefit of the business does not arise from his having given this notice of dissolution. It is unnecessary, therefore, to consider whether the plaintiff was entitled to a cession of the business for an indefinite time. Unless, therefore, the parties can agree, I must make the ordinary decree to wind up the business as on a dissolution of partnership at will. The plaintiff must pay the costs up to and including the motion for an injunction, which had been turned into a motion for a decree, but not further: it was his claim that gave rise to the suit. The subsequent costs must be paid in the usual way.

The plaintiff appealed from this decision. *Mr. Selwyn* and *Mr. Druce*, for the appellant, cited—

Parsons v. Hayward, 31 Law J. Rep. (N.S.) Chanc. 666.

Booth v. Parks, 1 Moll. 465.

Featherstonhaugh v. Fenwick, 17 Ves. 298.

King v. Chuck, 17 Beav. 325.

Essex v. Essex, 20 Ibid. 442.

Churton v. Douglas, Johns. 174, 191; s.c. 28 Law J. Rep. (N.S.) Chanc. 841.

Burrows v. Foster, before the Lords Justices, May 8, 1862, unreported.

Mr. Baggallay and *Mr. W. Knox Wigram*, for the respondent, cited—

Austen v. Boys, 2 De Gex & J. 626; s.c. 27 Law J. Rep. (N.S.) Chanc. 714.

Wedderburn v. Wedderburn, 22 Beav. 84; s.c. 25 Law J. Rep. (N.S.) Chanc. 710.

Mr. Druce replied.

The LORD CHANCELLOR.—This question is of some importance on the general point, how far a certain and particular provision in a contract of partnership can be assumed to be applicable to a new partnership when the term of the original partnership has expired and the partners continue the business without entering into fresh articles. The plaintiff and the defendant became partners in 1839; they entered into a partnership for seven years, and it was considered desirable to have certain provisions in the partnership articles for the purpose of insuring a great amount of attention to business by both partners. They were probably aware that being bound together for a term of years, if either partner had reason to complain of want of attention on the part of the other, he must seek his remedy in a Court of Equity, and they thought it convenient to insert a provision which should obviate the necessity of coming here for a dissolution. Accordingly, this provision was inserted in the articles, "that if, contrary to the several agreements hereinbefore contained, either of the said partners shall neglect or refuse to attend the business of the said partnership, &c., then, and in any of the said cases, the other of the said partners, if he shall think fit, shall be at liberty to dissolve the said partnership by giving to the partner who shall offend in any of the particulars aforesaid, or leaving in the premises where the said partnership business shall be carried on a notice in writing declaring the said partnership to be dissolved and determined. . . . And the said partner

to whom the said notice shall be given shall be considered as quitting the said business for the benefit of the partner who shall give the said notice." The original term came to an end in 1846, and these gentlemen, having mutual confidence in each other, determined to allow the partnership to continue without renewing the articles. The question is, what in that case is the presumption of law? Ordinarily a contract constituted by a written agreement must be considered as having come to an end at the expiration of the period for which it was entered into. The contract of partnership is different during the term from that which arises by the mutual consent of the parties after the expiration of the term: the one is to last for a certain term and the other only as long as they both shall choose.

Now, am I justified in assuming that all the articles and conditions in the original deed of partnership for a term are at once transferred by law to this new contract, which has no particular period for its duration? That would be a very strange and extravagant assumption, and one that is not warranted by any authority. All that has been said on the subject is that you assume the partnership to continue on the same general footing as before; but if the deed contains provisions giving to one of the partners an extraordinary power, not only of ending the partnership but of gaining a benefit by so ending it, I think I should be taking up a position which is not fortified by any authority if I held that such a special provision was transferred to the new contract, which in point of duration was a different contract. Another reason for holding that this particular provision is gone after the expiration of the term is, that the new contract being for no specified time, but determinable at the will of either party, the power to determine the partnership is not wanted, and a power which is applicable to a contract for a term cannot be presumed to be annexed to a contract which is not for a term. Again, it is a general rule that express penal clauses can only be imported into a contract so far as they have been the subject of a clear unmistakable stipulation, and I cannot take this particular clause, which I consider to have been pertinent to the original contract, as being repeated and renewed by the parties and forming part of the terms

of the new partnership. That being so, it is unnecessary to advert to the other points in the case. It was urged by Mr. Druce, with great ability, that it was for the benefit of the parties that this stipulation should be considered as transferred to the new contract, and it must therefore be considered a proper accompaniment of the agreement; but such a clause is not ordinarily found in contracts of partnership, and I cannot on that ground say that it ought to be imported. A clause which may be very necessary when the parties first commence their business relations, may be considered to be no longer necessary when they have acquired such confidence in one another that the written contract is not renewed. I think, therefore, that the Master of the Rolls has arrived at a just conclusion. I differ from him where he says that if the articles had contained a provision that six months' notice should be necessary to dissolve a partnership after it had become a partnership at will, it would be inconsistent with the incidents of such a partnership. That however is merely an *obiter dictum*, and the decision must be affirmed, and the appeal dismissed with costs.

[IN THE HOUSE OF LORDS.]

1863.	}	MOORHOUSE AND WIFE v. LORD AND OTHERS.
March 2, 5, 9,		
16, 19.		

Domicil.

A mere change of residence is not sufficient to constitute a change of domicil, although it may be tolerably certain that the new residence will be continued for life. There must be an intention to change the domicil.

This was an appeal from a decree and order made by Vice Chancellor Kindersley; and the questions on the appeal related to the succession to the personal estate of Dr. Peter Cochrane, who was a native of Scotland, but was for nearly forty years on the Bengal medical establishment of the East India Company, and amassed a very large fortune. The appeal was brought on several points; but only one of them is important to be reported, viz., the question of the domicil of Dr. Cochrane at the time of his death, which the appellants contended was

French, the Vice Chancellor having decided that it was Scotch.—[The judgment of the Vice Chancellor will be found reported in 4 *Drew.* 366, and 28 *Law J. Rep.* (N.S.) Chanc. 361.]

Dr. Peter Cochrane was the youngest son of John Cochrane, of Clippens, in the parish of Kilbarchan, in the county of Renfrew, in Scotland, and was born in the then Clippens House, on the 12th of September 1755. Having been apprenticed to a surgeon at Kilbarchan, he went to the East Indies, where he lived for forty-three years as medical officer in the service of the East India Company, having risen from the rank of assistant-surgeon to that of President of the Medical Board of Calcutta. In the year 1808, he married Miss Fearon, at Cawnpore, in the East Indies, and by her had two sons, Peter, born in 1810, and John, born in 1813. He left India in 1818, and early in the year 1819, arrived with his wife and two sons in Europe, and shortly afterwards proceeded to Scotland.

In the year 1789, he had become possessed, by purchase from the trustees of his father's creditors, of the family estate at Clippens, consisting of about sixty Scotch acres of land, which continued to be occupied by his father and mother during their lives, and after their deaths by his sister and her husband. The sister had determined to quit the old house on the estate at Clippens in consequence of its dilapidated state; but Dr. Cochrane prevailed on her to continue to reside on the estate by an offer to build thereon a new mansion-house and offices at his expense for their residence, which was accordingly done, without however the old house being destroyed, and the sister took possession of the new mansion-house when completed in the year 1815, and continued to reside there until her death, which happened in the year 1821. Dr. Cochrane in his letters to her frequently shewed his attachment to the property and expressed his anxiety to return to it. The summer of the year 1819 was spent by him in a tour through the north of Scotland, and he passed the winter at Edinburgh; in the following spring (1820) he furnished the mansion-house at Clippens, and in the month of June took up his residence there with his family. While at Clippens he maintained a large establish-

ment, and he also made great improvements in the estate, and converted some of the land into a garden to enlarge the former one, and made pleasure-walks through the woods and levelled the lawn in front of the mansion. He also kept up an intercourse with the neighbouring families, with whom he was on visiting terms. This continued up to the month of May 1825, when he left Clippens, with his wife and two sons, for the Continent. The reason given by him for leaving Clippens was, that he desired to place his two boys at school at Berne, in Switzerland, for their education, and that Mrs. Cochrane, their mother, was anxious to be near to them at first. In addition to which it appeared that the climate did not suit his health, and he had also been subjected to much annoyance through the misconduct of his wife, and the neighbours had ceased to visit Clippens. When he left Clippens, he broke up his establishment there and dismissed all his servants with the exception of George Crow, his gardener, and John Macdonald, the coachman, who respectively continued in his employ, the one to keep up the garden and pleasure grounds, and the other to look after the horses and young stock, and the dogs, poultry, pigeons and rabbits, of which there was a considerable number. The cows and carriage-horses were disposed of previous to his leaving, and the whole of the furniture, with the exception of that belonging to one bedroom, which was left for immediate use, was by his order packed up and left on the premises. The plate was also packed in chests and taken to the Union Bank of Paisley for safe custody. Mrs. Crow and her daughter were left in charge to air the house, to keep fires in the rooms, and generally to protect the furniture. The instructions given by Dr. Cochrane to George Crow were to keep the garden in the same state of culture as it then was, and to proceed with the improvements which had been commenced in it. He spoke to George Crow from time to time of his intention to leave Clippens, before he actually did so. The purport and effect of what he said was that he might be absent for three or four years. He expressed himself much attached to Clippens, and every object seemed full of interest as having been the residence of his ancestors, and he would not allow the old house in

which he was born to be taken down, although many of the neighbouring gentry tried to persuade him to do so in consequence of its being an eyesore to the new mansion; he was also continually on the look-out for the purchase of adjoining property for the purpose of adding it to his estate. He went from Clippens to London, where he remained about three months; he then went to Paris, and arrived there on the 31st of August 1825, and stayed there until the 23rd of September following, when he left, and on the 30th of that month arrived at Berne, in Switzerland, taking up his abode at the Hôtel de Faucon. On his arrival at Berne he placed his two sons, Peter and John, at the institution at Hofwyl, about six miles from Berne, under the management and direction of Monsieur de Fellenberg. In the month of April 1826, he removed his two sons from Hofwyl, and on the 17th of May 1826, returned to Paris. During his stay at Berne he retained his apartments in the Hôtel Faucon, and never left Berne, except for a day or two when he went on an excursion. From the time of his arrival in Paris, on the 17th of May 1826, down to the month of July 1829, he resided continually there, excepting only that in the autumn of 1827 he spent about three months at Dieppe. At Paris he lived in furnished apartments in the Boulevard des Capucines, No. 11, and placed his two sons at school in the neighbourhood, Choisi le Roi, St.-Germain and Passy. In the month of July 1829, he left Paris on a visit to Scotland, spending a few days in London on his way. He took up his residence with his family at the George Hotel, Glasgow, and paid frequent visits with them to Clippens. On those occasions he looked over the house and premises, and showed great interest in the horses and live stock, also in the growth of the young plantations and the general state of the lands, and appeared very anxious to purchase more land adjoining, and mentioned his intention of returning to the Continent to George Crow, who expressed great regret that he did not come and reside at Clippens, to which he replied that he could not come to settle there just then, but that it would not be long before he would do so. It might be a year and a half after this conversation, on or about the 20th of September 1829, he left Glasgow

NEW SERIES, 32.—CHARG.

for Edinburgh; and whilst there instructed his solicitor to prepare his will, which was accordingly done; and having proceeded to London, the will was finally settled by him there, and executed in duplicate on the 30th of October 1829. On the 6th of November 1829, he, with his wife and two sons, returned to Paris, and resumed possession of the apartments in the Boulevard des Capucines, No. 11. Early in the following year he removed to large unfurnished apartments in the Place Vendôme, which he furnished partly with furniture removed from Clippens, and partly with other expensive furniture which he purchased, and he had there a large establishment of servants, carriages and horses, and had laid down a large quantity of wine. He placed his eldest son Peter under the care of Mr. Baber, his brother-in-law, in England, intending to educate him for the army. At the latter end of the year 1830, his son Peter married after he had returned to Paris, and was again placed, together with his brother, under the care of the Abbé Langan, at Passy, in France. On the 18th of June 1831, Dr. Cochrane being then in ill health, commenced a journey to England, accompanied by his two sons and a physician, leaving his establishment at the Place Vendôme. They reached Beauvais that day, and in the evening he died. It was said that the object of this journey was to make an alteration in his will. From the time when he left Clippens in the year 1825, down to the month of May 1831, he kept up a frequent and confidential correspondence with George Crow, in which he from time to time detailed the movements of himself and family in their mode of living, and gave directions for the management of his estate at Clippens.

The evidence in the case was of the most voluminous description.

Mr. Rolt, Mr. Glasse and Mr. Welford, for the appellants, contended that Dr. Cochrane was at the time of his death domiciled in France. The residence in Scotland was merely experimental. The permanency of the residence and not the motive was to be regarded, for the purpose of ascertaining the domicile. They entered into a minute examination of the evidence, for the purpose of shewing that there was no intention on the part of Dr. Cochrane to return to Scotland from France. Upon the definition of

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domicil they commented on and contrasted Vattel's, Voet's and Story's definitions referred to by Vice Chancellor Kindersley in his judgment, and on his definition, and cited—

Johnstone v. Beattie, 10 Cl. & F. 42.

Munro v. Munro, 7 Ibid. 842.

Forbes v. Forbes, Kay, 341; s. c. 23 Law J. Rep. (N.S.) Chanc. 724.

Whicker v. Hume, 7 H.L. Cas. 124; s. c. 28 Law J. Rep. (N.S.) Chanc. 396.

Aikman v. Aikman, 3 Macq. 854.

Anderson v. Laneville, 9 Moo. P.C.C. 325, 334.

Bremer v. Freeman, 10 Moo. P.C.C. 306.

Guier and O'Daniel, 1 Binney's Pennsylvania Reports, 349, note.

Cole on Domicil, 36, 37, 106, 107, 111.

The Solicitor General, Mr. Anderson, Mr. E. F. Smith, Mr. Morris, Mr. W. Pearson, Mr. Jackson and Mr. Lord, for the several respondents, were not called upon.

LORD CRANWORTH, upon the question of domicil, said—Dr. Cochrane was a Scotchman, and his domicil of origin was Scotch; he went to India, and there acquired what, on the authorities, must be admitted to be an Anglo-Indian domicil, (though he could never clearly see why it should not be a Scoto-Indian domicil,) and had Dr. Cochrane died in India, his property would have been administered according to the law of England. He returned, and became to all intents and purposes a domiciled, or rather a re-domiciled, Scotchman; he afterwards went abroad, partly for the sake of the education of his children, partly on account of his own health, and partly because he was subject to much annoyance in Scotland through the conduct of his wife; after a little time, he took up his abode in Paris; at first in furnished lodgings, but afterwards in lodgings which he furnished, and if any one were pleased to say so, he meant to live there always. But that did not change the domicil. In order to acquire a new domicil (he would use an expression which he believed he formerly used himself in *Whicker v. Hume*, but which he would not shrink from using again, as he thought it a correct statement of the law), a man must intend *quatenus in illo exuere patriam*. It was not enough that a man merely meant to

take another house and go to some other place, and that on account of his health, or for some other reason, he thought it tolerably certain that he had better remain there all the days of his life. A man did not lose his domicil of origin, or his resumed domicil, merely because he went to some other place that suited his health better, unless he meant either on account of his health, or from some other motive, to cease to be a Scotchman, and become an Englishman, a Frenchman or a German. In that case, if he gave up everything he left behind and established himself elsewhere he might change his domicil. It would be most dangerous in this age, when people were in the habit of going to other countries or climates for the sake of health or for caprice, retaining at the same time possessions in this country and keeping up a house here, to hold that they thereby made themselves foreigners. That would be inconsistent with all the modern views on the subject of domicil. He thought the judgment on this and on the other points perfectly right, that the appeal ought never to have been brought, and he should move that it be dismissed, with costs.

LORD CHELMSFORD, on the subject of domicil, said,—There was no doubt that Dr. Cochrane's domicil of origin was Scotch; that he afterwards acquired an Anglo-Indian domicil, and subsequently resumed his Scotch domicil. The difficulty of getting a satisfactory definition of "domicil" had often been admitted, and every attempt to frame one had hitherto failed. With every respect for the precision and accuracy of judgment of the learned Vice Chancellor, he could not adopt the definition proposed by him; he had suggested as the definition of acquired domicil "The place in which a person has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which uncertain) shall occur to induce him to adopt some other permanent home." This definition, as he, Lord Chelmsford, had pointed out in the course of the argument, would reach the case of a person of delicate health, going to a milder climate with the determination

of remaining there until his health was restored; but Lord Campbell, in *Johnstone v. Beattie*, put that very case as one in which an existing domicile would not be lost and a new one would not be acquired.

The counsel for the appellants argued that a new domicile was acquired whenever a person went to reside in a place for an indefinite time. This definition and that of the Vice Chancellor appeared liable to exception, inasmuch as it omitted one important element, viz., the fixed intention of abandoning one domicile and permanently acquiring another. The present intention of making a place a permanent home could exist only where a person had no other idea than that of continuing there without looking forward to any event, certain or uncertain, which might induce him to change his residence. As long as he had in contemplation some event, upon the happening of which his residence would cease, it would be incorrect to say he had even a present intention of making it a permanent home. The nature and character of the residence adopted might shew an intention to abandon the former domicile, but that intention must be clearly and unequivocally proved. Lord Wensleydale, in *Aikman v. Aikman*, had laid down the rule very clearly, "Every man's domicile of origin" (and this was to be considered as domicile of origin resumed) "must be presumed to continue until he has acquired another sole domicile by actual residence with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burthen of proof unquestionably lies upon the party who asserts that change." The difficulty of the appellants in this case was greater, as they sought to supplant the domicile of origin by a foreign domicile. He quite agreed with what his noble and learned friend Lord Cranworth had said in *Whicker v. Hume*—"You may much more easily suppose that a person having originally been living in Scotland, a Scotchman, means permanently to quit it and come to England, or *vice versa*, than that he is quitting the United Kingdom in order to make his permanent home where he must for ever be a foreigner, and in a country where there must always be those difficulties which arise from the complication that exists and the conflict

between the duties that you owe to one country and the duties that you owe to the other." The question therefore was, whether Dr. Cochrane had intentionally and actually abandoned his Scotch domicile with the intention never to revert to it? The evidence was perfectly clear that he had not.—His Lordship then proceeded to analyze the evidence, and having arrived on this and the other points of appeal at the same conclusions as Lord Cranworth, he concurred in the motion that the appeal should be dismissed, with costs.

LORD KINGSDOWN concurred.—Upon the question of domicile he said he apprehended that change of residence alone, however long and continued, did not effect a change of domicile as regulating the testamentary acts of an individual. Change of residence might be and was a necessary ingredient, and it might be and was strong evidence of an intention to change a domicile; but unless in addition to residence there was an intention to change the domicile, no change was in his opinion made. The distinction drawn by his noble and learned friend, Lord Cranworth, to which Dr. Lushington had acceded in *Hodgson v. De Beaucheme* (1), was perfectly sound. A man must intend to become a Frenchman instead of an Englishman. A man might leave England with no intention of returning, nay, with a determination never to return, *e. g.*, a man labouring under mortal disease and told that to preserve his life, or even to alleviate his sufferings, he must go abroad. Was it to be said that if he went to Madeira he could not do so without losing his character of an English subject—without losing the right to the intervention of the English law in the transmission of his property after his death and in the construction of his testamentary instruments? Such a proposition was revolting to common sense. He confessed he should not have been sorry if advantage could have been taken of this case to express the opinion of the House upon some vexed points of the law of domicile, which it was highly desirable to have settled, and upon which he at least entertained strong doubts; but as it was considered that a

(1) 12 Moo. P.C. 825.

difference of opinion had arisen, and in this case the points did not necessarily or perhaps properly arise, he thought it better to abstain from expressing any opinion. There could not be the least doubt, applying to the case any law or rule that had ever been established, that this gentleman retained until his death his Scottish domicile.

Decree and order affirmed, and appeal dismissed, with costs.

WOOD, V.C. { *Re THE STATE FIRE INSURANCE COMPANY.*
Feb. 26. { *Ex parte MEREDITH'S AND CONVERS'S CLAIMS.*

Joint-Stock Company—Bills of Exchange—Agent—Liability of Shareholders—7 & 8 Vict. c. 110. ss. 44, 45.

By the deed of settlement of a joint-stock company established under the 7 & 8 Vict. c. 110, the directors were empowered to issue bills of exchange and promissory notes, but such bills and notes were only to bind the shareholders to the extent of their interests in the company. The directors, by deed-poll under the common seal of the company, and signed by three directors, appointed an agent in Canada, and empowered him to draw bills of exchange upon the company. To discharge claims against the company in Canada, the agent drew and gave there two bills of exchange, such bills containing no notice of any restricted liability. Upon the company being wound up, the holders of these bills put in claims for the amount, together with interest and damages calculated according to certain Statutes of Canada:—Held, that the appointment of the agent was valid, and that the bills in question were well drawn by him so as to bind the company, notwithstanding the 45th section of the act, and notwithstanding also the provisions in the deed of settlement for limiting the liability of the shareholders; and accordingly that the holders of the bills were entitled to prove under the winding up against the company.

Held, also, that the proof being against the company as the virtual drawers, the claimants were entitled to the interest and

damages given by the law of Canada, where the bills were drawn.

A proviso in a bill of exchange drawn by a joint-stock company, limiting the liability thereunder, is repugnant and void.

By the deed of settlement of the State Fire Insurance Company, a company incorporated under 7 & 8 Vict. c. 110, it was, amongst other things, provided (clause 45.) that, subject to the powers thereby given to the general meetings of the company, and the rules, regulations and restrictions therein contained, the directors should have the entire management of the affairs of the company.

Clause 47. was as follows: "The directors shall, and they are hereby authorized to make and issue, indorse and accept, in the name and on account of the company, such bills of exchange and promissory notes as they may think expedient: provided always, that it shall not be lawful to issue, indorse or accept any such notes or bills in any other case, or for any other purpose than in or for discharging existing claims or liabilities against or upon the company, or except or otherwise than upon condition that the same shall take effect only on the capital stock of the company, and shall be binding upon the shareholders, and each of them, to the extent of their respective shares and interests therein, and not further or otherwise; and that in contracting debts or liabilities on behalf of the company, the directors shall at no time exceed the usual period of credit, according to the customs of the several trades or businesses with which the directors shall from time to time have occasion to deal, contract or engage."

For the purpose of regulating contracts entered into by joint-stock companies, it is enacted by 7 & 8 Vict. c. 110. s. 44. that every such contract shall be in writing, and signed by two at least of the directors of the company, and sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case; and that in the absence of such requisites, or of any of them, any such contract shall be void and ineffectual.

By section 45. it is provided, that if the directors of a company be authorized by deed of settlement or by-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted, as the case may be, by and in the names of two of the directors of the company, and shall be countersigned by the secretary or other appointed officer of the company on whose behalf the same is expressed to be made.

In 1858 the State Fire Insurance Company, by deed under their common seal, and signed by three of the directors, appointed Alexander Stuart to be their attorney and general agent in Canada, with power, in the name and on behalf of the said company, to accept proposals for, and to countersign, grant and issue policies of insurance against loss or damage by fire, and generally to act as agent for the company, subject however, at all times, in execution of all the powers therein contained, to the rules and regulations of the said company; and he was thereby empowered to draw any bill or bills of exchange upon the said company, in payment of any claims or demands legally, or reasonably payable under any of the policies to be issued as therein mentioned.

In 1860 H. Meredith effected an insurance of certain property in Canada with the above-mentioned company. The policy was signed by A. Stuart, and contained a proviso, that "the capital stock and funds of the said company should alone be answerable for the demands under this and all other policies, and that no director, officer or member of the said company or proprietor of shares therein should in any event, upon any account, or in any manner be responsible or liable for or in respect of any demand or claim upon the said company beyond the amount of his or her particular share or interest in the capital stock of the said company at the time when such claim might arise, anything contained in the policy or any law or statute to the contrary notwithstanding."

A similar policy was granted to A. L. Convers.

In January 1861 the power of attorney granted to Stuart was revoked by deed;

but it was by such deed expressly declared, that he might still draw bills of exchange on the company for the sums payable by the company in respect of claims on policies in Canada.

A claim having been made on the company by H. Meredith under his policy, Stuart, to satisfy this claim, drew a bill of exchange in due form, and containing no notice of restricted liability, which was duly accepted by three of the directors of the company in London.

A similar bill of exchange was given to Convers in satisfaction of a claim on the company made by him. This bill was not accepted by the company, and was protested for non-acceptance; it was afterwards presented to the company for payment, but was not paid, and was protested for non-payment.

The company was now in course of being wound up, and Meredith and Convers had put in claims for the amounts of their respective bills; they also claimed, under certain statutes of Canada, interest at 6l. per cent. per annum, and 10l. per cent. on the amount of the bills as damages or loss on re-exchange.

Sir Hugh Cairns and *Mr. Bompas*, for Meredith and Convers, contended that the power of making a contract, conferred on the company by section 44. of the 7 & 8 Vict. c. 110, was not revoked or curtailed by section 45. of that act. That the appointment of Stuart as agent was valid; all the requisite formalities had been complied with: the company, therefore, were bound by his acts. That the proviso contained in clause 47. of the deed of settlement of the company, limiting the liability of the company on bills of exchange, was void as being repugnant to the very nature of a bill of exchange; and on this point they cited—

Pedell v. Gwynn, 1 Hurl. & N. 590; s. c. 26 Law J. Rep. (N.S.) Exch. 199.

Gordon v. the Sea Fire and Life Assurance Society, Ibid. 599; s. c. 26 Law J. Rep. (N.S.) Exch. 202.

That the bills of exchange must be governed by the law of Canada, where they were drawn; that the 7 & 8 Vict. c. 110. did not apply to Canada, therefore no objection to the validity of the bills could be grounded on

that act; that as the bills were made in the ordinary course of business, they were binding on the company, and that the claimants were entitled to the interest and damages given by the statutes of Canada, as the company, who were the drawers of the bill, were liable according to the *lex loci contractus*, which in this case was Canada. On these points, they cited—

Pattison v. Mills, 1 Dow & Cl. 342.

Forbes v. Marshall, 11 Exch. Rep. 166;

a. c. 24 Law J. Rep. (N.S.) Exch. 305.

1 *Smith's Lead. Cas.* 640.

Mr. Druce, with whom was *Mr. Rolt*, for the official manager, submitted that this case differed from *The Sea Fire Insurance Company*, because these bills of exchange did not bear on the face of them notice of the restricted liability. According to the deed of settlement, Stuart's powers ought to have been restricted to issuing bills with limited liability, for the company could only confer a power consistent with the deed of settlement. That the clauses of the deed of settlement were inconsistent, for since the power of a joint-stock company to draw bills of exchange depended entirely upon the deed of settlement—*Thompson v. the Universal Salvage Company* (1), and a bill drawn with this limited liability was in law no bill; therefore, not only the clause restricting the liability, but the whole power to issue bills, must be struck out of the deed, because it only contained a power to issue bills with this restricted liability. Even if the claims were valid as against the company, the contract itself, which appeared on the policies, might be looked at, and the judgment would not give the claimants more than they were entitled to under their contract; therefore, the shareholder could not personally be held liable. On this point, he cited—

Prince of Wales Company v. Harding,

E. B. & E. 182; a. c. 27 Law J. Rep.

(N.S.) Q. B. 297.

Re the Athenæum Assurance Company,

Johns. 80; a. c. 28 Law J. Rep. (N.S.)

Chanc. 335.

Ernest v. Nicholls, 6 H. L. Cas. 419.

Mr. Bagshawe, for the creditors' representative.

(1) 1 Exch. Rep. 694; a. c. 17 Law J. Rep. (N.S.) Exch. 118.

Wood, V.C. (without hearing a reply) said: This case appears to me to be covered by the authorities. It stands thus: the company have a clause in their deed of settlement, by which all policies that they effect against accidents by fire are to be paid out of the assets of the company, the shareholders being exempted from individual liability. There is also in the deed a power given to the directors acting for the company to draw bills of exchange, and it is provided that these bills of exchange shall only be payable in a limited manner, that is to say, out of the capital stock and effects of the company.

The Court of Exchequer determined in two cases (first, in the case of *Pedell v. Gwynn*, on *sci. fa.* as against individual shareholders, and then in the case of *Gordon v. the Sea Fire Insurance Company*, in an action against the company,) that although the deed of settlement contained a power to issue bills exactly similar to this, the bills so issued were, nevertheless, valid bills of exchange, which could not be fettered by any such restricted liability, and that such a restricted liability was repugnant to the nature of a bill of exchange.

It has been argued that there is a distinction between that case and this, because the present bills do not contain notice of this restricted liability, and it has been put in two ways: first, that according to the deed the agent ought to have had this restricted power only; and, secondly, that according to the power of attorney, to which I will presently refer, his agency and his power were so restricted. Then, it was argued that the clauses in the deed are inconsistent, the Courts of law having held that a bill so drawn, but with limited liability, would not be a bill at all, and that therefore the limited liability should be struck out; and that the deed must be read as if the power to issue bills had been actually omitted, as the power was only given with this restriction. But that does not appear to me to be a sound conclusion. As regards the fact of these bills not bearing on the face of them that which a Court of law has said would be void, it is obvious that the parties would not insert such an absurd and repugnant proviso. A deed containing such provisions as these

is not inoperative altogether, because these arrangements may be valid "*inter se*," and may possibly be upheld in equity as between the co-partners; but not only are the public at large not bound by any notice they may be supposed to have of this clause in the deed of settlement, but if the actual condition itself had been put upon the face of the bill, the public would have just as good a bill with that notice as if it had not been inserted, the whole thing being repugnant to the nature of a bill of exchange, and therefore not a notice which could in any way affect the holder of the bill. It appears to me to be plain that I cannot strike out the clause which enables the directors to grant bills; and therefore if they grant them, they must be granted in the only form in which they would be binding, which is this.

But then the act of parliament, it is said, requires that where there is a power to issue bills in a deed of copartnership of companies of this description, they shall be in a certain form, signed by two directors and countersigned by the secretary. There is nothing that prohibits a company from proceeding in the manner in which this company have proceeded, namely, by an instrument under their common seal appointing a person who shall act as their attorney and agent in drawing the bills. There is a clause in the act of parliament which says that every deed and instrument executed by the company under the seal of the company shall be signed by two directors. That form has been complied with. The power appointing this agent to draw bills is conferred by deed under the seal of the company and also signed by two directors. Stuart is therefore validly constituted the agent of the company by this instrument to draw the bills which the directors themselves have power to draw. It seems to me here that the company had perfect power under the act, by deed under their seal, executed in the manner in which this deed was executed, to appoint an agent who should draw bills for them. The original power seemed to have restricted him with reference to that condition about liability. The additional power which was given to him when the first power was revoked does not appear to contain that special restriction, but for the

reasons I have already given I do not think that material. It would have been an absurd restriction that would render it impossible for him to draw a bill, and therefore it would, I think, be considered repugnant, for when the object, scope and intention of the power was that there should be this power of drawing bills, when claims had to be settled abroad, it must have been intended that they should be drawn in a manner which would be effectual, and therefore the proper mode would be to draw them *simpliciter*, as this gentleman has drawn them.

It has also been argued that, in analogy to the case of *Gordon v. the Sea Fire Insurance Company*, where judgment was obtained upon a contract of limited liability as between the creditor and the debtor, the contract itself may be looked at, and that therefore the judgment should not go beyond the effect and scope of the contract in respect to which it has been recovered. But this case appears to be totally different; there was originally a contract of limited liability, contingent upon certain events occurring. The events occur, and the company, who must have the best knowledge of their assets, are content to give a bill of exchange, which is the mode of paying that liability which they have incurred on the limited contract. They give that bill of exchange, and that bill of exchange is not restricted. Upon the previous part of the discussion I have arrived at that conclusion, and I think it is competent to them to give bills in discharge of the original liability which had been contracted; if these gentlemen, therefore, having taken these bills, choose to sue upon them, it seems to me they have a clear right to come in as creditors in this winding up and prove against the company the amount of the bills. I think that the Canada damages follow in the same manner, because the proof in fact would be against the company as drawers. The bills were drawn in Canada, and the contract being made in Canada, I must decide that these gentlemen shall be admitted as creditors in respect of these two bills, including the interest and damages given by the statutes of Canada.

WOOD, V.C. }
March 3, 4, 9. } ALMACK v. HORN.

Will — Construction — “Lawfully to be begotten.”

A testator devised his real estates unto and equally between his daughter and granddaughter for their respective lives, with benefit of survivorship; and from and after the decease of the survivor the testator gave his real estates unto and to the use of all and every the child and children of his said daughter and granddaughter “lawfully to be begotten,” equally as tenants in common in tail.

The granddaughter survived her mother, and died leaving issue:—Held, that, in the absence of special circumstances, the granddaughter was entitled under the above devise to a share with her children after the determination of her life estate.

This was a SPECIAL CASE.

Henry Pocock, by his will, dated the 15th of May 1787, gave and devised all his real estate “unto and equally between his daughter Mary Harriott and his granddaughter Anna M. Harriott, for and during the term of their respective natural lives. And from and after the decease of either of them, the testator gave and devised the moiety of her so dying unto the survivor of them for the term of her natural life. And from and after the decease of the survivor of them, the testator gave and devised all his said real estates “unto and to the use of all and every the child and children of his said daughter and granddaughter lawfully to be begotten, equally to be divided between them if more than one as tenants in common, and not as joint tenants, and the several and respective heirs of the bodies of all and every such child and children lawfully issuing.”

The testator at the date of his will had no issue, except his daughter and granddaughter above mentioned. Subsequently to the testator's death his granddaughter married and had several children. The granddaughter survived her mother and died in 1861. Under these circumstances, the question had arisen whether, after the determination of her life estate, the granddaughter was entitled under the above

devise to any further interest in the testator's real estates as the child of his daughter.

Mr. Caldecott, for the plaintiff, contended that Anna M. Harriott was not entitled to any further interest. The whole question depended on the construction of the words “lawfully to be begotten.” No doubt the words “*procreatis*” and “*procreandis*” might have the same meaning—*Co. Lit.* 20 *b*; but the construction depended on this, viz., whether words having a future sense were used designedly or *per incuriam*—*Hebblethwaite v. Cartwright* (1). In cases where the words were words of descent only they had been construed as having a general meaning: but in all the cases where these words used as words of purchase had been held to have a general meaning there had been special circumstances. On this point he cited:

Hevet v. Ireland, 1 P. Wms. 426.

Wilkinson v. Adam, 1 Ves. & B. 422.

Doe d. James v. Hallett, 1 M. & S. 124.

Early v. Benbow, 2 Coll. 342; s. c. 15

Law J. Rep. (n.s.) Chanc. 169.

In the present case it was only reasonable to suppose that the testator used the words designedly in their proper future tense; his evident intention being to provide for his issue already in existence by giving them life interests; it was improbable that he should intend to give them any further share after their deaths—*Re Pickup's Trusts* (2).

Mr. Jolliffe, for persons in the same interest.

Mr. Dickenson, on the other side, submitted that the words “to be begotten” had been construed in a general sense when used either as words of purchase or of descent; and cited

Lomax v. Holmden, 1 Ves. sen. 290.

Cook v. Cook, 2 Vern. 545.

Words having a well-known legal meaning can only be deprived of that meaning by strong special circumstances. The only circumstances in the present case were these, viz., first, the improbability that parents and children should be intended to take *per capita*; secondly, the improbability that a person who had already enjoyed a

(1) *Ca. t. Talb.* 31.

(2) 1 John. & H. 389; s. c. 30 Law J. Rep. (n.s.) Chanc. 278.

life estate should be intended to take a further interest after her death. But with regard to the second circumstance, it existed as to realty in the case of *Pearce v. Vincent* (3); and as to personal estate in the case of *Elmsley v. Young* (4), and had, in those cases, been held insufficient to exclude the tenant for life. These circumstances were not sufficient to deprive the words of their ordinary legal meaning.

Mr. Caldecott, in reply, as to what was sufficient to make an exception to the general rule.

Wood, V.C. said, (March 9,) that the case turned on the construction of the words "children lawfully to be begotten" as used in the will of H. Pocock; that, no doubt, according to the strict legal meaning, those words would include children already begotten, and that this rule had probably been adopted to prevent the great confusion that would otherwise arise in cases of descent from letting in the younger before the elder, as was remarked by Lord Talbot in *Hebblethwaite v. Cartwright*, which was a very strong case, the words there being "hereafter to be begotten"; that, in *Doe v. Hallett*, Bayley, J. had stated the reason to be this, that the limitation was made to the children in respect of the stock, and not of personal affection to them; that the usual construction of the words might be controlled either by the context of the will, or by the circumstances of the testator's family, as was the case in *Early v. Benson*, where it was held, that the testator intended to use the words "children that may be born" in their restricted sense only: that case appeared to have been rightly decided: the question to be considered was, whether in the present instance there were circumstances sufficient to control the ordinary construction. The form of the devise was peculiar; but looking at the whole will and the state of the testator's family, there was nothing to manifest any intention to use the words in other than their ordinary sense, unless the improbability that the testator should give his grand-daughter a further interest after

her life estate, or mean parent and children to take together *per capita*, was sufficient to manifest such an intention. That there was in fact no improbability or absurdity in such a devise; that it was like a gift by a testator of a life estate to one of his next-of-kin, followed by a gift to his next-of-kin generally, where the tenant for life would be entitled to a further interest after the determination of his life estate. And that on any construction of this devise uncles and nephews would take together *per capita*. That the decision, therefore, in *Doe v. Hallett* must be followed, and the testator's grand-daughter and her children would take together as tenants in common in tail.

ROMILLY, M.R. }
Nov. 6, 22. } COOKNEY v. ANDERSON.

Jurisdiction — Demurrer — Service out of Jurisdiction — Consol. Order X. rule 7.

A Court of equity will not entertain a suit by a party residing within its jurisdiction against parties who reside in a foreign jurisdiction, in respect of property situate there, and upon a contract entered into there, which contains no special provision affecting in any way the jurisdiction of the locus contractus.

A general demurrer for want of equity will lie if it appear on the face of the bill that a foreign Court and not the Court of Chancery is the proper tribunal in which to try the question raised.

The service of a defendant out of the jurisdiction under the modern practice of the Court does not "per se" give the Court jurisdiction in a case not properly falling within its jurisdiction; and a defendant so served is not bound, if he contests the jurisdiction of the Court, to move to discharge the order for service, but he may raise the objection to the jurisdiction by demurrer.

This was a demurrer to a bill filed, by Susanna, the widow and executrix of James Thomas Cookney, praying that the trusts of a deed, dated the 9th of September 1859, and the business carried on under it, might be wound up. It also prayed for accounts, with the other usual directions.

2 E

(3) 2 Myl. & K. 800; s.c. 2 Law J. Rep. (N.S.) Exch. 194.

(4) 2 Myl. & K. 32, 780; s.c. 4 Law J. Rep. (N.S.) Chanc. 200.

The material statements in the bill were to the following effect. William Lancaster and Alexander Bankier Freeland, in November 1855, became joint-purchasers of certain ironworks in the parish of Riccarton, in the county of Ayr, in Scotland, and also of certain mines situate near Kilmarnock, and of other mining leases in the county of Ayr, and they carried on the business of smelters and iron-founders. The business was not successful, and, at the time of the execution of the trust-deed about to be mentioned, the mines, works and premises were charged with the following debts: to the Union Bank of Scotland, carrying on business at Glasgow, 64,053*l.*; to James Thomas Cookney, 25,000*l.*; to John Freeland, 5,000*l.*; to the Glasgow and South-Western Railway, 1,850*l.*; and to the trustees of William Blane, 976*l.* The debt to the bank was in part secured by a prior mortgage on the blast-furnaces and the land on which they were built, but it did not include the machinery on the premises or the leases; the rest of the debts were charged *pari passu* on the mines, works, machinery and property generally.

By a deed, made in Scotch form, dated the 9th of September 1859, Messrs. Lancaster and Freeland, after stating that they were unable to meet the demands upon them, conveyed the whole estate and property to James Anderson as a trustee, to act under the direction and superintendence of a committee, consisting of four persons and the survivors, any three of whom were to be a *quorum*. The committee named consisted of the defendants, James Robertson, the public officer of the Union Bank of Scotland, James Reid, the manager and cashier of the same bank, J. T. Cookney, the plaintiff's husband, and John Freeland; and under them James Anderson was to conduct the works for five years, or such other time as the committee should think fit, at a salary of not less than 500*l.* per annum, with a commission of 2*l.* per cent. on the net profits of the business, after deducting all charges and expenses and interest at the rate of 5*l.* per cent. on the debts due by Messrs. Lancaster and Freeland and on the capital contributed by them respectively; an allowance of 500*l.* per annum to each of them during the first year of the trust, and thereafter during the continuance thereof an

allowance of not less than 350*l.* per annum to each, such last-mentioned allowance to be paid by the committee. The trustee was then empowered to employ the funds and produce of the trust estate, and to borrow all other requisite funds for the purpose of carrying on the works. This was followed by other directions immaterial to the present question. The second trust was to pay the liabilities of Messrs. Lancaster and Freeland, with the exception of the debts after specified, being those already mentioned. In the third place, if it appeared that the works and leases, or any part thereof, could not be profitably carried on, the trustee and committee were authorized to sell the whole, or any part thereof, by public auction or private contract. In the fourth place, the trustee was to pay, first, the interest, and, next, the principal of the debts previously mentioned, and in case of deficiency, rateably and in proportion as if the funds were being distributed under the then existing Bankrupt Act. In the fifth place, the trustee was to pay the balance to Messrs. Lancaster and Freeland.

The business has since been carried on at a loss, with a constantly increasing debt, which now, in the whole, exceeds 140,000*l.*, and no interest has been paid since 1860.

The business is still conducted by the trustee and the committee at a loss, and at the present prices of iron it must continue to be so; and notwithstanding the remonstrances of the plaintiff, they persist in carrying on the business, and refuse to sell the property, and divide the proceeds amongst the persons entitled.

J. T. Cookney died on the 4th of December 1860, having, by his will, dated the 15th of June 1858, appointed the plaintiff his executrix; and no person was appointed a member of the committee in his place; and by a report made in May 1861, it appeared that the affairs of the trust were more deeply involved than at the date of the previous report.

The bill was filed, on the 4th of July 1862, against the trustee, the committee and creditors; and in pursuance of leave obtained under the Consolidated Order X., Rule 7, a copy of the bill was served upon the defendants in Scotland.

Messrs. Anderson, Lancaster, Robertson, Reid and J. J. Freeland, the defendants so

served, appeared and put in a general demurrer to the bill for want of equity.

Mr. Selwyn and *Mr. Druce*, for the demurrer.—None of the statements in the bill lead to the relief asked by the plaintiff of this Court. The trust arose upon a Scotch deed; it was to be carried out in Scotland by resident Scotchmen for the benefit, not only of the plaintiff, but for other parties. The trustee and the committee were invested with a discretion, and they had exercised it: a discretion to sell still remained with them, and they would, no doubt, carry it out if it was thought for the benefit of all the *cestuis que trust*. The domicile of these defendants made them subject to another jurisdiction; the land also was in a foreign country, having Courts holding an independent jurisdiction; the works also were carried on under foreign law. These facts were shewn in every line of the bill, and they negatived any right to sue in this Court.—

Norris v. Chambres, 29 Beav. 246; s. c. 30 Law J. Rep. (N.S.) Chanc. 285.

Story on the Conflict of Laws, 368, 5th edit. ss. 241, 242.

Mr. Hobhouse and *Mr. W. W. Mackeson*, in support of the bill.—If parties join for mutually carrying out a common interest, every discretion conceded to one or more is conferred for the promotion of the one result; equity can never recognize any other, whether the parties reside here or abroad, or whether they reside partly here and partly abroad: in either case, therefore, if spoliation or waste were being committed, the Court would interfere, and such was the conclusion which might be drawn from the facts of this case. The Court therefore would act in the same way as if the affairs of a foreign company were under consideration. The privity of interest gave the Court jurisdiction though a part of the defendants resided abroad, and though the common property was abroad.

Vicount Mulsington v. Earl Mulgrave, 3 Madd. 491.

De Manneville v. Crompton, 1 Ves. & B. 354.

Penn v. Lord Baltimore, 1 Ves. sen. 444.

Lewis v. Baldwin, 11 Beav. 153; s. c. 17 Law J. Rep. (N.S.) Chanc. 377.

Mr. Mackeson.—The Court can now direct the service of its process abroad. If

the defendants complained of it, they should have moved to discharge it; the discretion of the Court would then have been appealed to: but if it is to have no effect, *cui bono* is the service? The demurrer admits the jurisdiction.

Innes v. Mitchell, 4 Drew. 57, 141; s. c.

1 De Gex & J. 423; 26 Law J. Rep. (N.S.) Chanc. 625, 710.

Whitmore v. Ryan, 4 Hare, 612; s. c.

15 Law J. Rep. (N.S.) Chanc. 232.

Maclean v. Dawson, 27 Beav. 25; s. c.

4 De Gex & J. 150; 28 Law J. Rep. (N.S.) Chanc. 742.

2 Will. 4. c. 33.

4 & 5 Will. 4. c. 82.

Consolidated Order X., Rule 7.

THE MASTER OF THE ROLLS.—The service of the order on the defendants out of the jurisdiction cannot affect their right to demur.

Mr. Mackeson.—The decree asked for was not against the real estate, which was clearly out of the jurisdiction of the Court. Such a decree the Court would not make; but the Court was asked to make a decree *in personam*, through which the trustee might be compelled to carry out the trusts of the deed.

THE MASTER OF THE ROLLS.—Suppose the Court were to make an order, and direct the trustee to sell the works, how could it enforce obedience?

Mr. Mackeson.—A decree in this Court would bind the defendant's conscience, and it would give a right to sue in the foreign Court. Their not being within the jurisdiction could not affect the case.

Roberdeau v. Rous, 1 Atk. 543.

Pike v. Hoare, Amb. 428.

Carteret v. Petty, 2 Swanst. 323, note (a).

Hendrick v. Wood, 30 Law J. Rep. (N.S.) Chanc. 583.

Harrison v. Gurney, 2 J. & W. 563.

Carron Co. v. MacLaren, 5 H.L. Cas. 416; s. c. 24 Law J. Rep. (N.S.) Chanc. 620.

Seton on Decrees, 2nd edit. 559.

3 *Burge on Colonial Law*, 398.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS (after stating the material facts) said—If this had been

an English concern and an English trust deed, I should not have hesitated to have made a decree in accordance with the prayer on proof of the allegations contained in the bill. But the point on which I reserved my judgment was whether in a case of this description I have any jurisdiction to entertain the suit. The principle which governs the cases of jurisdiction of this Court over parties to contracts, is analogous to that of the Civil law, which as far as I am aware has been adopted by all modern nations. They are described by all writers to consist of three circumstances, any one of which will give jurisdiction to the tribunals of the country to take cognizance of the matter. The first is the domicile of the defendant being within the jurisdiction of the Court. The second is the circumstance that the subject-matter in dispute is situated within the jurisdiction of the Court; and the third is, that the contract was entered into within the jurisdiction of the Court. By the word "jurisdiction" I mean territorial jurisdiction; the topographical limits within which the compulsory process of the Court operates to compel obedience to its orders and decrees. Unless the English law ascribes a more extended jurisdiction, or unless this has been conferred on the Court of Chancery by statute, it will be difficult to find the means of giving the jurisdiction sought by the plaintiff in the present case. The defendants are domiciled in Scotland. The subject-matter in controversy, or that relating to which the controversy arises, consists of ironworks and smelting-furnaces situate in Scotland, and the contract or deed of trust and arrangement which is sought to be enforced was made in Scotland, between Scottish persons. The inconvenience of undertaking to determine the matter in difference between the parties in such a state of things scarcely admits of over-statement. In the first place, the contract is a Scottish contract, which must therefore be construed and regulated by Scottish law. An English tribunal has no knowledge or cognizance of such law, except as a fact to be proved by evidence. This itself is a serious inconvenience. If a point of some nicety in the Scottish law should arise in the course of the case, how is this Court to decide that question with any satisfaction to itself?

The evidence would be, I assume, as it might be in a difficult point of English law, contradictory. How is this Court to determine to which of the witnesses greater weight is to be attributed, or upon whom the greater reliance is to be placed? It is but lately that, in *Norris v. Chambres* it appeared that a German Court of justice had to determine a question depending on English law: before that Court was produced in evidence the opinion, expressed judicially, of the Master of the Rolls for the time being, and the written and signed opinions of three of the most eminent English counsel practising then at the English bar, which opinions were in exact conflict with each other. If such a matter were to occur in this case with reference to Scottish law, how is this Court to act? It is true that this is an inconvenience which cannot always be avoided, and which must, in spite of every endeavour to the contrary, occur occasionally; but it is highly desirable not to multiply instances of such cases, or to run out of the way to find them. The inconvenience of dealing with this case does not stop here. The reason usually given why the domicile of the defendant points out the Court where he is to be sued, is the necessity of being able to call on the defendant to appear, and to compel him to perform the mandates of the Court. The want of this power would be most pointedly shewn in the present case. I assume that the plaintiff obtains a decree, with costs, against the defendant. How is the plaintiff to enforce it? Attachment, sequestration, and the like ordinary processes of this Court, here are out of the question. Not one of these has any efficacy, or could be enforced beyond the territorial boundary of the jurisdiction of the Court. The only mode suggested in which the decree could be enforced would be, to proceed on that decree in the Scottish Court as in the case of a foreign judgment. If I were to adopt this course, a more circuitous and a more inconvenient one could scarcely be adopted. It is admitted that the Scottish law must govern this case, and, consequently, in a suit to enforce a decree as a foreign judgment, the decision here would have to be reviewed, and the cause tried over again before the Scottish Court; whilst if this Court had refused to interfere in the

matter, there would have been but one set of proceedings and one decision, namely, that of the Scottish Court, which would have settled the whole matter.

The case of *Norris v. Chambres*, affirmed by the Lord Chancellor, has been much commented on as an authority on both sides, both for the plaintiff and for the defendant. But although it relates to the jurisdiction of this Court, it has but a very remote bearing on this case. That case may be stated thus: The owner of an estate in Germany entered into a contract to sell it to an Englishman, who advanced a large portion of the purchase-money upon it, and died. The owner of the estate in Germany annulled the contract, and sold it to another person. The representative of the original purchaser sought to establish a lien on the estate in the hands of the second purchaser for the amount of the purchase-money advanced by the first purchaser. The plaintiff and the defendant were both Englishmen, and both domiciled here; but it was held that this Court had no jurisdiction, where there was no privity between them to interfere in a question relating to immovable property lying out of the jurisdiction of the Court. The question of privity between the plaintiff and the defendant there was the more material, because, in the well-known case of *Penn v. Lord Baltimore*, it is decided that a contract between Englishmen in England may create a lien on immovable property of one of these parties situated out of the jurisdiction of the Court, which this Court will do all in its power to declare and enforce. But although the absence of privity between the plaintiff and the defendant disables the Court from interfering in that case, it does not therefore follow that this Court will interfere in every such case where there is a privity of contract between the plaintiff and the defendant. In *Norris v. Chambres* both the plaintiff and the defendant were domiciled in England, and yet the Court would not interfere; and the privity of contract spoken of had reference to a contract entered into in England between Englishmen; and it is by reason of the existence of such a contract that the decrees enforced in *Penn v. Lord Baltimore* and other cases of a similar character arose, namely, that as the Courts of Chancery act

in personam of the defendant, it may indirectly and by virtue of this power act upon his immovable property in a foreign country; but in those cases there was no question but that, as between the plaintiff and the defendant, this Court had full authority and power to act on the property of either or both within the jurisdiction. But this power and authority flowed from the circumstance that the contract was an English contract; that is, a contract entered into between Englishmen in England, relating to English affairs and to be performed in England. But it would be an unprecedented event in the records of this Court if two foreigners should enter into a contract relating to foreign affairs to be performed in their own country, that this Court would allow one of them to sue the other with reference to that contract before English tribunals. If a native of France entered into a contract with a French architect to build him a house in Paris on certain terms and conditions, it is not competent for one of those parties to that contract to sue the other before the tribunals of this country for a breach of the contract, or to enforce the performance of it; nor would it vary the case if the contract had been entered into in England during the temporary residence there of the parties to it, provided that the defendant was not domiciled here when the action was brought or the suit instituted against him. But if that be so, the present case presents still greater difficulty; for the defendants are not resident, even temporarily, within the jurisdiction of this Court. The subject-matter of the contract relates to the administration of a trust for the management and sale of immovable property situate out of the jurisdiction of this Court; and what is more, it arises out of a contract relating to foreign matters entered into by foreigners residing abroad, and subject to the laws of their own country. It is true that this country is Scotland, and that so far as allegiance goes to the Sovereign, and so far as political rights and duties are concerned, it is part of the same country as England; but for the present purpose, it is as much a foreign country as France, regulated by a distinct system of laws and a separate administration of justice.

This case, therefore, wants every one of

those requisites referred to as being the foundation on which the Court can properly exercise its jurisdiction: first, the defendants are not domiciled within the jurisdiction of the Court; secondly, the subject-matter on which the Court is to act is not situate within the limits of that jurisdiction; and, thirdly, the contract is not a contract to be performed within the jurisdiction of the Court. The *forum domicilii*, the *forum rei sitæ*, the *forum contractus*, are all wanting; there is no case or authority which would maintain such an exercise of the jurisdiction of this Court.

The only remaining point is to consider whether this power has been conferred on this Court by any statute. It is not asserted that this is done in express terms; but it is suggested that the acts which authorize the service of subpoenas on defendants residing out of the jurisdiction of the Court, virtually confer this power; that no distinction is made between one class of defendants and another; and that either the defendant so served must appear, or that an appearance will be entered for him, and a decree made against him in his absence; and that this gives the jurisdiction, and supersedes the necessity of having recourse to the *forum domicilii* of the defendant. In addition to this, it is contended that the defendant, if he contested the right of the Court to take cognizance of the matter, must, when served, move to discharge the order permitting him to be served, and that if he do not do so, he has omitted the proper time for taking this objection, and that he cannot afterwards raise the question by demurrer. Nothing, however, contained in the statutes relating to the service of subpoenas abroad has the effect of extending the jurisdiction of this Court. Before those acts the power of serving a subpoena on a defendant abroad existed, but it was simply useless, because, unless the defendant voluntarily appeared, no further step could be taken against him. Now, under these acts, an appearance may be entered for the defendant by the plaintiff, who may thereupon proceed to obtain against the defendant, in his absence, such a decree as the facts proved, or taken *pro confesso*, will justify; and the Court can then attach the person of the defendant if he should come within the jurisdiction, or sequester his

property if there be any which lies within the jurisdiction of the Court. But all questions of jurisdiction remain exactly on the same principles as they did before; and these acts do not, in any respect, operate otherwise than to prevent a defendant from using his foreign residence as the means of escaping to do justice in cases where he would be compelled to do so if he were resident within the jurisdiction.

In the present case, it cannot be put higher than if the plaintiff had served the defendant, when temporarily resident within the jurisdiction; and if so, the case of the plaintiff would not have been advanced or made more favourable than it is at present. Neither is it my opinion that the defendants are bound to move to discharge the order permitting them to be served abroad, or that if they omit to do so, they are precluded from raising the question by demurrer. Upon moving to discharge the order for service, there might arise much inconvenience from a conflict of affidavits, and I hardly know how these could be excluded; and if so, I might have to incur the anomaly of hearing the case on evidence on both sides in order to ascertain whether it ought to be allowed to proceed. But, however this may be, I am not aware of any statutory provision or any decision which draws a distinction between defendants served within and those served beyond the limits of the jurisdiction of the Court, as to the mode in which they may resist the relief sought by the plaintiff; still less can I discover any principle which should preclude a defendant, when served in a place beyond the jurisdiction, from demurring to the plaintiff's bill within the time prescribed by the rules of the Court. It is obvious that the defendant must have this liberty with regard to all the more ordinary causes of demurrer; and it would be a surprise to find it laid down by any decision of the Court of Chancery that a defendant served in a place beyond the jurisdiction of the Court might demur; because, on the face of this bill, the plaintiff had shewn no title to the relief he asked, or because it thereby appeared that his title was barred by lapse of time, or by some acts of his own, and that he could not demur on the ground that this Court was not the proper tribunal in which to try the

question. Observe to what this would lead. He might demur because it appeared on the face of the bill that the Court of Chancery was not the proper Court in which to sue him, if it appeared that his proper remedy was by action at law, and that, consequently, the Court to which he was amenable was one of the Courts of common law at Westminster Hall; but he could not demur if he contended that the only Court in which the plaintiff could sue was a Court situate out of England: that is, that he might demur, because the plaintiff's remedy was by action at law in the Queen's Bench, Common Pleas or Exchequer; but that he could not demur, because the plaintiff's remedy was by action of *declarator* in a Scotch Court; and yet such must be the result if the defendant be not at liberty to demur, on the ground that the Court has no jurisdiction to entertain the subject-matter of the suit.

Upon all these grounds, I am of opinion that the defendants are entitled to demur in the present case, and that their demurrer must be allowed (1).

LORDS JUSTICES. }
March 2, 3, 11. }

ENO v. TATAM.

Mortgage—Bequest of Personal Estate subject to the Payment of Testator's Debts—Exoneration of Mortgaged Estate—Statute 17 & 18 Vict. c. 113.

A bequest contained in a will, dated in 1857, of all a testator's personal estate, "subject to the payment of his debts," renders such personal estate primarily liable for the payment of a sum of money, with which the testator had charged it by way of mortgage; notwithstanding the statute 17 & 18 Vict. c. 113. (commonly called "*Locke King's Act*,") which makes the mortgaged lands primarily liable to bear mortgage debts; the direction to pay debts out of a particular fund amounting to a sufficient indication of a "contrary or other intention" within the meaning of the act.

Dictum of Lord Campbell in *Woolstencroft v. Woolstencroft* (1) explained by Lord Justice Turner.

This was an appeal from a decree made by Vice Chancellor Stuart, reported *ante*, p. 159.

The testator in the cause, Hildred Eno, by his will, dated the 11th of November 1857, said: "I appoint my wife, Harriett Eno, to be executrix, and my friends, William Sykes and Isaac Sykes, to be trustees. I give my household goods, live and dead stock, and other my personal estate and effects, whatsoever and wheresoever, unto my wife absolutely, subject to the payment of my debts, funeral and testamentary expenses."

The other facts appear in the former report, except that it was shewn that the personal estate of the testator, after payment of his debts, except the 1,700*l.* mortgage debt, amounted to about 1,600*l.*

The Vice Chancellor having decided that the personal estate was primarily liable to the payment of the mortgage debt, the defendant, Mr. Tatam, appealed.

Mr. Bacon and Mr. Bedwell appeared for the appellant.

Mr. Schomberg, for the plaintiff.

Mr. Martindale, for Mrs. Tatam.

In addition to the cases cited in the Court below, the following were referred to:

Greated v. Greated, 26 Beav. 621; s.c.

28 Law J. Rep. (N.S.) Chanc. 756.

Pembroke v. Friend, 1 Jo. & H. 132.

Stone v. Parker, 1 Dr. & Sm. 212; s.c.

29 Law J. Rep. (N.S.) Chanc. 874.

Allen v. Allen, 30 Beav. 395; s.c. 31

Law J. Rep. (N.S.) Chanc. 442.

LORD JUSTICE TURNER, (March 11), after entering into a detail of the facts, proceeded to say, that the act did not apply to a case where the person seized should by his will or deed have signified a contrary or other intention, and that such contrary or other intention was to be collected according to the usual mode of construing wills and similar instruments. In the present case the testator had appointed his wife his executrix, and had given her his personal estate, subject to the payment of

(1) An appeal to the Lord Chancellor (the hearing of which will be reported *infra*) was dismissed.

(1) 2 D. F. & J. 350; s.c. 30 Law J. Rep. (N.S.) Chanc. 22.

his debts, and had devised his real estates in a manner which did not in any way point to the mortgage debt being paid out of the mortgaged estate. The trustees of the real estate were to let the property, were to apply the rents for the maintenance of his children (after his wife's death), and in a certain event to sell and hold the proceeds upon certain trusts. It was plain that the testator intended his debts to be paid out of his personal estate, and there did not appear to be any intention to distinguish the mortgage debts from the other debts. It had been suggested by the counsel for the appellants that a mortgage debt ought not to be considered as a debt; but it was a general rule of construction that a testator's intention was to be collected from the words he had used according to their ordinary meaning. If the act had provided that mortgage debts were in all cases to be paid out of the mortgaged estates, independently of a testator's intention, then this contention might have been well founded. It had been said that mortgage-debts were not usually spoken of as debts, but to accede to this would be to contravene the whole practice of the Court. The appellant's counsel had also relied upon the dictum of Lord Campbell in *Woolstencroft v. Woolstencroft*, that the rule which had been before observed, with respect to exempting personal estate, should now be observed with respect to exempting the mortgaged lands from the payment of the mortgage money. This probably meant no more than that the intention must be clearly proved. If Lord Campbell had intended to say, that as before the act it had been necessary to shew an intention not only to charge the mortgaged estate, but also to discharge the personalty, so now it was necessary to shew an intention not only that another fund should be charged, but also that the mortgaged estate should be discharged, he (Lord Justice Turner) said that he was not prepared to follow him. In order to take a case out of the act it was sufficient to signify "a contrary or other intention," and this destroyed the analogy between the two cases. In the one case the intention to be proved was contrary to a settled rule of law; in the other it was only contrary to a statutory enactment which was expressly made to depend upon the intention. Of

the authorities referred to during the argument, some had no bearing upon the present case; in the others the decisions had gone in different ways. His opinion agreed with those cases in which it had been decided that the mortgaged estate was not liable where there was a direction that the debt should be paid out of some other fund.

LORD JUSTICE KNIGHT BRUCE added, that the appellant's contention would render superfluous the words "subject to the payment of my debts, funeral and testamentary expenses" which the will contained; but without laying stress upon this, and looking at the whole contents of the will and codicil, it was, in his opinion, the testator's intention that the mortgage debt should be paid out of the personal estate (2).

(2) As Lord Justice Knight Bruce refers to the "whole contents of the will and codicil," they are inserted here *in extenso*:

"I appoint my wife Harriet Eno to be executrix, and my friends William Sykes, of the parish of Boston, and Isaac Sykes, of the parish of Skirbeck, farmer, to be trustees. I give my household goods, live and dead stock, and other my personal estate and effects whatsoever and wheresoever, unto my wife, absolutely, subject to the payment of my debts, funeral and testamentary expenses. I give all my real estates unto the said trustees, upon and for the following trusts and purposes: upon trust to let the same to the best advantage either from year to year or for a term of (not exceeding) seven years, provided my wife so long live. And to stand possessed of the rents and profits (after upholding the buildings and fences in tenantable repair and condition, and keeping the same insured against fire), in trust for the absolute benefit of my wife during her life, or otherwise permit her, in their discretion, to receive and take the rents and profits. And on the death of my wife upon trust to absolutely sell my real estates to the best advantage, either by public auction or private contract, and to buy in the same or any part thereof at any auction, and to rescind or vary the terms of any contract for sale, and re-sell the same estates without being answerable for any loss or diminution in price. And to convey and assure the said estates to the purchaser or respective purchasers thereof, who, I declare, shall be exonerated from all responsibility on taking a receipt or receipts for the sale money or monies from my trustees or the survivor

ROMILLY, M.R. }

Dec. 18; }

Jan. 13. }

CLARK v. MALPAS.

Costs — Taxation — Allowance between Party and Party.

At the hearing a decree was made in favour of the plaintiff, with costs. Upon taxation of the costs as between party and party, the expense of bringing the defendant's witnesses to London to be cross-examined in court, though plaintiff's counsel, in the exercise of their discretion, did not think fit to cross-examine them, and the costs of a shorthand-writer for taking notes of the examination, were allowed.

But the expenses and costs of attendance in court of the country solicitor, whose agent had conducted the cause, and the costs of

of them, his executors or administrators. And I will and declare that the trustees shall stand possessed of the sale monies aforesaid (after deducting all their incurred cost and expenses) upon trust" (then followed trusts for the benefit of the testator's brothers and sisters and nephews and nieces, a devise of trust and mortgage estates, and a power to appoint new trustees).

The codicil was this: "Whereas since the making of my will my wife has borne me a son whom I have called Hildred Allias, and I am wishful to make a provision for him, also for any after-born child or children. Now, I hereby will and declare that all my real estates shall, from and after the decease of my wife, be held by the trustees of my will, in trust for my present and every future child absolutely; if more than one, to take as tenants in common, and that the trusts for absolute sale and conveyance of the said estates and application of the sale money, shall arise and take effect only in the event of every child of mine dying under twenty-one years of age, without leaving lawful issue. And I empower the said trustees, after my wife's decease, to apply the annual income of my said estates for the maintenance and education of all my children in such a way as they, in their discretion, shall think proper, leaving my wife to bring them up in the best manner she can out of the provision made for her in my said will, to which end I appoint her to be guardian of the children; and on her death I appoint the said trustees to that office. And I hereby ratify and confirm my will in every respect not hereby varied or altered. Witness my hand this 6th of May 1859."

NEW SERIES, 32.—CHANC.

enrolling the decree made in the cause, were not allowed.

John Clark, as the heir-at-law of Josiah Gallimore, instituted this suit against Charles Malpas, and obtained a decree setting aside a purchase which the defendant claimed to have made from Josiah Gallimore in fee of three houses in Mill Lane, Tunstall, in the Staffordshire Potteries. The defendant also was directed to pay the costs.

It appeared that after the replication in the suit had been filed differences arose in respect of the evidence and the cross-examination of witnesses.

Permission was then obtained to cross-examine in open court the witnesses on both sides who had made affidavits. At the hearing two of the plaintiff's witnesses were cross-examined on behalf of the defendant, and they were re-examined on behalf of the plaintiff.

The defendant's witnesses were summoned by the plaintiff and attended, but they were not cross-examined.

A shorthand-writer's note of the cross-examination and re-examination of the witnesses examined was taken at the suggestion of the Court.

The plaintiff's solicitor, whose London agent had conducted the suit, came up from the country, that he might be present at the cross-examination and re-examination of the plaintiff's witnesses, and remained for several days until the cause was heard.

The decree made in the cause had also been enrolled.

Upon the taxation of costs as between party and party, the Taxing Master disallowed the expenses of summoning and bringing up the defendant's witnesses, the expenses of the journey of the country solicitor to town and his attendance at the hearing, the shorthand-writer's charges for taking notes of the evidence, and the costs of enrolling the decree.

The plaintiff now moved that the Taxing Master might review his report.

Mr. Selwyn and Mr. Jessel, for the plaintiff.

—The defendant's witnesses were summoned to attend *bonâ fide*; but counsel, in their discretion, had not thought fit to cross-examine them. Their attendance was reasonable and necessary. Upon the examination of country witnesses, the London agent cannot

be assumed to know the witnesses or the facts they can depose to. The country solicitor's attendance therefore became necessary; facts might arise which he alone could explain, and suggestions might have to be made which he alone could supply. The Court, in its discretion, suggested the propriety of the notes; they gave facility to explanation, and prevented dispute—*Malins v. Price* (1). The enrolment of the decree was the completion of the plaintiff's title; it was not complete till of record. The Taxing Master ought to have allowed the whole of these costs—2 *Daniel's Practice*, 1077, 3rd edit. (Headlam).

Mr. Southgate, for the defendant.—The omission to cross-examine the defendant's witnesses shewed that their attendance was unnecessary; it was an abandonment of the order to bring them up, and no right to costs could follow. A town agent must be considered competent to conduct a cross-examination of witnesses, though they were from the country. The defendant, therefore, ought not to be charged with the expenses of the country solicitor—a double expense—*Wyatt's Prac. Reg.* 146. The shorthand - writer's notes were, no doubt, proper, as they were taken on a suggestion of the Court. The enrolment of a decree was rarely resorted to; the only object of that step being to prevent an appeal to the Lord Chancellor. It was of course open for a party in whose favour a decree was made to enrol it, but it was not necessary to do so, and the enrolment, if made, must be at his cost; and on the taxation between party and party it was not usual to allow the costs of an enrolment. It was no part of the plaintiff's title, as the defendant was bound to re-convey the estate—*Clark v. Malpas* (2).

The MASTER OF THE ROLLS said the plaintiff was entitled to the costs of bringing the defendant's witnesses up for cross-examination. The defendant could not be allowed to say that the costs ought not to be allowed merely because they had not been cross-examined; the plaintiff's solicitor had acted with judgment. The Taxing Master could not know whether the cross-examination was *bonâ fide* or not. If counsel could have anticipated this

difficulty, the witnesses might have been put into the box; and had the simplest question then been asked, the costs of bringing them up must have been allowed. It was frequently a case of the greatest discretion and importance to say whether or not there should be a cross-examination of witnesses. The Court, under the new practice, dealt with each case that it might do complete justice between the parties; if, therefore, it was considered necessary to bring the witnesses up for cross-examination, and the costs were directed to follow the event, they would include the expenses of all the witnesses who, on reasonable grounds, were brought up for cross-examination, even though it might not have been thought necessary to call them. But if there was proof that they were brought up merely to multiply costs, such costs would probably be disallowed. The expenses of witnesses were usually costs to which the party succeeding was entitled; he must, therefore, receive them. It was impossible to allow costs of the attendance of the country solicitor; the expense could only be looked at as if the plaintiff had thought it expedient to give counsel a special retainer to attend on his behalf in court. He might think it essential to the success of his cause, but he could not charge the expense against the other party. As therefore the plaintiff had chosen to bring the country solicitor to London under the impression that the requisitions could not be made through correspondence with sufficient distinctness, he must himself bear the expense. The Court itself had suggested the expediency of having shorthand notes of the evidence. These costs must be allowed; they were incidental to an examination in open court; they were taken by persons quite unbiassed, and were convenient to refer to, and the costs in all cases ought to be allowed, but they must be confined to one copy only. The question of enrolment must be postponed, that the practice may be inquired into.

The MASTER OF THE ROLLS.—It is not the practice to allow the costs of enrolling a decree on the taxation of costs between party and party; this, upon consideration, appears correct; and the practice ought not to be altered: the costs of enrolling the decree, therefore, cannot be allowed.

(1) 1 Ph. 590.

(2) 31 Law J. Rep. (N.S.) Chanc. 696.

WESTBURY, L.C. }
 Jan. 23, 24; } LACON v. LIFFEN.
 Feb. 21. }

Bankruptcy—Bill of Sale to secure Past Debt and Future Advances.

*Traders having overdrawn their account at the bank, and being hopelessly insolvent, gave to the bankers a bill of sale comprising their whole property to secure the existing debt and future advances, with a stipulation that no further advances were to be made until the debt was reduced to 300*l*. Two days afterwards they sent letters to their creditors offering a composition of 10*s*. in the pound:—Held, affirming the decision of one of the Vice Chancellors, that the bill of sale was an act of bankruptcy.*

This was an appeal, by the plaintiffs, from an order of Vice Chancellor Stuart, reported *ante*, p. 25, dismissing the bill so far as it sought relief in respect of a certain bill of sale, with costs, on the ground that such bill of sale was an act of bankruptcy.

Mr. Malins and Mr. W. H. Bennet, for the plaintiffs, referred to

Worseley v. De Mattos, 1 Burr. 467.

Graham v. Chapman, 12 Com. B. Rep.

81; s. c. 21 Law J. Rep. (N.S.) C.P. 173.

Rust v. Cooper, Cowp. 629.

Thompson v. Freeman, 1 Term Rep. 155.

Whitwell v. Thompson, 1 Esp. 67.

Hutton v. Cruttwell, 1 E. & B. 15; s. c.

22 Law J. Rep. (N.S.) Q.B. 78.

Bittleston v. Cooke, 6 Ibid. 296; s. c. 25

Law J. Rep. (N.S.) Q.B. 281.

Whitmore v. Claridge, 31 Law J. Rep.

(N.S.) Q.B. 141.

Carr v. Burdiss, 1 Cr. M. & R. 443;

s. c. 4 Law J. Rep. (N.S.) Exch. 60.

Lindon v. Sharp, 6 Man. & G. 895;

s. c. 13 Law J. Rep. (N.S.) C.P. 67.

Mr. Bacon and Mr. G. L. Russell, for the defendants, the respondents, were not called on.

The LORD CHANCELLOR.—The bankrupts in this case were fishmongers at Lowestoft, who some time ago had opened an account with the plaintiffs, who were bankers at the same place. The account was opened on

an engagement that they should be at liberty to overdraw it to the extent of 300*l*.; and, undoubtedly, on the 23rd of December 1858, they had overdrawn the account to an amount exceeding 500*l*. The bankers were alarmed and determined to make no further advances; and on the 22nd of December, when two cheques drawn by the bankrupts, amounting to 112*l*. 11*s*. 3*d*., were presented at the bank for payment, they declined to pay them. A meeting took place, and the bankrupts paid into the bank a sum of money amounting to 57*l*. or 58*l*., whereupon the bankers agreed to pay, and did pay, both cheques; it being agreed that there should be a general assignment of all the stock-in-trade and property of the bankrupts given to the bankers by a bill of sale, to which was to be added a mortgage of some fishing-boats, which, independently of the property comprised in the bill of sale, comprised, as has been admitted at the bar, the whole property of the bankrupts. Now the bankrupts at this time, the 22nd of December, were in a hopeless state of insolvency; whether that was known to the bankers or not is, for the purpose of the law, so far as I have here to determine it, immaterial; but there can be little doubt from the circumstances stated in the affidavits that the condition of the bankrupts was well known. The bill of sale was accordingly given, and was given with a contingent stipulation that the bankrupts were not to expect or look for any further advances to be made to them by the bankers until the debt of 578*l*. had been reduced to 300*l*., and there were no possible means of reducing the debt except by selling up these men, realizing the whole of the property comprised in the bill of sale, which necessarily would instantly put an end to their trade and business, and stripping them of the whole of their property. Well, now, after this bill of sale was given, on the 24th of December, when the ink was scarcely dry on the bill of sale, the bankrupts sent letters to all their creditors, offering a composition of 10*s*. in the pound. A more palpable proof of gross insolvency can hardly be conceived; but if a man makes a conveyance of his estate knowing himself to be insolvent and knowing himself to be in a situation in which no prudent

man can expect any other result than bankruptcy to follow such a course, the conveyance is made undoubtedly in contemplation of bankruptcy, and then the conveyance, whatever be its merits, undoubtedly is void in the eye of the law and becomes an act of bankruptcy. The debt of 578*l.* secured by the bill of sale on the 22nd of December was made up of the existing debt and the additional sum of money which they then paid ; that security, therefore, was taken upon the very face of it for an existing debt, and not only did it contain no agreement to advance money by the bankers to the bankrupts, but it was accompanied, as I have already observed, by a declaration on the part of the bankers that they would not advance any more money until the debt was reduced to 300*l.*

Now that the bank was well aware of the condition of these men is shewn from the circumstance that, without any indulgence in point of time, at that season of the year, the whole of their property is so taken that I find it all reduced into money, and actually entered as having been received by the bank from the auctioneer, I think on the 3rd of January, for I find in the books an entry of 223*l.* on that day, and a subsequent entry of a later date of further proceeds. Well now, how stands the law ? There are a variety of aspects, in any one of which this transaction must be taken as an act of bankruptcy. First of all, the law has been well settled ever since the 13 Eliz. c. 5. that if there be a voluntary conveyance of property by a man who is indebted at the time, which conveyance would have the effect of delaying or defeating the payment of his creditors, such conveyance is stamped by that statute with the character of fraud. The law every way says that a conveyance for an antecedent debt is a voluntary conveyance ; it is a conveyance without any valuable consideration moving at the time. But a voluntary conveyance becomes a fraudulent conveyance ; and then the acts relating to bankruptcy come in, and declare that if a man makes a fraudulent conveyance of the whole or any part of his property he commits an act of bankruptcy. Again : if a man hands over property for payment of his creditors, except under pressure, he makes

a voluntary preference, and that is an act of bankruptcy. There can be no doubt all these conditions are fulfilled in the present case. There can be no earthly doubt the whole thing was a scheme formed at the time by the bankers, who found themselves in this situation of peril, and who took all that they could get in the hope of its standing good. But they must have known, and the bankrupts must have known, that after they had made the conveyance of the property any creditor who was offered 10*s.* in the pound would exclaim against this transaction, and would of necessity bring it to be questioned in a court of law. The whole thing, therefore, is pregnant with proof that this transaction, as each party must have well known, was done in contemplation of bankruptcy. Now, there can be no doubt as to this view of the law being correct ; and I have not the least doubt in assenting to the passages which have been read from the judgment delivered by Lord Campbell in *Hutton v. Cruttwell*, and the judgment delivered by the Court of Queen's Bench the other day in *Bittleston v. Cooke*, as correct representations of the bankrupt law ; and I think this deed would be an act of bankruptcy even if there were not the strange circumstances to which I have referred, and if it had been treated only as a voluntary conveyance made for an antecedent debt, but which must be accompanied with the necessary result of defeating or delaying the other creditors. It is impossible, therefore, to say that this was not an act of bankruptcy. The Vice Chancellor has arrived at a perfectly correct conclusion, and the petition of appeal must be dismissed.

But then it is said, that granting it to be an act of bankruptcy, the matter has been inquired into and compromised or settled in a Court of Bankruptcy. I find no such thing done. What was done in the Court of Bankruptcy—not that it would at all interfere with the equity of this transaction—was this : after the bankers had received the produce of their bill of sale and entered it in their banking-book they made up their account, and giving credit for these proceeds and adding the whole in their favour, the bankrupts were then indebted to them in a sum of 349*l.* 3*s.* 8*d.*, and then they still

held as security for that debt the fishing-vessels comprised in the mortgage or the alleged mortgage. Now, what they did in the Court of Bankruptcy was to inquire into the transaction of the mortgage and the value of the fishing-vessels. But it must be understood that when the Court of Bankruptcy, for the purpose of ascertaining the amount of proof, went into the mortgage it did not involve or imply for a single moment any recognition as to the legal value of the security. It was only for the purpose of ascertaining the amount to be proved; but whether the security be legal or not is a point left entirely untouched, or, at all events, not decided by reason of proof in the matter. I am not, therefore, for a moment, of opinion that the question of the invalidity of the bill of sale and the right of the assignees to recover the money, are in the smallest degree affected by what took place in the matter of proof in the Court of Bankruptcy, and I have no hesitation in declaring that that was an act of bankruptcy. As the parties have placed the matter in my hands to deal with it as the jury would deal with it if the action of trover had been tried, and to decide the amount to be paid by the plaintiffs to the assignees, I will hear evidence as to the real value of the property thus seized and hastily sold. I am by no means disposed to accept the sum of money actually realized by the sale as being the real value of the goods.

His LORDSHIP (Feb. 21) made the following order: Reverse the decree of the Vice Chancellor so far as relates to costs; and the plaintiffs offering to pay 450*l.* to the defendants (the assignees) as the full value of the goods and effects taken under the bill of sale in the pleadings mentioned, let such sum be so paid by them. No order as to costs of the suit or of the appeal. Deposit to be returned to the plaintiffs. Liberty to the plaintiffs to increase the proof of their debt under the bankruptcy by the said sum of 450*l.*

STUART, V.C. }
Feb. 11, 12, } PRIDEAUX v. LONSDALE.
13, 14, 16; }
March 20. }

Baron and Feme—Voluntary Settlement by Wife before Marriage without Knowledge of Husband pending Treaty for Marriage—Costs—Acquiescence.

A lady, three months before her marriage, but after she was engaged to be married to her future husband, executed a voluntary settlement of a fund upon herself for life, and after her death upon such trusts as she should by deed or will appoint, and in default of appointment upon trust for such persons as under the Statutes of Distribution would be entitled thereto at her death, as if she had died possessed thereof intestate and without having been married. The settlement also empowered the trustees, notwithstanding the trusts aforesaid, to transfer the trust fund as the lady should, whether covert or sole, by request in writing, direct. The husband, prior to the marriage, was told by the lady that she had executed a document affecting the above fund, but he did not then make any inquiries as to the nature of such document. The lady died about two years and a half after the marriage, without having made any appointment or disposition of the fund; and the husband, shortly after her death, for the first time ascertained that the settlement was to the effect above stated. The husband thereupon filed a bill to have the fund transferred to him. It appeared that his wife, during her lifetime, had stated to him that she had been informed by her solicitor that he would be entitled to the fund if he survived her:—Held, that, as the information which the husband received as to the nature and effect of the settlement was incorrect, he was entitled to have it declared that it was invalid, and ought to be set aside.

A law-stationer, who was an executor of the person who had bequeathed the above fund to the lady, advised and framed the settlement, and although he was not a party thereto, he was made a defendant to the suit:—Held, that, as his conduct had been mainly the occasion of the litigation, the husband was entitled to a decree against him, together with the other defendants, with costs.

Acquiescence without full and sufficient knowledge and understanding of the circumstances of the case, in respect of which such acquiescence is alleged to be a bar, cannot be of any avail.

The case made by the bill, the statements in which were supported by the plaintiff's affidavit, was as follows.

In April 1859 the plaintiff was and for more than eighteen months prior thereto had been engaged to be married to his late wife, Lucy Mills Prideaux.

Early in the above month he was informed by her that there had been left to her by the late Mrs. Lydia Maria Child a legacy of 1,000*l.*; and they thereupon agreed to be married in the course of the ensuing summer.

In the ensuing month of May his late wife informed him that the legacy had been invested in the funds; and that she had signed some document, the effect of which was, as she had been told by Mr. Richard Moulton, who was a law-stationer and was one of the executors of Mrs. Child, to prevent her brothers, the defendants, Richard Maitland Lonsdale, Charles Lonsdale and William James Lonsdale, from troubling her for money, and her spending it without the intervention of her uncle, Christopher Lonsdale, the other of the executors of Mrs. Child and the father of the first defendant, Robert Edward Lonsdale.

The plaintiff was on terms of intimacy with his intended wife's brothers, and, not wishing to interfere between her and them, made no inquiries of her about the matter.

The plaintiff was married to his late wife on the 16th of July 1859, and prior to his marriage he made no inquiries respecting the document which she had mentioned to him as having signed as before stated.

In October 1859, the plaintiff went with his late wife to the Bank of England to receive the dividends on the above legacy, when he for the first time ascertained that it had been invested in the purchase of 1,101*l.* 18*s.* 3*d.* 3*l.* per cent. Bank annuities, in the names of his late wife and of the defendants Robert Edward Lonsdale and Richard Maitland Mills.

The plaintiff thereupon made an objection

to his late wife respecting the mode of investment of the above sum, and she shortly afterwards told him that she had called on Mr. Yetts (her solicitor prior to her marriage), with the view of getting it altered, and that she had asked him to make a will for her, giving the stock to her husband; but Mr. Yetts told her it was not necessary for her to make such a will, as, of course, the stock would be his at her death, if he survived her.

The plaintiff was satisfied with that representation, and at that time made no further inquiry in the matter.

On the 30th of January 1862, Mrs. Prideaux died, and shortly after her death the plaintiff obtained a copy of the document which his late wife had signed prior to her marriage. That document was an indenture dated the 11th of May 1859, and made between Lucy Mills Lonsdale, spinster, (afterwards the plaintiff's wife Lucy Mills Prideaux) of the one part, and Robert Edward Lonsdale and Richard Maitland Mills of the other part; and after reciting (among other things) that Lucy Mills Lonsdale had then lately transferred into the joint names of herself and the said Robert Edward Lonsdale and Richard Maitland Mills the sum of 1,101*l.* 18*s.* 3*d.* 3*l.* per cent. Bank annuities, and that the same was then standing in their names, it was witnessed that L. M. Lonsdale, R. E. Lonsdale and R. M. Mills should stand possessed of the sum of 1,101*l.* 18*s.* 3*d.* 3*l.* per cent. Bank annuities, and the interest and dividends thereof, upon trust to permit L. M. Lonsdale during her life to receive the same, and after her death upon such trusts as L. M. Lonsdale should, notwithstanding coverture, by deed, will or codicil, appoint, and in default of such appointment in trust for such person or persons as under the Statutes for the Distribution of the Effects of Intestates would have become entitled thereto at the decease of L. M. Lonsdale, if she had died possessed thereof intestate and without having been married, such persons, if more than one, to take as tenants in common in the shares to which they would be entitled under the same statutes. And it was thereby declared that notwithstanding the trusts aforesaid, R. E. Lonsdale and R. M. Mills, on any previous request in writing for that purpose

by L. M. Lonsdale, and whether she should be covert or sole, should join with her in transferring or disposing of all or any part of the trust premises to such person or persons, and in such manner as she should by request in writing appoint.

Richard Moulton attested the signature of L. M. Lonsdale to the above deed.

The bill alleged that the plaintiff, until after the death of his late wife, was wholly ignorant of the existence of the deed of the 11th of May 1859.

The deed was prepared and engrossed by Richard Moulton.

The bill also alleged that the plaintiff's late wife was at the date of the above deed under the influence of her uncle Christopher Lonsdale and Richard Moulton in all matters relating to her interests under Mrs. Child's will; that the obtaining the execution of the above settlement by the plaintiff's late wife was an improper exercise of such influence over her on the part of Christopher Lonsdale and Richard Moulton, and a fraud upon the then inchoate marital rights of the plaintiff; and that the plaintiff's late wife was when she executed the settlement without any legal adviser and wholly inexperienced in business.

The recital in the settlement that the plaintiff's late wife had transferred the sum of stock therein mentioned into the names of herself and R. E. Lonsdale and R. M. Mills, was incorrect. Such stock never stood in the name of the plaintiff's late wife. It was standing in the name of Mrs. Child at her death, and was transferred into the names of L. M. Lonsdale, R. E. Lonsdale and R. M. Mills by Christopher Lonsdale and Richard Moulton, the executors of Mrs. Child.

The above-mentioned sum of stock was claimed under the trusts of the settlement by Richard Maitland Lonsdale, Charles Lonsdale and William James Lonsdale, the brothers of the plaintiff's late wife; and in consequence of such claim the defendants Robert Edward Lonsdale and Richard Maitland Mills declined to transfer it to the plaintiff, who had taken out letters of administration to his late wife.

The bill prayed, 1. That it might be declared that the indenture of the 11th of May 1859 ought to be delivered up by the defendants R. E. Lonsdale and R. M. Mills

to be cancelled, and that the same might be decreed accordingly; 2. That it might be declared that the transfer of the above sum of stock by the defendant Moulton into the names of L. M. Lonsdale, R. E. Lonsdale and R. M. Mills was, under the circumstances, a breach of trust on his part; 3. That the defendants R. E. Lonsdale and R. M. Mills might be deemed to transfer into the plaintiff's name the said sum of 1,101*l.* 18*s.* 3*d.* 3*l.* per cent. Bank annuities, or a like sum of stock, and that the several defendants other than the trustees of the deed of the 11th of May 1859, might be ordered to pay the costs of the suit.

The late Mrs. Prideaux's three brothers, who claimed the fund in settlement, said in their answer, that they did not believe that the plaintiff was in April 1859, or had been for more than eighteen months prior thereto, engaged to be married, and that it was not the fact that they were known to be engaged persons, inasmuch as their marriage was a surprise to all the friends of the plaintiff's late wife.

Moulton also in his answer said, that he first heard that the plaintiff and his late wife were going to be married about a fortnight before the marriage took place, and he had no other knowledge of the fact. He and Christopher Lonsdale, on or about the 28th of April 1859, suggested to the late Mrs. Prideaux, then Miss Lonsdale, that a deed or some such document as the settlement of the 11th of May 1859 should be executed by her. On or about the 30th of April 1839 Mrs. Prideaux asked Moulton to prepare a proper deed. She gave him oral instructions for that purpose, and he made a memorandum of such instructions in writing and sent them to a solicitor, who laid them before counsel to prepare a draft in accordance with them. Counsel thereupon prepared a draft, but Moulton said that as the draft so prepared did not accord with the instructions, he altered it into the form of the indenture of the 11th of May 1859, the effect of which has been before stated, and had the same engrossed. He believed the plaintiff's late wife was not advised by any independent solicitor on the occasion of her executing such document, and that she was never furnished with a copy or abstract of it, but that she

was perfectly acquainted with her powers under it and the effect of it.

The plaintiff's solicitor, in his affidavit, said that after Mrs. Prideaux's death Moulton had told him that the object of the deed of the 11th of May 1859 was to prevent Mrs. Prideaux's brothers from getting the money which was the subject of it.

The cause now came on to be heard upon motion for a decree.

Christopher Lonsdale was still alive; but he was not made a party to the suit, nor had he been examined as a witness on either side.

Mr. Bacon and *Mr. Batten*, for the plaintiff. — Although Mrs. Prideaux had communicated to her husband that she had executed some document affecting the property in question, he had been misinformed as to its exact nature. He was told by his wife that his right by survivorship would be unaffected by it; whereas not only was that not the case, but even if there had been children of her marriage with the plaintiff, such children would have been excluded unless she had made an appointment in their favour. The husband could not be said to have acquiesced in the deed, inasmuch as he had never been informed prior to his wife's death that he had no interest under it; and his conduct could not, therefore, be held to defeat his rights. It was here shewn that at the date of the settlement there was existing an actual treaty for marriage; that the lady executed the deed under a misapprehension as to the effect it would have in defeating her intended husband's rights, and that he was never before her death made acquainted with its true nature. Under these circumstances, the plaintiff was entitled to a decree.

They referred to—

The Countess of Strathmore v. Bowes,
1 Ves. jun. 22–28.

Goddard v. Snow, 1 Russ. 485.

Watt v. Grove, 2 Sch. & Lef. 503.

Burnham v. Bennett, 2 Coll. 254.

Taylor v. Pugh, 1 Hare, 608; s. c. 12
Law J. Rep. (N.S.) Chanc. 73.

Levellin v. Cobbald, 1 Sm. & G. 376.

Mr. Martindale, for the trustees.

Mr. Malins and *Mr. Fooks*, for the defendants, the Messrs. Lonsdale, the brothers of the plaintiff's late wife.—In order

to entitle the plaintiff to relief, the evidence must shew, first, that there was an actual contract of marriage existing at the date of the settlement; secondly, that the lady executed the settlement in contemplation of the future marriage; and, thirdly, that she, before marriage, concealed it from her husband — *Goddard v. Snow*. The evidence failed to establish the first of these requisites. With reference to the second, the wife had an absolute control over the fund; and as to the third, the husband himself admitted that his wife had told him of the settlement. He knew of the mode in which the fund was invested, and his conduct shewed that he had recognized the settlement and acquiesced in it.

They referred to—

Maber v. Hobbs, 2 You. & C. Exch. 317;
s. c. 6 Law J. Rep. (N.S.) Exch.
Eq. 12.

England v. Downs, 2 Beav. 522; s. c.
9 Law J. Rep. (N.S.) Chanc. 313.

Wrigley v. Swainson, 3 De Gex & Sm.
458.

St. George v. Wake, 1 Myl. & K. 610;
s. c. Coop., t. Brough. 129.

Loader v. Clarke, 2 Mac. & G. 382.

Mr. Southgate and *Mr. Cracknall*, for Moulton.—The plaintiff could not obtain a decree against Moulton alone as for a breach of trust; for to such relief Christopher Lonsdale was a necessary party. Then, if Moulton were only an agent, he could not be made a party, except on the ground of fraud.—

Le Texier v. the Margravine of Anspach,
15 Ves. 159.

Marshall v. Stadden, 7 Hare, 442; s. c.
19 Law J. Rep. (N.S.) Chanc. 57.

Reynell v. Sprye, 8 Ibid. 271.

Attwood v. Small, 6 Cl. & F. 352.

In order to entitle the plaintiff to a decree against Moulton, it ought to be shewn that he knew of the marriage at the time of the settlement, and thereby intended to exclude the plaintiff's marital rights. This the evidence failed to establish. The evidence only went to shew that Moulton had added to the ultimate limitation the words "without having been married," and the husband would have been equally excluded if those words had not been inserted—2 *Jarman on Wills*, 111.

Mr. Bacon, in reply.

STUART, V.C. (March 20.)—The plaintiff seeks by this suit to set aside a settlement made by his wife after her engagement to marry him. He was not a party to the settlement, and he asks relief on the ground that it has defrauded him of her personal property, to which, by his marital right, he was entitled.

It has been argued, that because the husband was told before the marriage that the lady had executed some instrument affecting the property in question, he was bound to inquire into the nature of the instrument, and is therefore fastened with a notice of its contents, and is bound by acquiescence, so as to have lost any right to set it aside.

It is, however, impossible to apply the doctrine of constructive notice to a case of this kind. The information which the plaintiff received as to the nature and effect of the instrument was incorrect. Suppression of the truth, or misrepresentation of a material fact, will vitiate any contract or gift, the validity of which depends upon the truth and accuracy of the representation on which it is made.

Acquiescence without full and sufficient knowledge and understanding of the real nature and effect of the instrument can be of no avail.

It appears from the evidence that the plaintiff did not know or understand the real nature and effect of the instrument at any time before the death of his wife; and it also appears that the wife herself never perfectly understood the effect of that ultimate trust which deprived the plaintiff of his marital right. Nor is there anything to shew that persons who under that ultimate trust now claim to be entitled to the property were understood or intended by the lady to be objects of her bounty to the exclusion of the rights of her husband.

This ultimate trust could not have prevailed against a child of the marriage, and it is not easy to see how the fact that there has been no child of the marriage can make such a trust in favour of mere volunteers valid against the surviving husband.

There must be a decree declaring that the settlement is invalid and ought to be delivered up to be cancelled, and that the

defendants pay to the plaintiff the costs of the suit.

As to the defendant Moulton, it has been argued that he is improperly made a defendant, and that the plaintiff is not entitled to any relief against him. He is not named as a party to the deed which has intercepted the marital right. But the property of which the plaintiff is deprived by the deed was a legacy under a will of which the defendant Moulton was the executor. He was the adviser and framer of the deed. The recital of the transfer of the legacy by the plaintiff's wife into the names of the trustees of the deed is not a true and accurate recital. He framed the ultimate trust which has excluded the marital right of the plaintiff, and is a voluntary trust in favour of persons whom neither the wife herself nor the plaintiff knew to be objects of her bounty. Knowing the real nature of the deed and not having any right to the custody of it, he kept it in his own repositories and never communicated its nature or contents to the plaintiff whose rights were so materially affected by it. It does not appear that he ever informed the plaintiff's wife, whom he procured to create this ultimate voluntary trust, of its real nature and effect. Throughout the whole transaction he was an actor and not an agent. His conduct has been mainly the occasion of this litigation, and under these circumstances the plaintiff is entitled to a decree against him and the other defendants for payment of the costs of the suit (1).

(1) The above decision was appealed from; and the appeal was argued on the 6th and 7th of May, and judgment delivered on the latter day.

Mr. Bacon and *Mr. Batten*, for the plaintiff, in support of the decree.

Mr. Malins and *Mr. Cracknell*, for the appeal.

Mr. Bacon was only called on to reply as to costs.

The LORDS JUSTICES affirmed the decree of the Vice Chancellor, except as to costs, on the ground that the settlement was an imprudent and improper one, and executed without legal advice, and ought therefore, apart from any question of fraud on the marital right, to be set aside. As to costs, they directed that none should be given against any party either below or on the appeal.

2 T

ROMILLY, M.R.

Nov. 4, 5, 6;

Dec. 3.

LORDS JUSTICES.

March 20.

TOKER v. TOKER.

Voluntary Settlement—Setting aside—Unsupported Allegations.

A voluntary settlement which conveys real estate to a trustee for the settlor for life, with remainder to her nephew absolutely, will not be set aside upon unsupported allegations of fraud, undue influence, intimidation and coercion.

This bill was filed, by Margaret Grace Toker, against her nephew Philip Champion Toker, to set aside a voluntary settlement, dated the 16th of November 1853, by which, for a nominal consideration, she conveyed the whole of her real estates to Richard Bathurst and his heirs, to the use of the plaintiff for life, without impeachment for waste, and after her decease to the use of P. C. Toker absolutely.

The plaintiff when she executed the deed was sixty-six years of age, and she was then and still is a single woman.

On the 26th of July 1859, she instituted this suit alleging that the deed was obtained from her without a knowledge of the contents; that on receiving a copy after her escape from duress, she repudiated it as having been improperly obtained from her through fraud and undue influence; and it asked that the deed might be set aside and the estates reconveyed to her. A full synopsis of the facts and of the evidence in the judgment makes it unnecessary to repeat them.

Mr. Lloyd and Mr. Kingdon, for the plaintiff.

Mr. Selwyn, Mr. Baggallay and Mr. W. A. Clark, for P. C. Toker, the defendant.

Mr. Martindale, for Anna Toker, formerly Anna De Burgh, who disclaimed all interest in the estates.

Hoghton v. Hoghton, 15 Beav. 278; s. c. 21 Law J. Rep. (N.S.) Chanc. 482.

Cooke v. Lamotte, 15 Beav. 234; s. c. 21 Law J. Rep. (N.S.) Chanc. 371.

Nanney v. Williams, 22 Beav. 452.

Forshaw v. Welsby, 30 Beav. 243; s. c. 30 Law J. Rep. (N.S.) Chanc. 331.

Bentley v. Mackay, 31 Beav. 143; s. c. 31 Law J. Rep. (N.S.) Chanc. 697.

Mr. Lloyd, in reply.

THE MASTER OF THE ROLLS.—This lady for many years previous to the transactions which led to the execution of the deed of the 16th of November 1853, had resided with her brother John Buck Toker, but at that time she was residing on the Marine Parade at Brighton, a few doors from the residence of her nephew and his family. Her brother had for some time previously been engaged in various speculations which had turned out ill, and shortly before the time to which the present transaction relates, he had left the plaintiff and had gone to London, to reside in the house of Madame Anna De Burgh, whom he afterwards married. On former occasions J. B. Toker had induced his sister to assist him, by advancing money on the security of his property, and afterwards by allowing him to postpone her charges on his estates to other charges, which he was then about to create. On the 28th of October 1853, the plaintiff became exceedingly agitated on the receipt of several letters, from one of which she learned that her account at her bankers, instead of being to her credit, was overdrawn to the extent of 61*l*. Another letter from Madame De Burgh, suggested to her, apparently as the only means of saving her property, the propriety of copying and sending a letter inclosed therein, the effect of which would have been to cause her papers and affairs to be placed wholly in the hands of Mr. Edward Auchmuty Glover, a gentleman who certainly does not, from the papers in this case, appear to have been then, or indeed at any time, possessed of much property. She became much alarmed at this communication, and was made so ill by it that her servant thought it necessary to go to the house of the defendant, and request Mrs. Toker, his wife, to come and see her, which Mrs. Toker accordingly did. The plaintiff also, at her own desire, accompanied Mrs. Toker to her own house; and at the same time a telegraphic message was sent to her nephew, who had left Brighton that morning for London, to recall him. The result of the evidence on both sides, which is voluminous, but not contradictory, is that the plaintiff was a person easily influenced by those who were around her, and she seems to have been aware of this failing, and to have sought about for means to

secure herself from becoming a victim to this infirmity. Accordingly, when Madame De Burgh came down to Brighton, to visit her, she declined to see her, unless in the company of her nephew or his wife. She declined in like manner to see her brother, and she seems to have had vividly present to her mind, that she should be ruined, if she were with him and with the lady who afterwards became his wife. It is apparent on the evidence, nor indeed is the contrary alleged, that this reluctance of hers to see Madame De Burgh or her brother alone, proceeded entirely from her own spontaneous disposition, and that she was not influenced in that respect by any one. She also at the same time consulted with Mr. Bathurst, her family solicitor, and she voluntarily desired him to prepare a will for her in favour of her nephew, which was accordingly done on the 1st of November 1853. Afterwards, on the 3rd of November, she wrote to Mr. Bathurst the following note—

"My dear sir, I wish you at once to prepare the necessary conveyance of all my landed estate to my nephew Philip Champion Toker, reserving to myself a life interest therein. I should be glad to hear that you have obtained satisfactory information from Mr. Francis Ommanney as to my liabilities, and also ascertain the nature of the documents in his hands signed by me; also let me know the result of your interview with Mr. Octavius Ommanney." In consequence of this letter, Mr. Bathurst proceeded with the preparation of the deed, and he gave instructions to counsel to prepare it. On the 5th of November the plaintiff wrote again to him a letter which was to this effect: "My dear sir, as I am most anxious to save as much of the family property as I can, I must urge you to proceed with the deed referred to in my last letter as soon as possible. It is also late in the season, and I am desirous of moving into The Oaks before the cold sets in. I shall be at Faversham on Monday at the 'Ship,' when I trust the papers will be ready for my signature." On the 12th she wrote to him another letter, which was to this effect: "Will you have the goodness immediately to write to my brother for the money for the hay which he received from Messrs. Prescott on my account, as I am left without a shilling. It appears that Madame De

Burgh, instead of paying my money to my nephew's account at Drummond's, as I requested, returned it to my brother, who has since paid into Mr. Octavius Ommanney's hands, only 60*l.*, just the amount of his account overdrawn. This has no doubt been done purposely to leave me penniless. I do not desire to have an advance from Mr. Octavius Ommanney, as I wish to close my account with him. I inclose his letter to me for your perusal, as I fear the hay for 1853 may be disposed of in London, and the proceeds get into other hands. I wish you at once to see Mr. Coulter, and sell it immediately for the best price you can obtain. As soon as you receive any money on my account, have the goodness to pay into my name and open an account for me with Messrs. Rigdon & Hilton, bankers, of Faversham. I shall be at the 'Ship Hotel' as arranged on Tuesday next." The plaintiff says that all these letters were written under the influence of, as she believes, and at the dictation of the defendant. This is expressly denied on the other side, and the letter of the 5th of November was written at the time when the defendant was not at Brighton. In the interval between the 5th and the 15th the defendant had two interviews with Mr. Bathurst, but nothing turns on these circumstances, if, as is proved by the evidence and the contents of the letters themselves, Mr. Bathurst acted and considered himself to be acting solely as the solicitor of the plaintiff. Certainly there was no collusion between Mr. Bathurst and the defendant, to deceive or control the plaintiff. The evidence of the plaintiff does not attempt to establish any such case, or indeed approach towards it, and the evidence of the defendant strongly refutes it. On the 15th of November the plaintiff accompanied her nephew to Faversham, when she lodged at the "Ship," and on the following morning, the 16th of November, the plaintiff accompanied her nephew to Mr. Bathurst's office. He left her there; she went in alone, and she remained for a considerable time, between three and four hours, with Mr. Bathurst. This is Mr. Bathurst's account of the transaction: "On the 16th of the said month of November the plaintiff called on me at my office in Faversham, and told me she had come to execute the deed of settlement. I thereupon read the engrossment of such

deed, clause by clause, carefully over to the plaintiff, fully explaining, as I did so, the nature, purport and effect of every clause of it; and I say particularly that I explained to her that the effect of the deed was to convey to her nephew, the said Philip Champion Toker, all her landed estates, and in reply she told me that such was her wish and intention, and expressed herself perfectly satisfied with it. The plaintiff shewed no hesitation or reluctance whatever about executing the deed, but, on the contrary, appeared quite ready and desirous to execute, and accordingly she did then and there execute the deed in the presence of myself and of Charles Tucker and George Kennet, who were then clerks in my office, but the former of whom is since dead; and I say, at the time when the deed was so executed by the plaintiff I believe, and do now sincerely and firmly believe, that the plaintiff freely, deliberately and with a full and accurate knowledge of the nature and effect of the deed, executed the same, and that the deed was in accordance with the intention and wishes of the plaintiff. Upon the same occasion, but I believe after the deed had been executed by the plaintiff, some conversation took place between us respecting an arrangement which had been made between herself and Philip Champion Toker for their living together at The Oaks, and she expressed her wish that I should see Philip Champion Toker and arrange with him, on her behalf, the terms on which such joint residence should take place; and I say to the best of my recollection and belief, my interview with the plaintiff on the said 16th of November lasted upwards of three hours, during which the plaintiff was alone with me at my office."

The evidence given by Mr. Bathurst would have been more satisfactory if it had stated that he had explained to the plaintiff that the act she was doing was irrevocable. I therefore requested that Mr. Bathurst might be examined *viva voce*, and accordingly this was the result. I put this question to Mr. Bathurst, "Did the plaintiff understand that the effect would be, under all events, that her real estate would go to Mr. Philip Champion Toker after her death?"—A. Yes.—Q. Did she understand that she could not alter the deed?—A. I am not sure that she did. I think she did.—Q. Do you remember whether you told her that she

could not alter the deed?—A. No; I do not remember that circumstance, but I think it most likely I did.—Q. Did you explain to her fully the effect of the deed?—A. I read it over.—Q. That does not amount to much, but you cannot recollect that you told her that she would have no power to alter the deed?—A. No. I cannot recollect that circumstance.—Q. Can you recollect whether she understood that the effect of it would be to give her landed estate to Mr. Philip Champion Toker, in every event, after her death?—A. Yes. I think so. I think that was the case, but it is so long ago that I can hardly charge my memory." In a subsequent part of his examination, he says, he had a serious illness which had affected his memory. Upon this evidence, it must be taken that Mrs. Toker, the plaintiff, knew what she was about, and that the contents and effect of the deed were fully explained to her. This makes a material difference between the present case and the majority of cases of an analogous description which have so frequently come before the Court. There is another circumstance which is strongly in favour of the defendant. The solicitor who prepared the deed for her was her own solicitor, and was the old family solicitor, and it is clear that he acted as her solicitor, and not as the solicitor of the defendant; and it certainly would not have assisted the case of the defendant if it had been shewn that he had employed another solicitor on his own behalf to act in the matter. It differs, therefore, materially from those cases in which only one solicitor was employed, but that one was the solicitor of the grantee. Mr. Bathurst seems to have felt that he was acting, and that he really did act, for the plaintiff alone. And it is to be observed, that his evidence is confirmed by his contemporaneous letters in answer to the complaints the plaintiff made on the subject, which were made as early as the month of March 1854, and, indeed, as soon as she returned to reside with her brother and Madame De Burgh. It follows, therefore, that this deed must stand as a valid instrument, unless it can be made to appear that it was obtained from the plaintiff by undue influence, that is by the possession of personal influence exerted over her by the defendant or by his family for their own advantage. The evidence however contains nothing leading to

that conclusion. That she was attached to her nephew and his family, and that she had great confidence in him, is established by the evidence, and is, indeed, the moving cause for the bounty which she conferred on him. But beyond this there is nothing, except the assertion of the plaintiff, unsupported by any documentary evidence, or by any facts established in the cause. When the catastrophe, or rather the receipt of the letters of the 28th of October occurred, the application for assistance made to the defendant's family and himself, proceeded from the plaintiff herself, and as far as the evidence of Mr. Bathurst and the documentary evidence is concerned, the substitution of a deed for a will proceeded from herself alone. Unless a deed were made irrevocable, it would in effect be exactly the same thing as a will. I am also impressed with the manner and the terms in which the plaintiff complained of the transaction in March 1854. I concur in the opinion expressed by Mr. Bathurst in his letter of the 18th of March 1854, that her previous letters of the 9th, 11th, and 17th of that month did not emanate from herself; the last of them states that she wrote them all by the "advice and sanction" of her brother.

Upon the evidence it is clear that this lady had, when she declined a few months before to see her brother alone, acted in a just estimate of her own incapacity to resist his influence, and that the alteration of her intentions was occasioned by her visit to him in the month of March 1854. She speaks of that visit and of her leaving The Oaks in the terms of having effected an escape, but the evidence wholly disproves the accuracy of any such impression. There was no restraint put upon her, nor was she subjected to any species of duress; and on the whole I am disposed to believe that at the moment when she left The Oaks on the morning of the 7th of March, to see her brother in London, she intended, as she stated at the time, to return, but that she was induced by him not to do so. It is also strongly in favour of the defendant that the charge made by the plaintiff in her letter of the 9th of March 1854 is not one of undue influence, but of intimidation, which is completely disproved, and that the charge made in the letter of the 11th of March is also not one of undue influence, but of false and fraudulent representations, which is also

disproved by the evidence. If the plaintiff had been subject to the influence of the defendant, and by reason thereof was unable to act for herself, and had been thereby induced by him to execute this deed, the Court would undoubtedly have set it aside, but there is no evidence of the existence of any such influence beyond the esteem which she seems to have entertained for the defendant before the 28th of October 1853, or after the 16th of November in that year. The evidence shews convincingly that during that period the proposal for the deed emanated from herself, and that she understood what she was about. It is also strongly in favour of the defendant that Mr. Bathurst has from the first told exactly the same story that he does now, and that he gave full information both of the nature and of the effect of the deed, and that nevertheless this bill was not filed until after the death of her brother, and upwards of five years had elapsed after the parties were at issue, and after the plaintiff had contested the validity of the deed, and also after a serious illness had attacked a witness on whose testimony the whole must depend, and which may have impaired the full recollection of Mr. Bathurst as to the transaction, and which he alleged to be a reason for not more confidently answering the questions put to him.

The whole matter rests on his evidence, and it supports the defendant's case. The law of this Court is very strict on the subject of voluntary deeds: it gives no assistance for the completion of them, and it sets them aside where there is the slightest taint upon them; but at the same time it does not lay down as a rule that they are always void, and the mere alteration of intention is not sufficient to induce this Court to interpose and cancel an instrument which was fully understood and deliberately executed by the grantor. That I believe to have been the case here, and therefore I cannot interfere because the feelings of the plaintiff are no longer what they were in 1853. I must dismiss this bill; but of course the defendant will not in the circumstances of this case ask from his aunt the costs of the cause. The bill will be simply dismissed.

The plaintiff appealed from the above decision. The appeal was argued, on the

20th of March 1863, before the Lords Justices.

Counsel for the plaintiff (the appellant) *Mr. Greene* and *Mr. Kingdon*; for the respondent, *Mr. Selwyn*, *Mr. Baggallay* and *Mr. W. A. Clark*.

LORD JUSTICE KNIGHT BRUCE said that he could not but consider the case one of difficulty, and he had not been able wholly to free his mind from doubt upon the matter. The Master of the Rolls had dismissed the plaintiff's bill, and he (the Lord Justice) could not give his voice for disturbing that decision. His Lordship was of opinion that *Mr. Bathurst* was a trustworthy witness; and, considering that there was no proof in the case of fraud, misrepresentation, or undue influence exercised against *Miss Toker*, the plaintiff, his Lordship thought that the settlement could not be disturbed. That settlement was in form irrevocable, and he (the Lord Justice) was of opinion that the lady intended it to be so.

LORD JUSTICE TURNER entered into an elaborate statement of the facts and an examination of the evidence, and finally expressed his opinion to be in accordance with that both of his learned Brother and the Master of the Rolls. The appeal would be dismissed, but there would be no costs beyond the deposit.

WESTBURY, L.C. { *Re* THE BRITISH PROVIDENT LIFE AND FIRE ASSURANCE SOCIETY.
Feb. 14, 18. { (*Dr. Grady's case.*)

Winding-up—Contributory—Transfer of Shares—Purchase by Company—Acquiescence.

Upon the compromise of an action brought by G. against a company in which he was a shareholder, it was arranged that G. should transfer his shares to S, who was the managing director, and should receive from the company a sum of money as the price of his shares and in satisfaction of his claim. Accordingly, the money was paid, the shares were transferred, and the transfer registered. Two years afterwards the company was ordered to be wound up, and the official manager placed G.'s name on the list of contributories, on the ground that the transfer

was invalid, S. being a trustee for the company, and the assent of the shareholders to the transaction not having been obtained. The Court, under the circumstances, declined to impute to G. knowledge that S. was a trustee for the company; but independently of this it was held, that the transaction having been acquiesced in by the shareholders for two years, their consent must be presumed as against the company, and accordingly G.'s name was ordered to be taken off the list.

Where an act has been done by a public company, to the legality of which certain formalities are requisite, and the circumstances are such that knowledge and acquiescence may be imputed to every shareholder, the Court will, as against the company, infer that the necessary formalities have been complied with.

This was an application by *Dr. Grady* to have his name removed from the list of contributories of the *British Provident Life and Fire Assurance Society*, in course of being wound up, in respect of twenty-five shares formerly held by him, but since transferred to *Mr. Sheridan*, one of the directors of the company. *Dr. Grady* had formerly been one of the medical officers of the society, but disputes arose between himself and the society; and on the 26th of October 1858 he received a notice that his professional services were dispensed with. Shortly after this he commenced an action against the society for monies due to him in respect of services rendered. This action was compromised by the payment to *Dr. Grady* of six months' salary and a promissory note for 100*l.*, and the transfer by him of his shares to *Sheridan*. This transfer, dated the 29th of March 1859, was duly executed and entered on the books of the company, and *Sheridan's* name was returned to the *Joint-Stock Companies' Registration Office* as the holder of the shares. The order for winding-up was made in March 1861. The official manager had placed *Dr. Grady's* name on the list of contributories, on the ground that *Sheridan* was a trustee for the company, and the assent of the shareholders ought to be obtained in order to make the transfer valid.

Mr. T. A. Roberts, for *Dr. Grady*, denied that he had any knowledge of *Sheridan* being a trustee for the company, but if this

were so, the shareholders had authorized or, at all events, acquiesced in the transfer—*Holwey's case*, 1 De Gex & Sm. 777.

Mr. Bailly and *Mr. E. K. Karlake*, for the official manager, referred to

Stanhope's case, 3 De Gex & Sm. 198 ;
s. c. 19 Law J. Rep. (N.S.) Chanc. 389.

Morgan's case, 1 Ibid. 750 ; s. c. 1 Mac.
& G. 225 ; 1 Hall & Tw. 320 ; 18 Law
J. Rep. (N.S.) Chanc. 265.

Eyre's case, 31 Law J. Rep. (N.S.) Chanc.
640.

Mr. Shebbeare, for the creditors' representative.

Richmond's Executors' case, 3 De Gex &
Sm. 96.

Laues's case, 1 De Gex, M. & G. 421 ;
s. c. 20 Law J. Rep. (N.S.) Chanc.
295 ; 21 Ibid. 688.

The LORD CHANCELLOR (without calling on Mr. Roberts for a reply).—In this case, at the instance of the official manager, a gentleman of the name of Grady, who transferred his shares to a Mr. Sheridan, on the 29th of March 1859, by a deed of transfer, duly registered and entered in the books of the company, has been put upon the list of contributories as a shareholder of the company, which is now being wound up under an order dated in March 1861. Undoubtedly it is incumbent on the official manager to produce a sufficient case to justify my wholly disregarding this transaction, and arriving at the conclusion that these shares still remain vested in Dr. Grady.

Now, the undisputed facts appear to be these: Dr. Grady was a shareholder of twenty-five shares. He was also one of the medical officers of the Life Assurance Company. A disagreement arose between him and the company some time previously to the month of March 1859, and he brought an action against the company to recover a sum of money to which he alleged he was entitled. That action led to a negotiation, which terminated in this compromise, namely, that Dr. Grady should receive a certain sum of money from the company; and it was part of the negotiation that his shares should be transferred to Mr. Sheridan. The allegation of the official manager is, that Dr. Grady knew that Mr. Sheridan was a trustee for the

company. There is nothing brought forward in support of that statement, except the inference to be collected from the admitted facts of the case; and those are the fact that the agreement to transfer the shares was undoubtedly part of the general compromise and agreement by which the action was settled, the fact of Sheridan being the managing director, and the fact that the sum of money entered in the transfer of the shares as the consideration was in reality paid to Dr. Grady as part of the larger sum that was handed over to him from the funds of the company. On the other hand, Dr. Grady swears that he had personally agreed with Mr. Sheridan to make a transfer to him of the shares. He states distinctly that Sheridan, as an inducement to him to come to terms of compromise, offered to take his shares off his hands; and Dr. Grady states that he had no knowledge and no reason to believe that Sheridan was to hold them in trust for the company. Sheridan makes no affidavit: there is, therefore, the direct statement of Dr. Grady; and the question is, whether it is outweighed and disproved by the *evidentia rei* resulting from the transaction itself. The intrinsic evidence resolves itself merely into the fact of the one contract being arrived at at the same time as the other, and the fact of the money paid to Dr. Grady being a lump sum, which included the consideration for the transfer. But I am not of opinion that I can infer from that that Dr. Grady knew that Mr. Sheridan was to hold these shares on the part of the company, or that he was in reality to become the assignee of them as the property of the company. Sheridan's affidavit might have contradicted what is sworn to by Dr. Grady. There is nothing said, either by the solicitor who acted on the part of the company, or by the solicitor of Dr. Grady, or by any of the directors, to warrant my coming to the conclusion that the statement made by Dr. Grady is erroneous or untrue. I must, therefore, arrive at the conclusion that the transaction was that which Dr. Grady represents. It may be perfectly true that it was part of the general compromise. It is very possible that the directors might have found one of their own body who, in order to avoid the

exposure in the action, was willing to stand in the shoes of Dr. Grady. It is very possible that the money might not be paid separately and distinctly to Dr. Grady, but Dr. Grady might well be warranted in believing that would be matter of arrangement between Mr. Sheridan and the other directors, that is, between Mr. Sheridan and the company. I cannot, therefore, arrive at the conclusion that a mere suspicion, to be derived from the mode of completing the transaction, when the fact which I am desired to infer from that suspicion might have been directly proved by the evidence either of Mr. Sheridan or of the solicitor, is to be put into the scale as sufficient to weigh down the positive statement of Dr. Grady.

Now it might be sufficient to rest there, but I am by no means disposed to overlook the rest of the case. Let it be for a moment assumed that Mr. Sheridan in point of fact was acting on behalf of the company. I find that the company was not at all disqualified from purchasing shares, and in that particular the case is wholly in contrast with the numerous cases that have been cited at the bar. It approaches much more nearly to the case of *Bargate v. Shortridge* (2) than it does to the cases that have been cited before me. If a company has no power to do a particular thing, undoubtedly that power cannot be added to the company by the agreement of the shareholders, nor can it be inferred to have been done legally, merely from acquiescence or from subsequent delay in questioning the transaction. But if a company has power to do a thing, and if there is only requisite a particular formality, such as the consent of a general meeting, in order to warrant the exercise of that power, and if I find the company dealing with an individual at arm's length and taking a transfer of shares, duly completing that transfer, and entering the transaction in books, so that I am warranted and justified in imputing a knowledge of it to every shareholder, I am fully borne out not only by the reason of the thing, but by the express authority of the case which I have referred to, in inferring as against the company that the formality

which alone is wanting to the exercise of the power had been either antecedently supplied or subsequently added to the transaction. It has been said in answer to that, that Dr. Grady was a shareholder. That does not in the smallest degree make the matter different, as far as I am warranted in inferring the formality. If Dr. Grady was a shareholder, which was undoubtedly the case, he was a shareholder dealing at arm's length with the company. The company proposed that he should put an end to his action, and they engaged that they would take a transfer of the shares. They had a perfect right to do so, provided the shareholders either subsequently acquiesced or had previously given the authority, and I am of opinion that I am perfectly warranted in inferring the fact that that formality was not wanting. The transfer was duly entered in the books of the company on the 4th of April 1859. In another book, called the ledger of the company, it also appears the return was made to the registration office in the manner required by the statute on the 30th of May 1859; and in that return John Sheridan is represented as the holder of the twenty-five shares by transfer from William Grove Grady. There is therefore everything required for a valid transaction, and everything that was necessary to give notice to every shareholder of what had taken place, even if I suppose what had taken place to be in reality a purchase by the company. That that would be totally immaterial as affects Dr. Grady, unless he had notice of it, I have already observed; but even if he had reason to believe it, yet if I find the transaction dealt with in the manner I have described, and acquiesced in by the shareholders of the company for more than two years after the regular completion of it, I do not go beyond that which reason requires and authority justifies in holding that the formality of the consent of the shareholders must be presumed as against the company. I shall therefore direct the name of Dr. Grady to be taken off the list of contributors.

(2) 5 H.L. Cas. 297; s. c. 24 Law J. Rep. (N.S.) Chanc. 457.

WOOD, V.C. { SIMPSON v. THE SCOTTISH
March 6, 9. { UNION FIRE AND LIFE IN-
SURANCE COMPANY.

Policy of Insurance—Landlord and Tenant, 14 Geo. 3. c. 78. s. 83.

Under an agreement with their landlord S, W. M. and J. M. insured certain houses of which they were joint tenants from year to year for 500l. The houses were burnt down, and S. thereupon informed the Insurance Company that he was the person entitled to the benefit of the policy, and claimed to have it laid out in rebuilding the houses. The Insurance Company entered into an arrangement with W. M. and J. M., and cancelled the policy. S. thereupon rebuilt the houses at his own expense, and filed a bill to compel the insurance company to pay him so much of the sum due on the policy as had been properly expended by him in rebuilding:—Held, upon a demurrer by the company, that no sufficient request had been made to the company to satisfy section 83. of 14 Geo. 3. c. 78. That S. was not entitled under the above section to rebuild the houses himself and then call upon the company to refund the money so expended.

A tenant from year to year insuring is not limited in his claim on the insurance company to the extent of his interest in the property insured.

Where a new right has been created by act of parliament, the proper method of enforcing it is by mandamus at common law.

Quære—whether section 83. of 14 Geo. 3. c. 78. applies to property not lying within the bills of mortality.

The bill in this case was filed, by David Caldwell Simpson, against the Scottish Union Fire and Life Insurance Company and F. G. Smith, and stated that certain houses, Nos. 4 and 5, Simpson's Terrace, North Woolwich Road, belonging to the plaintiff, were in 1861 let to William Miller and Jane Miller as tenants from year to year. That an agreement was made that William Miller should insure the said houses in his own name or in the name of Jane Miller, or in the name of himself and the said Jane Miller, for 500l. That in pursuance of this agreement W. Miller effected an insurance of the said houses in the Scottish Union

Fire and Life Insurance Company for the sum of 500l., and duly communicated to the plaintiff that an insurance had been effected. That on the 10th of December 1861, the said houses Nos. 4 and 5, Simpson's Terrace, were burnt down, and that on or about the 12th of December 1861, the plaintiff went in person to the office of the Scottish Fire and Life Insurance Company, and there informed the defendant F. G. Smith, the secretary of the said company, that the plaintiff was the landlord or lessor of and the person interested in and entitled to the said two houses which had been burnt down, subject only to the tenancy of W. Miller and J. Miller, and inquired whether the said houses were insured by the said W. Miller; and the plaintiff stated to F. G. Smith, that by the arrangement and understanding with the plaintiff the said W. Miller and J. Miller had agreed to insure the said buildings. F. G. Smith, after some reference to the books of the company, informed the plaintiff that W. Miller had effected two separate policies of insurance with the company, namely, a policy for some sum upon the stock-in-trade, furniture, chattels and effects of the said W. Miller and J. Miller, in and upon the said messuages and dwelling-houses, and a separate policy for the sum of 500l. upon the messuages and buildings themselves. The 11th paragraph of the bill was as follows:

"The plaintiff and the said F. G. Smith had some further conversation upon the subject of the said insurance, and from what took place at such interview it appeared to the plaintiff that the said F. G. Smith considered the case was a suspicious one, and would require investigation, and the said F. G. Smith by his observations and statements led the plaintiff to believe, and the plaintiff was thereby induced to believe that no arrangement would be effected with reference to the said policy for 500l. with the defendant W. Miller without communication with the plaintiff. The plaintiff also stated to the said F. G. Smith that he claimed to be entitled, as the owner or lessor of the said premises, to the benefit of the said policy, and to have the same either laid out and expended, so far as the same would extend, in and towards the rebuilding and reinstating the said houses which had been so burnt down, or paid to the

plaintiff for that purpose; and the plaintiff at the conclusion of the interview with the defendant F. G. Smith, made an observation to this effect: 'I may rely upon your paying nothing to Miller,' and the defendant assented to this."

The bill further stated that afterwards F. G. Smith informed the plaintiff that the company had settled with Miller, and had cancelled the policy, and F. G. Smith refused on behalf of the company to further discuss the matter with the plaintiff, or to make any arrangement with him as to the application of the money for which the said premises had been insured. That the plaintiff then rebuilt the two houses, in the same style and of the same description and value as the said two houses destroyed by fire, and that after full notice of the claims of the plaintiff the company, in January 1862, entered into an arrangement with W. Miller, by virtue of which the company paid to W. Miller the sum insured, upon the other policy of insurance effected by W. Miller upon his own stock, furniture and effects in and upon the said premises, and that in consideration thereof W. Miller and J. Miller waived, or purported to waive, all their rights and claims in respect of the said policy for securing 500*l.*, and delivered up the said last-mentioned policy of insurance to the company, and that the company alleged that the same had been in some manner cancelled or destroyed by them.

The bill prayed that it might be declared that under the circumstances the plaintiff was absolutely entitled to require the defendants, the Scottish Union Fire and Life Insurance Company, and the directors thereof, to lay out and expend the said sum of 500*l.*, or other the amount for which the said dwelling-houses and buildings were insured, or a sufficient part of such sum, in and about the rebuilding and fully reinstating and restoring the said dwelling-houses and premises, and that the defendants, the said company, became and were under the circumstances in the said bill stated bound and liable to lay out and expend and apply, and ought at the request of the plaintiff to have laid out, expended or applied the same, or a sufficient part thereof accordingly, and that it might be declared that the defendants, the said com-

pany, had become and were liable to pay the amount due upon the said policy to the plaintiff in satisfaction, so far as the same would extend, of the amount properly and necessarily expended by the plaintiff in rebuilding and reinstating the said houses. That an account might be taken and the defendants, the company, might be decreed to pay to the plaintiff the 500*l.*, or so much thereof as should appear to have been properly expended and laid out by the plaintiff as aforesaid.

To this bill the defendants put in separate demurrers for want of equity.

Sir H. Cairns and *Mr. H. Cox*, in support of the demurrers, submitted that it did not appear on the face of the bill that any distinct request had been made to the company as required by 14 Geo. 3. c. 78. s. 83. Even if a sufficient averment of such a request appeared on the bill, yet the demurrer must be allowed, as the act 14 Geo. 3. c. 78. was expressly limited by the preamble to places within the Weekly Bills of Mortality. On this point they cited—

Vernon v. Smith, 5 B. & Ald. 1.

Richards v. Easto, 15 Mee. & W. 244; s. c. 15 Law J. Rep. (N.S.) Exch. 163.

Filliter v. Phippard, 11 Q.B. Rep. 347; s. c. 17 Law J. Rep. (N.S.) Q.B. 89.

That in the present case the insurance having been effected in the name of the tenant, the company could only be required to pay a sum proportioned to his interest and the damages he suffered in respect of his tenancy. At all events, the landlord could recover nothing from the company as they had already made terms with the tenant in whose name the houses were insured—

The Sadlers' Company v. Badcock, 2 Atk. 554.

The landlord's right, if any, was that created by 14 Geo. 3. c. 78. s. 83, which he must enforce by mandamus at common law, not by a bill in Chancery.

Mr. Everitt, in support of the bill, contended that the act 14 Geo. 3. c. 78. s. 83. extended to the country generally. Where words sufficiently general were used in an act of parliament, they must not be limited by the wording of the preamble. A request sufficient to satisfy the requirements of the act was averred in paragraph eleven of the bill, but there was no necessity to aver any request, as the statute was in the alterna-

tive, the words being, "upon the request of any person, or upon grounds of suspicion," and the bill contained an averment of grounds of suspicion.

As regarded the interest of a tenant from year to year, it was clearly more than the value of one year's rent, for being in possession he could require the premises to be restored to their original condition; and the words of the statute were express—"cause 'the insurance money' to be laid out so far as the same will go"; there was no hardship in the case, as the company were not being asked to pay twice over; they had not parted with the money.

Most of the cases as to mandamus were cases arising under the Bank Charter Act. Under a mandamus no account could be taken against the company. The plaintiff was entitled to enforce his right under the policy of assurance by an application for an injunction. On this point he cited—

Law v. the London Indisputable Life Policy Company, 1 Kay & J. 223; s. c. 24 Law J. Rep. (N.S.) Chanc. 196.

Hutchinson v. Wright, 25 Beav. 444; s. c. 27 Law J. Rep. (N.S.) Chanc. 834.

Sir H. Cairns, in reply.

WOOD, V.C.—I am sorry to be compelled to decide this case upon the narrow grounds taken by the averments of the bill as the question that has been argued is one of considerable importance. Before any claim can be made to the benefit of the 83rd section of this act (supposing the act to be of the general character assumed by the bill, and to be applicable to buildings not within the Bills of Mortality), I apprehend a distinct request, not necessarily in writing, but a distinct request must be made by the person claiming to be interested, to have the monies laid out and expended as far as they will go towards rebuilding and reinstating the house or houses which have been destroyed. The mode in which that is averred in the bill is this: there was an agreement by the plaintiff with the Millers, the tenants, that they should insure in their names, not in the name of the landlord, in the sum of 500*l.*; and then the bill states that a fire having taken place, the plaintiff went to see Smith, the secretary of the company, who he says was and is the

agent duly constituted in their behalf in all affairs of the company. The plaintiff stated to Smith that he was the landlord or lessor of, and the person interested in and entitled to the two houses and premises which had been burnt down, and he inquired whether the houses were insured by Miller pursuant to the agreement with the plaintiff, and for what sums. Then Smith, after some reference to the books of the company, informed him that Miller had effected two separate policies of insurance with the company, namely, a policy for a certain sum upon the stock-in-trade, furniture, chattels and effects of the Millers in and upon the messuages and dwelling-houses, and a separate policy for 500*l.* upon the messuages or dwelling-houses and buildings themselves. The only thing approaching to a request is stated in the eleventh paragraph of the bill; but no reference is there made to the act of parliament, and the statement in that paragraph as it stands is an extremely weak way of averring that there was a request under the act of parliament to the company that this money should be laid out by the company in rebuilding. There is a statement of a claim,—no request made to the company,—but a statement in a conversation with the secretary, that the plaintiff claimed to have the money either laid out in reinstating or to have it paid to him as being the landlord or owner, which may refer either to his agreement or to the act of parliament. He refers it to neither. Then follows an averment of the agreement by the company with the Millers, by which the Millers, who had effected the policy as to the buildings, abandoned it, and gave it up to be cancelled upon being paid their policy on the goods. What strikes me upon the whole bill is this: there is no averment of a request to lay out this money, but only of a claim in some shape or other under an agreement with the Millers, who were the persons entitled to the benefit of the policy—a claim that it should not be paid to the Millers, and that the plaintiff was, in fact, the proper owner of the money to be received under the policy; because, he goes on to aver here that the Millers had no interest in the policy. Now, I apprehend, it is clear that that is not what is pointed at by section 83, supposing the

section to be general in its application. It appears to me that a tenant from year to year having insured his premises for 500*l.*, if his house were burnt down, would be entitled to say, "I have a right to have the insurance for this sum of 500*l.* in respect of the value which I put upon the premises. I have a right to have the premises rebuilt so that I may carry on my business, as I am a tenant from year to year. I have a good trade, and there are a number of other things which concern me, and therefore I ask to have the property reinstated, and it is worth this amount." It does not appear to me that I ought to contract his rights to the narrow interest that he may be supposed to have *quà* tenant from year to year; he would have a right to say, "I stand upon this policy, and insist upon having the house rebuilt"; and then the landlord would have a right in respect of the tenant's interest to have the property, which he so insured, rebuilt in order to avoid the possible consequence of fraudulent insurance contemplated by the statute. But I take it to be too clear for argument, that if a person does not make any request before the person who insures is settled with, he cannot make it afterwards. I cannot possibly enter into the question as to what led the company into this bargain. I cannot know anything about the suspicious character of the policy which was effected on the goods and stock in-trade. I cannot know anything as to the supposed fraud with respect to the value of the goods which may have been removed. The person who insures, and who is *prima facie* entitled to the 500*l.*, unless the right of the landlord has been interposed by a request, can require payment to himself, or make a bargain by which he would give up his right, or allow the policy to be cancelled; and if that is done, it is clear that in the absence of fraud between the persons concurring in the transaction, no such right as that claimed by the plaintiffs could survive. There being no averment of a request, the bill in its present form cannot be sustained. But supposing this flaw could be amended by averring that a formal request had been made in the mode that is pointed out by the act, and supposing the act to be general, then another question arises. The act o parliament directs that a request

of this kind shall be made, in order that the company may apply the insurance money; and it appears to me, that it would be impossible for them to pay it to the owner, for this reason; the act says, it may be either the owner or the tenant that is committing a fraud; and what seems to have been intended was the benefit of the public altogether. It is a public enactment that the company shall see the money laid out; and the owner who comes to ask for the money may have been guilty of the fraud just as much as the tenant. The legislature says, in order to deter persons from wilfully setting their houses on fire and gaining the insurance money, "it shall be lawful for the governors or directors of insurance offices, and they are hereby required, on the request of any person or persons interested in or entitled unto any house or houses, or other buildings which may hereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses or other buildings have been guilty of fraud, or of wilfully setting their house or houses or other buildings on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating or repairing such house or houses." When this gentleman rebuilt his own house, and asked to be paid the money that he had laid out, the company would have a right to say, "No, we will see it done, and it shall be done by our own surveyor." They would have a right to say that upon two grounds: first, that they are the persons pointed out by the act to see this is absolutely done, and that the money is not handed over; and, secondly, they have a right to see that the money is properly and judiciously laid out in the way that would be satisfactory to themselves; superintending the buildings, in order that neither more nor less than the proper amount may be laid out, whatever the value of the property might be. Of course, it is obvious that one of the frauds, and the most likely fraud to be perpetrated, would be the insuring of a house worth 500*l.* for the sum of 1,000*l.* or the like; and, accordingly, the sum to be laid out would only be the sum required

to rebuild a house of the same character and description as that destroyed, and not the whole amount specified in the policy. But, supposing even the request to be made, the proper course is, not to build the house at your own expense, and, when you have done so, to come and say, give me the money in respect of this; because that might lead to numerous frauds. There might be engagements, of which the company would know nothing, between the landlord and the tenant, as to building the house; there might be a contract that if the house were burnt, the tenant should rebuild it; and he would be obliged to do so under a repairing covenant, as has been held in some of the cases. All this would be unknown to the company, and they would pay this money into the hands of another person, instead of seeing that the money was properly laid out by themselves. And that brings me to another branch of the argument which Sir Hugh Cairns put before me, namely, whether the proper remedy would not be by mandamus; because it has been settled that where an entirely new right is created by act of parliament, then the remedy is by mandamus; but if there be only a new remedy given for enforcing the old rights, then the addition of the new remedy by act of parliament does not prevent the old remedy from taking effect. That has been settled with regard to dealings with railway companies; and one leading case is *Weale v. the West Middlesex Waterworks Company* (2). It was there held that you must look to see whether the right is in itself new; if so, the remedy given by the act is that to be pursued.

The first ground on which I think the demurrer must be allowed is this, that there has been no request made; and the second, which goes more to the substantial merits of the bill, is this, that assuming the request to have been made in the proper form, the proper course was not for the plaintiff to erect these premises for himself, and then, after having erected the premises, to come to this Court and say, now direct this insurance company to hand over the money which was insured by this tenant in the first instance, in

order to recoup me the expense I have been put to in rebuilding the premises. But the proper course would have been, as it appears to me, in the first instance, to have proceeded by mandamus. If, as has been argued, the plaintiff has a right to come here, I take it that the act of last session, 25 & 26 Vict. c. 42, would probably cover this case; but I am not called upon to decide that point, as I apprehend the right course in a case of this description, where the original remedy is given by mandamus, would not be to alter and oust the jurisdiction of the Court of Queen's Bench, which has the special prerogative of enforcing acts of parliament, but first to establish your right by way of mandamus, and then, if any difficulty arose with reference to the payment, to come to the Court of Chancery to enforce the charge so made good by the Court of Queen's Bench. I think, therefore, without deciding the point, as to whether or not that section of the act of parliament is to be treated as a general enactment, I must allow this demurrer, upon the two grounds I have mentioned; namely, first, that there ought to have been a request stated, and then in pursuance of that request an application made to the Court of Queen's Bench to enforce the right by mandamus; and secondly, that the plaintiff was in error in rebuilding the houses and asking to have the money expended by him repaid by the company. I consider that the case is of so much importance that I shall not refuse leave to amend as it has been asked.

Wood, V.C. }
 Feb. 23; } *Re MAXWELL'S TRUSTS.*
 March 13. }

Apportionment—Dividends on Shares—in Insurance Company—in Railway Company—Apportionment Act, 4 & 5 Will. 4. c. 22. s. 2.—Companies Clauses Consolidation Act, s. 91.

Lady M, being entitled, under the will of her late husband, to a life interest in certain shares in the Alliance Insurance Company, (the dividends on which were under the deed of settlement to be declared half-yearly, and made payable in the months of April and October in each year,) and also

(2) 1 J. & W. 358.

to a life interest in certain shares in railway and gas companies, died in November 1860. Subsequently a dividend was declared on the shares in the Alliance Company for the half-year ending on the 25th of March 1861, and on the shares in the railway and gas companies for the half-year ending the 31st of December 1860.

The executrix of Lady M. now claimed an apportioned part of these dividends:—Held, that the dividends on the shares in the Alliance Company were apportionable under the Apportionment Act, because the profits were by the deed of settlement of the company divisible at fixed periods.

The apportionment must be made with reference to the last previous time when the dividends were made payable, and not to that when they were earned.

The dividends on shares in companies incorporated by acts of parliament containing clauses similar to section 91. of the Companies Clauses Consolidation Act, or in which the last-mentioned act is incorporated, are not within the Apportionment Act.

Sir Charles Maxwell, by his will, dated the 18th of July 1843, bequeathed personal estate to trustees in trust for his wife, Lady Maxwell, for her life, and from and after her decease then for other persons. Such property included London and North-Western Railway stock, Great Western Railway stock, twenty shares in the South Metropolitan Gaslight and Coke Company and fifty shares in the Alliance Fire Insurance Company.

Lady Maxwell died on the 17th of November 1860; and this petition was presented, under the Trustees' Relief Act, asking for payment of the dividends and interest on the fund in court to the persons next entitled under Sir C. Maxwell's will.

On the 22nd of February 1861 a dividend was declared on the London and North-Western Railway stock for the half-year ending the 31st of December 1860, and was made payable on the 26th of February 1861.

On the 15th of February 1861 a dividend was declared on the Great Western Railway stock for the same half-year, and was made payable on the 1st of March 1861.

On the 2nd of April 1861 a dividend was declared on the shares of the South

Metropolitan Gas Company for the same half-year, and was made payable on the 12th of April 1861.

And on the 5th of April 1861 a dividend was declared on the shares of the Alliance Insurance Company for the half-year ending the 25th of March 1861, and was made payable on the 10th of April 1861.

Lady Maxwell's representatives now claimed to be entitled to an apportioned part of these dividends, under the Apportionment Act (4 & 5 Will. 4. c. 22), s. 2.

The London and North-Western Railway Company were incorporated by the 9 & 10 Vict. c. cciv., with which act the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16.) was incorporated. By section 91. of this last act it is provided that certain powers of the company, including the declaration of dividends, shall be exercised only at a general meeting of the company.

By section 120. of the same act it is enacted, that "Previously to every ordinary meeting, at which a dividend is intended to be declared, the directors shall cause a scheme to be prepared shewing the profits, if any, of the company for the period current since the preceding ordinary meeting at which a dividend was declared, and apportioning the same, or so much thereof, as they may consider applicable to the purposes of dividends amongst the shareholders according to the shares held by them respectively, the amount paid thereon and the periods during which the same may have been paid, and shall exhibit such scheme at such ordinary meeting, and at such meeting a dividend may be declared according to such scheme."

The Great Western Railway Company were incorporated by 5 & 6 Will. 4. c. cvii., and it is enacted by section 146. of that act "That it shall be lawful for the said company, and they are thereby empowered from time to time, at any half-yearly general meeting, or at a special meeting to be called for that purpose, to declare and make a dividend out of the clear profits of the said undertaking, and such dividend shall be after the rate of so much per share upon the several shares held by the members of the said company in the joint-stocks thereof." And it is thereby provided "That such dividends shall not be made oftener than quarterly."

The South Metropolitan Gas-Light and Coke Company was incorporated by 5 Vict. c. lxxix., which act contains provisions (section 84.) as to the declaration of dividends similar to those contained in section 91. of the Companies' Clauses Consolidation Act.

At an extraordinary general court of proprietors of the Alliance Insurance Company, held on the 16th of April 1834, certain alterations were made in the deed of settlement of the company, and it was resolved that the profits and accumulations made by the investment of the capital of the company, should thereafter be divided half-yearly, and that such half-yearly dividends should be paid and payable at the office of the company in the months of April and October in each year.

By section 2. of the Apportionment Act (4 & 5 Will. 4. c. 22), it is enacted, "That from and after the passing of this act, all rents service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this act), and all rentscharge and other rents, annuities, pensions, dividends, moduses, compositions and all other payments of every description in the United Kingdom of Great Britain and Ireland made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions or other payments as aforesaid, or in the estate, fund, office or benefice, from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions and other payments according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the

death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions and other payments being made."

Mr. Amphlett and *Mr. Dickenson*, for the petitioners, claimed the whole of the dividends.

Mr. Rendall, for the executrix of Lady Maxwell, contended that the dividends on the shares in the Alliance Insurance Company were clearly apportionable, because they were made payable or became due at fixed periods; and it had been decided in *Hartley v. Allen* (1) that the income of the profits of a joint-stock company was a "dividend" within the Apportionment Act. As regarded the dividends on the railway and gas shares, the only question was, whether they were dividends "made payable or coming due at fixed periods," as provided by the act. He submitted that they were, if not under sections 66, 91. and 120. of 8 & 9 Vict. c. 16, at any rate under Sir C. Maxwell's will; and on this point he cited *Knight v. Boughton* (2).

Mr. W. W. Cooper and *Mr. Macnaghten*, for other respondents.

Mr. Amphlett, in reply.

WOOD, V.C. (March 13.)—In this case a question arises with regard to the apportionment of the profits in certain joint-stock companies, the tenant for life having died between two periods of payment; and there are four dividends with regard to which the question arises. Three of them rest entirely upon the provisions of the Companies' Clauses Consolidation Act.

With regard to the fourth, there is a difference, because that depends on the deed of settlement of the company (which is called the Alliance British and Foreign Life and Fire Insurance Company), which deed as altered at a general court of the proprietors, held on the 16th of April 1834, contains a special provision with reference to the times of payment, which are directed to be half-yearly, in April and October in each year.

(1) 27 Law J. Rep. (N.S.) Chanc. 621.

(2) 12 Beav. 312; s.c. 19 Law J. Rep. (N.S.) Chanc. 66. See too *Plummer v. Whiteley*, Johns. 585.

If the case were *res integra*, I should have more hesitation than I now feel with reference to the question whether or not companies which are created for the purpose of carrying on business, and which divide their profits according as those profits may or may not accrue from period to period, and according to the amount of those profits, could be strictly held to be within the purview of the Apportionment Act. I find that it has been held, by Vice Chancellor Kindersley, in *Hartley v. Allen*, that the dividends on shares in a joint-stock company of this description are apportionable; and following that decision, I must hold that the dividend on the shares in the Alliance Insurance Company would be apportionable; and the period is to be calculated from the time when the dividend became payable, and not the time when the profits were earned, for that is the course which the Vice Chancellor followed, and I can see no other which could be pursued under the act of parliament. In all these cases, the calculations are made in March to the end of the previous year, and then a declaration of dividend is made in March, payable in April: that is the usual course which is pursued in companies of this description. The act of parliament is express, saying that it should be according to the time that should have elapsed since the last period of payment; and one sees the difficulties which one would be exposed to in any other way of looking at it, because the act has reference to payments which become due at fixed periods. Whatever is payable in respect of dividend is not due until the meeting has declared that it shall become due and payable. Therefore, the apportionment must be made with reference to the last payment, and without reference to the year when the profits may be said to have been earned; and there is good reason for that, for though the company might make their account of the profits earned in the last year, it would be most improper in them, if they had a large sum in hand, and knew that there was a large demand coming (as, for instance, in the case of the vast frauds which were perpetrated on the Great Northern Railway Company), to declare any dividend, notwithstanding that the previous year had been one of great profit. It is all in the

breast of the directors who have to manage the concerns of the company; and the dividend can only be payable at the period when it is declared to be due and payable. In the case, therefore, of the Alliance Insurance Company, which has said our profits shall be divided in April and October, I am content to follow the decision of Vice Chancellor Kindersley.

But as to the other companies, the question appears to me to stand on an entirely different footing, because these companies, having passed no by-law whatever declaring when the dividends should be paid, I can see nothing in the Companies Clauses Consolidation Act, or in their special acts, authorizing me to say that these dividends are due at a "fixed period," for the case stands thus: By the general act the ordinary general meetings are appointed to be held in given months. It is also provided in the clause as to dividends that where a dividend is about to be made at an ordinary meeting, certain processes shall be gone through; but there is nothing in the act which says that the dividends shall be made only at the period of the ordinary meeting; nor is there anything in the act which says that there shall be any dividend made at all. It is scarcely to be expected that any act of parliament should be so general in its nature as to provide that at a given time the dividend shall be made, although, perhaps, the company might be disposed to come to such an arrangement. The clause in the Companies Clauses Consolidation Act provides that the general meetings, if it is not otherwise prescribed by the special act, shall be held in the months of February and August in each year, or at such other stated periods as shall be appointed, and that they shall be called ordinary meetings. There is nothing which says that the dividends must necessarily be declared at such meetings, and nothing which says that they shall be declared at all the ordinary meetings which take place at the two fixed periods in the year. It is quite true the habit has been to divide at certain given periods, but it might well be, and I believe in many of these companies is the fact, that they do not for three or four years declare any dividend at all, because they have none to declare; and though that difficulty might

exist, whatever by-law—as in the case of *Hartley v. Allen*—is framed, yet the Court might give a reasonable construction to any by-law, providing that the profits shall be divided half-yearly, and, without much forcing the language of the act of parliament, might say that a meeting at which it shall be declared there is nothing to pay, may be treated in a sense as the last period of payment; but I cannot apply that principle to a case in which no period of payment is appointed, and it does not appear to me to be strictly within the purview of the act. The object of the act was this: the tenant for life relies on certain fixed periods, at which the dividend will be paid, and which therefore he frames his expenditure to meet. It appears to me that that cannot be predicated of the owner of shares in companies like these, and this argument perhaps goes a little beyond *Hartley v. Allen*, but the tenant for life cannot be said to have a fixed reliance on the profits earned in railways of this description, still less when he knows that there is no obligation to make these payments at a given period; and for all that can be foreseen, the board of directors have a right to say that none shall be declared for the three or four years next ensuing. It appears to me that the case does not fall within the letter of the enactment, and I cannot hold that these dividends are apportionable.

KINDERSLEY, V.C. { GIBSON v. THE HAM-
Jan. 16, 22. { MERSMITH RAILWAY
COMPANY.

Trade Fixtures—Manufactory.

A railway company gave notice to take part of a manufactory, and were required by the owner, under the 92nd section of the Lands Clauses Act, to take the whole. A valuer, on behalf of the company, went to the manufactory, and, without entering it, valued it at a specified sum, and that amount was paid into court under the 85th section of the Lands Clauses Act, in the usual way. The company were then proceeding to take possession, and to issue their warrant to summon a jury, when the owner of the manufactory insisted that the valuation had not included certain fixtures upon the premises, such as a steam-engine, shaping and turning lathes,

etc., and that the company were bound to take such fixtures. The company contended that the fixtures being trade fixtures and removable by the owner, he could not compel the company to take them. The owner then filed a bill and moved for an injunction to restrain the company from taking possession, or summoning a jury, without making compensation for the fixtures:—Held, that although the fixtures in question were trade fixtures, which the lessee might remove during the term, the company were bound to take them; and that whatever a railway company are bound to take under the 92nd section, they must, in proceeding under the 85th section, cause to be valued, and pay the value of into court.

This case came on upon a motion for an injunction (an interim order having been made) that the defendants, their agents and workmen might be restrained from entering into or continuing in possession of the premises in the bill mentioned, until the purchase-money and compensation for the same premises, including the fixtures and fittings, had been paid or deposited; and also that the defendants might be restrained from issuing their warrant to the sheriff for summoning a jury. The facts were these: In the year 1851, the plaintiff and Henry Coley took a lease for ninety-nine years of the premises in question, being about half an acre of land, upon which they built a manufactory, now known as the "West London Iron Works," and carried on business until the 12th of April 1855, when an assignment was executed by Henry Coley to the plaintiff of the whole interest, upon trust for sale, and the partnership was dissolved. From that period the business of the manufactory had not been carried on, and in the spring of 1862, the defendants' company, finding it necessary to take a portion of the land and premises, including a corner of the manufactory, for the purposes of the then intended junction of the West London and Hammersmith and City Railway lines, gave to the plaintiff the usual notice to treat, upon which he, under the powers of the 92nd section of the Lands Clauses Consolidation Act, gave to the company a counter-notice, that he required them to take the whole of the manufactory. A negotiation then ensued, and

in the month of September 1862, Mr. Frederick Marrable, who was employed on behalf of the company, went to the manufactory, which, it appeared upon the evidence, he never entered at all, and valued the premises at 1,568*l.*, which sum the company paid into court under the provisions of the 85th section of the Lands Clauses Act, being anxious to obtain possession for the purpose of executing their works, and gave the usual bond; there being no question, so far, as to the regularity of their proceedings. The company were then proceeding to issue their warrant to summon a jury to assess the value in the usual way, when, after some correspondence, which did not terminate satisfactorily, this bill was filed, and the interim order for the injunction being obtained, the present motion was made. The manufactory contained certain fixtures and fittings, such as a steam-engine, drilling-machine and lathes of various kinds, which, in fact, constituted the machinery for carrying on the iron-works; and it not appearing whether the surveyor intended to include these articles or not, the plaintiff insisting that he did not, and that he intended to exclude them, knowing they were on the premises, and the company contending that they were included in the valuation, the question was whether they were bound to take the whole building, with such fixtures and fittings, and to pay for them, as well as for the manufactory and land.

Mr. Toller and *Mr. Erskine* appeared for the plaintiff, in support of the motion, and argued that the fixtures and fittings in question were a part of the manufactory, inasmuch as without them it could not be worked and would be of little value. That the plaintiff was entitled to compensation for the loss of them there was not the least doubt; in fact, it was admitted; but surely it could never be said that he must take them from their fixings and remove and sell them thus isolated for the mere value that attached to such articles in an independent condition. Whatever loss an individual sustained by being compelled to part with his property he must be compensated for; and upon that principle, in the case of a railway company taking a building, they must take it in its entirety, with whatever formed a part of it, and without which it

could not be used; more particularly, as in the case of a manufactory like the present, either the building itself or the fixtures separated would be of so much less comparative value.

Mr. Osborne and *Mr. G. L. Russell* appeared for the company, and contended that the fixtures in question were included in the valuation, or if not, being trade fixtures, were capable of being removed by the tenant during the term; and therefore, as they belonged to him, and not to the landlord, they could not be regarded as a part of the manufactory, and the company were not bound to take them. The principle upon which the Courts had proceeded with regard to fixtures was, that if a tenant gave up possession and left trade fixtures, he meant to abandon, and therefore was not entitled to remove them afterwards. In this case the fixtures were trade fixtures, which belonged to the tenant as his separate property, and it would be most oppressive upon railway companies to be compelled to pay for things of this kind which might be of a most costly description, and, being in fact only chattels, could never have been intended by the legislature to be taken into account. The company were ready to compensate the plaintiff for the cost of removal, and he would then either be able to sell them for their full value or use them on other premises. The fact was that the whole premises had been long shut up, and the articles in dispute were rusted and worth little more than old iron.

Cases cited—

- Mather v. Fraser*, 2 Kay & J. 536; s. c. 25 Law J. Rep. (N.S.) Chanc. 361.
Giles v. the London, Chatham and Dover Railway Company, 1 Dr. & Sm. 406; s. c. 30 Law J. Rep. (N.S.) Chanc. 603.
Lord Robert Grosvenor v. the Hampstead Junction Railway Company, 1 De Gex & J. 446; s. c. 26 Law J. Rep. (N.S.) Chanc. 731.
Cole v. the West London, &c. Railway Company, 27 Beav. 242; s. c. 28 Law J. Rep. (N.S.) Chanc. 767.
King v. the Wycombe Railway Company, 28 Beav. 104; s. c. 29 Law J. Rep. (N.S.) Chanc. 462.
Colegrave v. Dias Santos, 2 B. & C. 76; s. c. 1 Law J. Rep. K.B. 239.

- Williams v. Evans*, 23 Beav. 239.
Ex parte Barclay, 5 De Gex, M. & G. 403; a.c. 25 Law J. Rep. (N.S.) Bankr. 1.
Underwood v. Bedford, &c. Railway Company, 7 Jur. N.S. 941.
Dadson v. the East Kent Railway Company, Ibid. 941.
Barker v. the North Staffordshire Railway Company, 2 De Gex & Sm. 55.
Hare v. Horton, 5 B. & Ad. 715; a.c. 3 Law J. Rep. (N.S.) K.B. 41.
Lord Dudley v. Lord Warde, 1 Amb. 113.
Elwes v. Maw, 3 East, 38.
Whitmore v. Empson, 23 Beav. 313; a.c. 26 Law J. Rep. (N.S.) Chanc. 364.

KINDERSLEY, V.C. (after stating the facts).—The plaintiff insists upon the defendants, the company, taking the whole of the premises, and the plaintiff insists that the whole of the premises which the company are bound to take is not only the land and the buildings upon the land, but also the fixed machinery and articles of that description which are in and upon the premises, and which the plaintiff insists form part of the manufactory. The company on the other hand say, "No, we do not dispute an obligation to take the whole of the premises, and to pay for them (that is, regarding the premises as consisting merely of buildings); but as to the fixed machinery, we are under no obligation to take it; it is not, in this sense, part of the premises which you have a right under the 92nd section of the act to require us to take." And that is the question.

Now there is no case, as I understand, —neither I nor, I believe, learned counsel have been able to find one—in which the exact point has been decided; and therefore I must endeavour, to the best of my judgment, to decide it by a deduction from principle. First, with regard to the terms of the act: the sections in question are the 85th, under which the company may take the premises on depositing the value, and the 92nd, which entitles the plaintiff to say, "If you take a part you shall take the whole." The 85th section provides that if the promoters of the undertaking shall be desirous of entering upon and using any such lands; which words,

"such lands," refer to the lands mentioned in the next preceding section, and there the lands spoken of are "any lands which shall be required to be purchased or permanently used for the purposes and under the powers of this or the special act." Now, the lands required to be used are the lands spoken of in the 85th section, the language used in which is "if the promoters of the undertaking shall be desirous of entering upon and using any such lands"—which is any lands required for the purposes of the undertaking—"before an agreement shall have been come to, or an award made, or verdict given for the purchase-money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the bank by way of security, as hereinafter mentioned, either the amount of purchase-money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum as shall, by a surveyor appointed by two Justices, be fixed as the value of the land. Under that section the company are proceeding to do this. They say that they have had a surveyor appointed by two Justices (Mr. Marrable), who has made a valuation of the premises—that is, of all the premises which they (the company) say they are bound to take—and that amounts to 1,500*l.* odd, and they have deposited that in the bank; and then they say they are entitled, under the 85th section, to take possession. It will be observed that in the 85th section, and I think in most of the sections, the language is "lands,"—sometimes "lands and premises," but "lands" is the term commonly applied,—and by the interpretation clause the word "lands" shall extend to messuages, lands, tenements and hereditaments of any tenure."

Now, in the 92nd section the language is not confined to that term: the language is, "And be it enacted, that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof." So that if a person has a house, or a building of any kind, or a manufactory, he has

a right to say to the promoters or to the company, "If you want to take a part you shall take the whole, not only of my land, but of my house, building or manufactory." That is the language of the 92nd section. The plaintiff says, "My manufactory consists not only of this half acre of land and certain buildings upon it, but of divers quantities of fixed machinery and engines of various kinds." It does not signify whether they are few or many, because the same principle, of course, will apply. I assume it is agreed between the parties (though I do not know that the evidence is very distinct about it) that there are on these premises some fixtures, at least, of the ordinary kind which are not commonly called trade fixtures, and that there are other fixtures also which are trade fixtures, that is, things which would be in themselves chattels, but so affixed to either the soil or to the buildings on that soil as to be in the proper sense of the term fixtures, but they are trade fixtures besides other ordinary fixtures, about which I do not apprehend there is any controversy. The plaintiff says, "My manufactory, which you are bound to take the whole of on my requisition, consists not only of the land and of the buildings, but also of those portions of fixed machinery—my steam-engine for example—which is embedded into the soil," and which, in the ordinary sense of a fixture, is a fixture, and, subject to the question of its being a trade fixture, is part of the freehold according to the common expression. The others are either embedded into the soil or are so affixed to the walls and buildings, and so on, that they are in the same strict and proper sense fixtures, that is, things in themselves, chattels which have become affixed to the freehold. The company say, "No, that is not part of your manufactory." Of course they must say so, because if it is part of the manufactory, under the 92nd section, they, on the terms of it, are bound to take it if the plaintiff requires it. He does require it, and they say that is not, within the meaning of this section, part of the manufactory, and for this reason: although, according to the general law of fixtures, that which is a fixture has become part of the freehold; so that, as between the landlord and tenant,

the tenant has no right to remove those fixtures at all, and when the term expires, he is obliged to give up the premises with all those fixtures to the landlord, although that is the case, there is an exception to that, and trade fixtures are the exception, and those things which are now in controversy are confessedly trade fixtures. The defendants say, "that is an exception; they are not affixed to the freehold; they are not part of the manufactory in the proper sense of the term, and therefore you have no right to require us to take those fixtures; and that is the question now between the parties. Now, how are we to get at the right conclusion on that subject? Why, of necessity, we must begin by seeing what is the original and general principle with regard to the law of fixtures. We know that the cases on the subject are numerous, and, at the same time, it may be partly from the very nature of fixtures, and partly from the law as it now stands, having been brought about not by the act of the legislature, but by gradual encroachments on the law itself, if I may so call it, by Courts of justice, that the cases are certainly in a state that it is not very easy to deduce, clearly and distinctly, the principles upon which the modern exceptions (I say modern, as compared with the state of the old law) have been founded. But I must endeavour to follow them out. Now, there is no question about this, that in the early period of our law—I mean the period which we can trace back—the law of fixtures was simply this (and it was a universal law), that if a tenant of land, or buildings upon land, annexed to the soil, or to the walls, or to the other parts of the building, any chattels so that they became firmly annexed, the degree being very difficult to determine, either to the soil or the building, they were fixtures, and being fixtures they became part of the freehold, to use the ordinary expression, as between landlord and tenant, that is, they had become part of the property of the landlord, subject, indeed, as the whole of the premises were, to the existing lease to the tenant, but, subject to that lease, the property of the landlord, and that the tenant had no right, at any time whatever, to remove them; he could not, even after having made those annexations, remove

them even the very next week, or the very next day; he could not remove them at all. That was the old law; as to what constitutes such an annexation as does make it a fixture in the house, it is impossible to lay down any general rule; it depends on the circumstances of each case, and in each case the Court or the jury must determine whether the annexation is such as to constitute it a fixture. That question, however, does not arise here. The parties are agreed that, as to some of these engines, or pieces of machinery at least, they are, in the ordinary sense of the term (subject to the question of the tenant's right to remove them), fixtures: that is, affixed properly and firmly to the freehold. I say the old law was clearly what I have stated, and there was no exception originally to that rule. But as trade increased it was found that it was very much for the interests of the public, as tending to foster and encourage trade, that there should be an exception introduced into that original law—an exception in favour of trade, and an exception, at least the first exception, the most important, though not, as it is observed, the only one. (But the most important exception, and an exception in favour of trade, was this, that if a tenant of premises carries on a trade on those premises, or a manufactory of any kind (I use the term trade in a wide sense), and for the purposes of that trade, and in the exercise of that trade, puts up fixtures, though they are clearly and firmly annexed to the freehold, in the ordinary sense of the term, he is entitled within the term, but within the term only, to remove those fixtures as between himself and the landlord. I say that was the first exception, and an exception clearly in favour of trade that was introduced, as I have said, not by the legislature, but by the gradual operation of decisions of Courts of law and equity, and that rule is now clearly part of the law. There is no question about the general proposition. A tenant of premises who has himself erected fixtures for the purpose of his trade may, at any time within the term, remove those fixtures as between himself and the landlord, with this proviso, that they can be removed without material injury to the freehold; and I suppose there is no question but that these things in this case might be so removed.

I assume that if they cannot be removed without material injury to the freehold, the tenant has no right to inflict that injury, or to remove them at all; but otherwise he can remove them but within the term, and it is very important to bear that in mind. If he does not remove them within the term, the landlord takes them with the rest of the premises as soon as the term is over. I have said that was not the only exception that has been introduced: another exception, the grounds of which, perhaps, are not quite so satisfactory, was this, that with regard to what are called sometimes ornamental fixtures, a tenant has been held entitled to remove them quite unconnected with the question of trade. I may mention one instance, which is frequently the subject of cases in the books, "ornamental marble chimney-pieces" having nothing to do with trade. Now, it has been held that, as an exception to the general rule, although according to the old and general law, those fixtures would go to the landlord, which are, as we know, in the case of marble chimney-pieces, built into the wall, or that portion of the wall where the aperture of the chimney is; still, whether it is satisfactory or not, on the footing that they were considered as put there by the tenant merely for his temporary domestic use while he occupied the premises, and not as a permanent addition to the freehold, it has been held (and there is no question about it, and it is now part of the law) that within the term the tenant may remove them. In connexion with that exception which I first mentioned as to trade fixtures, this has also been held repeatedly, that if the tenant becomes bankrupt, his assignees have passed to them not only his right in the term, if they chose to take it, but also the fixtures and the right to remove those fixtures—the same right which the bankrupt himself had; and more than that: if a judgment is recovered against the tenant in an action, the sheriff may take in execution those trade fixtures which the tenant himself might have removed; I mean during the pendency of the term, but all in connexion with trade for the benefit of creditors. It was considered that, inasmuch as the tenant himself might remove those fixtures, the term not having expired, so, if a creditor recovers judgment against

him, he may take those in execution, and, in fact, exercise through the sheriff a right of removal. Now comes this question, and it seems to me that it is the question upon which what I have to determine depends. When an exception to the general law of fixtures was introduced in favour of trade fixtures, was the principle of that exception this, that they were never affixed to the freehold at all, or was it that, although affixed to the freehold, there was an exception to the right of removal? Was this exception with respect to trade fixtures an exception to the general rule, that they are affixed to the freehold, which depends on the nature of the annexation? or was it an exception to the rule that they were incapable of removal during the term? If they were affixed to the freehold substantially, it was not an exception to that portion of the rule, but an exception in favour of trade fixtures to the rule that the tenant could not remove them, and they still remained affixed to the freehold; they were still fixtures affixed to the freehold, and, unless removed, would go to the landlord. Now, if the exception was an exception to the affixing to the freehold, to their becoming part of the freehold, one is utterly at a loss to comprehend, if they are trade fixtures, why, if they are not removed during the term, they go to the landlord. Why should they go to the landlord, except because they are annexed to his freehold, and have not been removed? Why should they? I confess I am utterly at a loss to know, except that a suggestion has been made—I do not mean for the first time—but a suggestion has been made that after the term it would be a trespass to go on the premises to remove the fixtures belonging to the tenant; the tenant has no longer a right to go on the premises. It would be a trespass on his part to go and get his fixtures; and therefore we consider—for this is the suggestion—that inasmuch as though he had the right to remove them, he has not removed them: he meant to abandon them, and make them a present to the landlord. I must say, anything more unsatisfactory to my mind than that I can hardly imagine. Clearly, to my mind, the exception was not an exception to the annexation to the freehold to their being fixed to the freehold; but the exception in

favour of trade was, that they are capable of being removed by the tenant within the term. It appears to me that that is the principle of the exception. Some cases have been referred to with reference to the language of the Judges; and, no doubt, it may, upon a somewhat hypercritical examination, be considered as rather tending to be an exception as to fixtures affixed to the freehold; but I have examined the language of all the cases, and it appears to me that it would be unreasonable and unfair to those very Judges to say that that was in their mind. The question was not in their minds at the moment whether the exception was an exception in favour of trade fixtures so as to make them not affixed to the freehold, or an exception as to the right of removal. The question in their minds was, are these fixtures affixed, and, if affixed, are they trade fixtures; and if they are trade fixtures, are they not capable of being removed during the term? Now, I may observe this: supposing that they are ordinary fixtures, and not trade fixtures, but belonging to the owner in fee, so that no question between landlord and tenant can arise, then of course the owner in fee may remove them whenever he likes; they are his chattels, because he has no landlord over him to exercise any paramount right. Suppose a railway company want to take a house, have the company a right to say, we will take your house, but we should like you to remove your marble chimney-pieces; they are fixtures which you have a right to remove? Indeed, even a tenant would have a right to move his marble chimney-pieces. Supposing a company want to take possession of the house, can they say to the tenant or owner, you have a right to remove them, and therefore they are an exception; they are not affixed to the freehold, and therefore we will not take them. You must remove them? Surely not. And I do not see how you can apply what is contended for on the part of the defendants to the one without applying it to the other; and surely nothing would be more absurd than to say that the tenant or owner of a house, whose house is being taken by a railway company, cannot insist on their taking the whole of the premises, including the fixtures; but inasmuch as he has a right of removal as to those fixtures, the company

would have a right to say, "you must remove those fixtures, and we do not mean to take them." Therefore, it is not the right of removal which prevents the annexation to the freehold. The right of removal during the term is perfectly consistent with their being annexed to the freehold, and becoming in that sense part of the premises. The defendants say this: "We do not dispute but that, in one way or the other, in the long run, you ought to be compensated; but you must be compensated in this way: *quoad* the premises, you will get the purchase-money, and *quoad* the damage which you sustain by reason of removing your fixtures, and selling them at a broker's or at a marine store-shop, or in any other way you can as old iron, in that respect you will, when we go before a jury, be allowed compensation. Now, let me suppose that that compensation would be allowed, and the question is, is it to be purchase-money or compensation? If the tenant removes the fixtures (I am speaking now of such a manufactory as is in question here, namely, these iron-works), and if the fixtures are on the premises, the premises themselves, exclusive of the fixtures, are worth a great deal more than those same premises are when the fixtures are taken away. Therefore it would be extremely hard upon the owner or tenant (that is, the person against whom the company are proceeding to take the premises) that the company should be entitled to say, "Now you must remove your fixtures; we know it will diminish the selling price of the premises without the fixtures, that is, that the removal of the fixtures will not only diminish the value of the premises to the extent of the value of those fixtures, but will diminish that value *ultra* that." That, I say, would be a great hardship and a very unreasonable thing against an owner or a tenant. It appears to me that, looking at the matter with reference to the language of the act, and with reference to what I conceive to be the principles applicable to the law of fixtures, and to what is really required in order to do justice between a company and an owner or tenant of lands, those things which are fixtures in the proper sense of the term, although being trade fixtures, they come within the exception which entitles the tenant to remove them during the term, they are part of those premises which the

tenant has a right to require the company to take. Now, let us consider for a moment the language of the 92nd section. The words, as I have said, are "any house, or other building or manufactory." That this is a manufactory is beyond all question. It is not a manufactory which is actually in work, but that can make no difference whatever. It is in a condition to be worked at any time, either by the plaintiff himself or by any person to whom he may either let or assign it. Would any one say, on the popular or technical legal use of language, that that manufactory which is now at Hammersmith is not as it stands, the land and the building, and the engines and the manufactory, and so on, which are affixed to it, not simply the land and the bricks and mortar composing the building—would any one say that the manufactory does not consist of the engines which are now affixed to that freehold? Surely it does. Now I made the observation that I was at a loss to understand upon what sensible principle, if a tenant does not move his trade fixtures within the term, they go to the landlord. It has been suggested, as I have already observed, that the tenant must be supposed to have meant to make the landlord a present of them. As I have said, that is not satisfactory to my mind. I think they go to the landlord for this reason, because they are affixed to the freehold and are not removed within the term; otherwise, supposing that besides the fixtures there was a vast number of utensils not affixed to the freehold at all, the utensils of a brewery for example, I cannot enumerate the various articles that would be used in one species of manufactory or another, but, of course, in every manufactory, besides the fixed machinery, there must be a vast quantity of loose machinery, mere chattels, never fixed to the freehold, and of course not forming part of the freehold. Supposing that the tenant should have omitted through inadvertence or accident at the expiration of the term to remove all those loose fixtures, do those go to the landlord? and why not? Why should not the same observation be made on his not removing them during the term? It must be assumed that he meant to make the landlord a present of them. Then the house, utensils and articles remain the property of the tenant: and why do not the others remain his property? Why

does not the same principle apply to these? It appears to me that, as to one, it consists of chattels which are not affixed to the freehold, and with regard to the other, they cease to be chattels as long as they remain affixed to the freehold, and they become part of the freehold; and the only exception is, not to their being affixed to the freehold, or to others being part of that freehold, but as to the right of removal which in favour of trade is given to the tenant. For these reasons, it appears to me that I must consider that the premises—the manufactory, for that is the term in the 92nd section—which the company are bound to take consists, not only of the land and buildings and the ordinary fixtures, but includes all of those things, whatever they are (I am not at all professing to say what they are, nor has it been brought before me, and no question is raised that they are not)—whatever are fixtures in the proper sense of the term affixed to the freehold, so that if they were not trade fixtures there would be the right of removal,—those are part of the premises, the manufactory, which the company are bound to take upon the requisition of the plaintiff, and that, therefore, the injunction must go. I think I ought to make this observation before I conclude, with regard to the construction of the 85th section and the 92nd section taken together: I am quite satisfied that whatever the company are bound to take upon the requisition of the owner or tenant, acting under the right and privileges of the 92nd section, those must be taken into account as valued if the company exercise their powers under the 85th section. That was decided first by Vice Chancellor Wood. It came then before me, and not knowing of that decision, for it had not been reported and was not cited, I came to the same conclusion (1); and in a subsequent case before Vice Chancellor Wood he has still adhered to that decision (2). I consider that point settled. Whatever, therefore, under the 92nd section the company are bound to take and ultimately pay for, I do not mean by way of compensation but by way of purchase-money, that they must pay into court,—that is, the value of those premises they must pay into court

(1) *Giles v. the London, Chatham and Dover Railway Company*, 1 Dr. & Sm. 406.

(2) *Gardner v. the Charing Cross Railway Company*, 2 Jo. & H. 248.

if they choose to exercise the power given to them by that section. I did not go into that in the outset because, although it was not quite admitted, I do not think counsel argued strongly against it, and I have no doubt about it.

KINDERSLEY, V.C. } *Re CROSSE'S WILL.*
Feb. 13.

Will—Period of Vesting—Distinction between Settlements and Wills—Absence of Gift over.

A testator, who had seven sons, gave certain chattels to his wife for life, and after her decease to such of his sons as should be then living and should first attain twenty-one. He then gave three specific parts of his real estate to six of his sons, naming them, each part to two, with benefit of survivorship, and another specific part to the remaining son, with a money legacy. He then gave all his residuary real estate and personal estate to trustees, upon trust, to sell and convert at their discretion, and out of the income to pay his wife an annuity, any deficiency to be made up out of the estates given to his sons, and subject thereto and after the decease of his wife to convey and transfer the residue of his real and personal estate to his seven sons before named or such of them as should be then living, share and share alike as tenants in common, and not as joint tenants, to be vested in him or them when and as he or they should respectively attain twenty-one, or die under that age leaving issue at his or their decease. And in case any one or more of the said children should die under twenty-one without leaving issue, then to transfer and convey the share of such child so dying to the others or other of them as tenants in common, to be paid at the time appointed for payment of the original shares:—Held, that a son who died leaving a widow and children, but who predeceased the testator's widow, took no share in the residuary estate.

In this case a sum of 200*l.* had been paid into court by the trustees of the will of Thomas Crosse, under the provisions of the Trustees' Relief Act, the question being, whether the representative of a son who had predeceased the widow and tenant for life was entitled in his right to any share

in the residuary estate. The testator, after giving to his wife Elizabeth Anne Crosse the use of his plate during her life, and after her decease or second marriage to such of his sons as should be then living and should first attain the age of twenty-one years, continued, "I give and bequeath my mansion of Brodlands, with the messuage, farm and premises, to my sons Thomas Neufville Crosse and Latymer George Crosse, their heirs and assigns, and in case of the death of either of them under the age of twenty-one and without leaving issue, to the survivor, in fee simple." There was then a devise of Clascey Farm and lands to his sons Samuel Crosse and Joshua Grant Crosse, in the same terms; and a devise in like terms to his sons Robert Crosse and Charles Grant Crosse of a farm called Ashby's, and a devise of a farm at Friskney to his son John Hill Crosse, in fee, the manor, farms and lands so given to be charged with an annuity of 500*l.* to his wife, each portion given to two sons to contribute two-sevenths and to the one son one-seventh. The testator then gave all his residuary real and personal estate to John Collingridge and to his sons Thomas Neufville Crosse and Latymer George Crosse absolutely, on trust, if they should think it advisable, but not otherwise, to sell the real estate and to convert the personalty, and to invest 2,000*l.* in trust for John Hill Crosse, to be paid to him at twenty-one; and from the interest and dividends thereof, and rents of his unsold real estate, to pay his wife an annuity of 500*l.*, any deficiency to be made up out of the estate devised to his sons; and subject thereto, and after the decease of his said wife, upon trust to convey, assign, transfer and pay the residue of his said personal estate, and also convey such parts of his real estate as should not have been sold, unto his said seven sons thereinbefore named, or such of them as should be then living, share and share alike, as tenants in common and not as joint-tenants, and to be vested in him or them when and as they should respectively attain twenty-one, or die under that age leaving issue at his or their decease. And in case any one or more of his said children should die under the age of twenty-one without leaving issue, then that the trustees should from time to time, as and

when the same should become payable, pay, assign, transfer, and convey the original share of the said trust monies, or the securities thereof, or of his said residuary estate, which should belong to such of his said children as should die as aforesaid, and also the part or respective parts or shares of and in the same which from time to time should belong to or be taken by them, or either of them, so dying, and the accumulations of the dividends and interest, if any, arising from the share of the child or children so dying, to the others or other of them, as tenants in common, to be paid at the times appointed for payment of the original shares. There were then clauses for maintenance and advancement during the minority of any son not exceeding one-half of his said sons' *then apparent shares* in the said trust fund, with a trust for accumulation of so much of the shares of each of his said children as should not be applied for their maintenance and advancement, to be added to the principal of their respective shares, and to be subject to the same trusts. And the testator declared that the provisions given by his will to his wife and children were intended by him in satisfaction of any claim she or they were entitled to under the settlement made on his marriage, or in any other manner, and of any claim for dower, and there were other clauses upon which no question turned.

The testator also made a codicil to his will, but no question was raised upon it. Robert Crosse, one of the sons, married and had two children, and then died, in his mother's lifetime; and on her death, which happened in 1862, the trustees, considering it doubtful whether his widow and children, to whom he had, by will, left all his property, took any share, in his right, in the testator's estate, paid the fund of 200*l.*, representing the testator's residuary property, into court, under the Trustees' Relief Act; and a petition was now presented, by the other brothers, for payment out of court, raising the question whether Robert Crosse took any share under the will, all the sons having attained twenty-one.

Mr. Baily and *Mr. Hardy*, for the petitioners, argued that the gift to the sons being clearly dependent on their surviving the widow, there was nothing in the subse-

quent parts of the will to extend that gift and make it absolute. No doubt a clear gift might be controlled by a subsequent clause; but the subsequent clause must be, at least, equally clear.

Farrer v. Barker, 9 Hare, 737.

Swallow v. Binns, 1 Kay & J. 417.

Re Woollaston, 27 Beav. 643; s. c. 28 Law J. Rep. (N.S.) Chanc. 721.

Mr. Glasse, for the widow and representative of Robert Crosse.—A general intention of equality was observable throughout this will, even in the gift of the plate; and the maintenance and advancement clauses were inconsistent with the notion that a child predeceasing the widow should be excluded; although a gift might be in clear terms, a general and contrary intention would override it. This will must, in fact, be regarded as if it were a settlement—

Bythessea v. Bythessea, 23 Law J. Rep. (N.S.) Chanc. 1004.

Mr. Baily was heard in reply.

KINDERSLEY, V.C. (after shortly referring to the facts).—It must be remembered that the question in this case arises upon a will, not a marriage settlement; the distinction between the two recognized by the Courts is, that a settlement, being in contemplation of marriage, a general intention to provide for the husband, wife and children is assumed *à priori*; and there is no reason for making any difference as between children, there being at that time neither husband, wife nor children; but all being future and uncertain. In the case of a will the testator is dealing with a different state of things: he has a wife and children; and from misconduct or otherwise, or from miscarriage or success in life, or from an infinity of reasons, without attributing to him a capricious mode of dealing, he may have reasons to induce him to make a great difference in the disposition of his property with respect to his different children. What therefore was intended by the Judges in the various cases as to the distinction between settlements and wills was, not that necessarily a different construction must be put upon them, but that in a settlement there is no reason for making a distinction in benefiting the objects; while in a will there may be: and all the circumstances, and what was in the testator's mind,

must be considered. This case is likened to the case of a settlement; but I do not recognize the similitude. There may be a general desire as to equality or not; but that does not put it on the footing of a settlement: only that the testator, having regard to the state of his family, thought fit to make certain arrangements. Although there may not be a great desire to prefer one to another, they are not put on an equal footing; although, in giving the estate to the sons in pairs, and one estate to one son with a legacy, I think, of 2,000*l.*, there may be something like equality in actual value. After giving the annuity to his wife, and contemplating an insufficiency of residuary property to pay it, and providing that his sons shall make up the deficiency, he proceeds, "subject thereto after the decease of my wife," clearly fixing that as the period, he directs a transfer of his residuary personal estate and a conveyance of his real estate to his seven sons, or such of them as shall be then living, share and share alike, as tenants in common, and not as joint tenants. Taking that as the backbone of the gift, if there was nothing more, it is impossible for one moment to contend but that he intended only such of the seven sons as survived the wife to take. But he goes on, "to be vested in *him or them*"; not in *them* only, "when and as they or he shall respectively attain twenty-one, or die under that age." In whom? Whom did he mean? All, or only such of them as should survive the wife? Clearly only those who should survive the wife. Then comes language more ambiguous; and the real question is, whether what follows is sufficient to induce the Court to say that the testator did not intend to exclude those who should not be living at her death. No doubt the Court, acting on principles now well established, the policy of which, however, may well be questioned, has held that words as strong as those which occur here may be controlled and overridden by the context, and I quite concur in the observations made in *Farrer v. Barker*, that the cases have gone quite far enough; but the question here is, whether what follows is of sufficient weight so to override it, in the case of a son predeceasing the widow, whether he left issue or not. The words used are "said," not "such children," and that

creates an ambiguity, making it doubtful whether he meant *all* his sons or those only to whom he had made the last gift of the residuary estate. But it is not, I think, a sufficient ambiguity to override the gift itself; and Vice Chancellor Wood, in *Swallow v. Binns*, considered a mere ambiguity not sufficient in such a case. Then, as to the words "original share," is such share given to any except those who did survive the wife? There, again, it is merely doubtful, and not sufficient, either alone or in connexion with the other clause, to override the previous gift. The same observation applies to the clause for maintenance, although the language is certainly remarkable. But supposing any son was under age during the wife's life, there is nothing inconsistent in providing for him out of his apparent share, although, by dying before the wife, he would not be entitled to it; so also as to the advancement clause, where a young man might become either a soldier or a sailor at an early age. Then comes that peculiar clause, not met with in any of the cases, as to the provision being intended in satisfaction of any claim of the legatees. There may be a settlement as to some property of which nothing is known; and if anything turned upon it, I would not have disposed of this case without some inquiry. But whatever it was, the meaning appears to be, that if the testator's wife or children elected to take under any such instrument, they might do so—nothing more. In this case there is not, as in many of the authorities, a gift over on death under twenty-one without issue, which induced the Courts to hold that there was an overriding of the gift. The gift being then clearly explicit and unambiguous, it is not affected by any other part of the will. The division must therefore be into sixths.

WOOD, V.C.	} GILBERT v. LEWIS.
June 2.	
WESTBURY, L.C.	
Nov. 18, 20; Dec. 2.	

Parties—Bankrupt—Fraud—Married Woman—Separate Estate.

A bankrupt who, by fraud committed before his bankruptcy, has acquired property

which has passed to his assignees, cannot properly be made a defendant to a suit for setting aside the fraudulent transaction, either for the purpose of fixing him with costs or otherwise.

If a bill seeks discovery from a bankrupt merely as incidental to relief prayed against him, the bankrupt, not being a necessary party to the suit in respect of the relief, may demur to the discovery.

An allegation of fraud is insufficient without a statement of the circumstances constituting the fraud.

Semble—A gift to the testator's widow "for her sole use and benefit" does not give her a separate estate, so as to entitle her on marrying again to sue by her next friend.

This was a demurrer.

The bill was filed, by Sophia Gilbert, the wife of the defendant, William Henry Gilbert, by her next friend, stating that George Philip Bradley, the former husband of the plaintiff, being entitled in remainder expectant on the decease of his mother, Phoebe Bradley (who died in 1846), to certain freehold property at Kingswinford, in Staffordshire, by his will, dated in 1842, gave all his real and personal estate to the plaintiff "for her sole use and benefit," and died in 1843. Shortly after the death of the tenant for life, the defendant, John Hunter, who had since become bankrupt, entered into possession of the property, having, as was alleged, by himself and his assignees, become entitled thereto in the following manner.

By an indenture, dated the 22nd of March 1828, John Bradley and G. P. Bradley, being entitled in equal shares to the remainder in question, granted to R. H. S. Hele, an annuity of 100*l.*, determinable on lives, secured by a term of 2,000 years, with full powers of sale in default of payment.

By an indenture, dated the 2nd of August 1837, the annuity was assigned to Thomas, Earl of Strathmore, in consideration of 2,000*l.*, subject to the right of re-purchase, and the term was assigned to Hunter determinable on the re-purchase.

By an indenture, dated the 4th of August 1837, the term was, under the power contained in the deed of 1828, sold

and assigned to George Richards Elkington absolutely.

By an indenture indorsed on the last-mentioned deed, and dated the 5th of April 1841, after reciting that the purchase-money paid by Elkington was the proper money of John Hunter, and that Elkington was a trustee for him, the term was assigned absolutely to Hunter.

The bill charged that the transaction was a fraudulent contrivance on the part of Hunter to obtain the said hereditaments, without payment of the value thereof; that the deeds were fraudulent and void, and ought to be set aside and cancelled; that the deed of 1828 was made without consideration, and that the pretended consideration therein mentioned did not, in fact, pass, and that the same deed was really made for Hunter's benefit, and was fraudulently contrived by him; that the assignment and transfer of August 1837 were fraudulent and merely colourable, and the sale was in equity a sale by a mortgagee with a power of sale to himself. It also alleged that Hunter acted as the attorney and solicitor of the Bradleys in the preparation and execution of the deed of 1828, and that all the parties interested under the several deeds were his clients, and acted under his influence and for his benefit; and that Hunter, as such attorney and solicitor of the Bradleys, obtained possession of the title-deeds, and the same were now in his custody or power; that the defendant Hunter was adjudicated bankrupt on the 29th of October 1861, and the defendants Lewis and Graham were his assignees; that the defendant Hunter alleged that there would be a large surplus coming to him under his bankruptcy, after payment in full of all his creditors, and he insisted, and Lewis and Graham admitted, that, for this and other reasons, the said term in the said hereditaments was not vested in Lewis and Graham as the assignees under the said bankruptcy; it also stated that Hunter had retained possession of the premises until the appointment of assignees, shortly after which Lewis and Graham had entered into and continued in possession.

The bill prayed that it might be declared that the deeds were fraudulent and void, and ought to be set aside, and that they might be delivered up to be cancelled, or

that the defendants, Lewis, Graham and Hunter, might be decreed to re-assign the said hereditaments to the plaintiff for the residue of the term of 2,000 years free from the annuity; that the plaintiff might be let into possession; that the defendant Hunter might be decreed to deliver up to the plaintiff the deeds relating to the said hereditaments, and pay the costs, and for further relief.

The defendant Hunter demurred to the whole relief sought by the bill, except the delivery up of the deeds, and as to this part of the bill he put in an answer denying that the deeds were in his possession.

Mr. Rolt and Mr. Dickinson, for the demurrer, contended that the bankrupt was improperly made a party. They cited

Benfield v. Solomons, 9 Ves. 77.

Lloyd v. Lander, 5 Madd. 282.

Collins v. Shirley, 1 Russ. & M. 638.

Rochfort v. Battersby, 2 H.L. Cas. 388.

Whitworth v. Davis, 1 Ves. & B. 545.

Mr. Giffard and Mr. Reilly, for the bill, referred to—

Mackworth v. Marshall, 3 Sim. 368.

King v. Martin, 2 Ves. jun. 641.

Fenton v. Hughes, 7 Ibid. 287.

Le Terrier v. the Margravine of Anspach, 15 Ibid. 159.

Plummer v. May, 1 Ves. sen. 426.

Dalton v. Hayter, 7 Beav. 313; s. c. 3 De G. M. & G. 817.

Boyes v. Rossborough, Kay, 71; s. c. 23

Law J. Rep. (N.S.) Chanc. 305.

Plumbe v. Plumbe, 4 You. & C. 345; s. c. 10 Law J. Rep. (N.S.) Exch. Eq. 33.

WOOD, V.C.—I have been carefully considering this case, and I think it is one in which the demurrer should be allowed. With regard to the authorities, it may be very easily disposed of, because not one of them has any reference to the point in dispute.

First, as regards the case of the bankrupt, no bill can be sustained against him for the purpose of relief, because all his interest passes to his assignees; but it is said he may be made a party for the purpose of discovery. In *Whitworth v. Davis* it was considered doubtful whether the case of a bankrupt constituted an exception to the general rule that a mere witness having no interest

ought not to be a party; but it is unnecessary to consider it here, because whether he could or could not be made a party for the purpose of discovery there can be no right to have the relief prayed against him.

Then comes the question, which is more material, whether, having been charged with fraud which will affect the estate vested in him anterior to the bankruptcy, he can now be made a party as an accomplice in the fraud for the purpose of fixing him with costs. The only authority cited on that point is *King v. Martin*, in which the fraud was alleged to be between the bankrupt and his assignees, the bankruptcy itself being fraudulent. That comes within the principle of a host of other cases that might be cited deciding that where two or three persons concur in a fraud no one of them can escape being made a party to the suit and being liable to costs by saying he derived no benefit from the fraud and only gratuitously assisted in procuring a fraudulent benefit to another. A party cannot defend himself on that ground, but he may be made a party for the purpose of making him pay costs. A distinction is very rationally drawn, although it is but a *dictum*, in *Lloyd v. Lander*, between the case of a fraud committed by the bankrupt as an agent taking no benefit whatever, and being brought before the Court in order to answer for costs, and the case of a person who has committed a fraud of which he takes the sole benefit, and then the whole interest in his estate, by virtue of the operation of the bankruptcy laws, passes to his assignees. The question then is whether he, having committed a fraud for his own benefit, the plaintiff can, when it comes to a hearing, split her rights, and deal with the bankrupt irrespective of the assignees, with respect to the rights which will pass *ultra* the bankruptcy, and in respect of which she has remedies against him. The only case approximating to an authority is *Mackworth v. Marshall*, but the judgment there is given in such an unsatisfactory manner that it is impossible to concur in the reasons alleged. They were not the reasons urged in argument by the counsel adverse to the plea, and which are now urged by Mr. Giffard. It is not said by the Vice Chancellor that, the bankrupt having committed a fraud, that fraud is

to be split and severed from the benefit that he derived from it, and he is to be made a party in respect of the costs on account of the fraud committed by him anterior to his bankruptcy; but certain persons defendants in the suit had taken the bills of exchange, which were the subject-matter of the suit, and held them in their hands, saying they held by way of security, but subject to their security they held for the benefit of Marshall the bankrupt, and the Vice Chancellor says Marshall is a necessary party in respect of his interest in the bills. But according to the plea that interest was in the assignees, and therefore the assignees would be the persons to represent that interest, and if the plaintiff established his right against them, of course the holders of the bills would have to hand them over. The case is put on a footing which I am quite unable to follow. I cannot regard that as a decision that a person committing a fraud anterior to bankruptcy may afterwards be brought before the Court for the sole purpose of fixing him with costs. In the present case the bankrupt, as it is alleged, concurred with others and obtained a benefit by that fraud, which benefit is now vested in the assignees, and the assignees choosing to stand or fall by the transaction will either surrender the property or make such compensation out of the estate as may be necessary. If they insist on holding it they will hold it at their own risk, and subject themselves to costs if they should fail to establish their right. There is no charge in the bill that since the bankruptcy the assignees and this bankrupt have concurred together in fraudulently withholding this property from the plaintiff. If there had been such a charge that would have brought the case a little nearer to the case of *King v. Martin*, but I find no authority for saying that a bankrupt who has committed a fraud before his bankruptcy is on that ground alone a proper party to the suit.

Then there was another point which was argued as to the possession of the deeds. I was a good deal struck with this fact, that while the pleader has thought it necessary to cover by the answer that part of the bill which says that "the four deeds herein particularly mentioned, together with other documents relating to the indentures afore-

said, are now in his possession, custody or power," he has not thought it necessary to cover that part relating to the general possession of deeds and documents. I was rather struck with that, because it would seem to lead us to the admission that he has got those documents in his possession which might make it necessary to retain him as a party for the purpose of the suit. I think, however, that is answered by the observation in *Lloyd v. Lander*, that you must distinguish between the special deeds which are charged as being those to which the fraud refers, and which may or may not be recovered from him, and his other deeds. With respect to that, there is a general allegation in the bill that as solicitor of the Bradleys he obtained possession of the deeds. Whatever he obtained acting as solicitor of the Bradleys, if the four deeds in question ought to be set aside, they will be set aside, and therefore they are out of the question, and you do not want him a defendant. Of course, as you file your bill against the assignees you have nothing more to do with him, and if you succeed against the assignees he is only holding the general deeds as the solicitor of the Bradleys. It appears to me, therefore, that it is right that no answer should be put in, as they were simply retained by him as the solicitor of the Bradleys, without relation at all to the four deeds in question, and wholly unconnected with the alleged fraud. As to the four deeds he has answered, following the suggestion of the Vice Chancellor in *Lloyd v. Lander*, that there might be some special averment relating to them which might make it necessary to have an answer.

Then there remains this question. At one time it struck me for a moment, that if the plaintiff succeeds in setting aside all the deeds, the bankrupt will be a trustee of the term; and in that case it might be well held that the term being a trust term would not pass under the bankruptcy. I think, however, that is not the proper way of viewing it, because you must first set aside the deeds. When you set aside the deeds he is simply a trustee, but that is not the character of the relief you want in this suit at all, because it will then be determined, that on that account the estate would not pass to the assignees; but it has been argued here, that the ground on which it does not pass to the

assignees is, that there will be a large surplus after payment of all the bankrupt's debts, and you must take the whole case together. It is alleged that all these deeds were executed, by which, amongst other things, the estate has been sold up and the trust of the term has been vested in Hunter, and if so it must be in his assignees. It is attempted to be got over in this way: Hunter says that there will be a large surplus. He alleges, and his assignees admit, that for that and other reasons (the other reasons not being alleged) the term in the hereditaments is not vested in them. The fact of there being a surplus is not material. The averment that Hunter claims an interest of this particular character makes the bill absurd, for no such interest can be in him.

In *Plummer v. May* and *Dalton v. Hayter*, and that class of cases, it was decided that where a person claims an interest which he will not disclose in the subject-matter of a suit, it is necessary to make him a party to the suit, in order that you may force the discovery from him; but no case has been cited which bears on the facts stated in this bill, in which the nature of the interest claimed by Hunter is stated. That disposes of the argument raised on the bills of exchange, and the possibility of setting aside this deed hereafter against the assignees; in which case it may then be held that the term, being a trust term, has not become vested in them. If I were to hold that, then in every case in which it was sought to set aside a transaction against the assignees of a bankrupt, the bankrupt would always be obliged to be made a party; because, in all cases, if you succeed in setting aside the transaction, there would be a resulting trust in favour of the person said to be defrauded by the bankrupt. There is no authority at all for any such proposition, and I think therefore, upon all these grounds, the demurrer must be allowed.

From this decision the plaintiff appealed.

Mr. Giffard and *Mr. Reilly*, for the appellant.

The LORD CHANCELLOR called the attention of counsel to the question whether the words of the will, "for her sole use and benefit," gave to the plaintiff a separate

estate, enabling her to sue by her next friend.

Upon this point they cited :

Adamson v. Armitage, 19 Ves. 416 ;
a. c. G. Cooper, 283.

Blacklow v. Laws, 2 Hare, 49.

Tyler v. Lake, 2 Russ. & M. 183 ; s. c. 4
Sim. 144.

Ex parte Ray, 1 Madd. 199.

— *v. Lyne*, Younge, 562.

Newlands v. Paynter, 4 Myl. & Cr. 408.

Lindsell v. Thacker, 12 Sim. 178 ; s. c.

10 Law J. Rep. (N.S.) Chanc. 348.

Ex parte Killick, 3 Mont. D. & D. 480 ;

s. c. 13 Law J. Rep. (N.S.) Bankr. 6.

Massey v. Parker, 2 Myl. & K. 174.

Davis v. Prout, 7 Beav. 288.

Tullett v. Armstrong, 4 Myl. & Cr. 390.

Upon the other points they cited, in addition to the authorities referred to in the Court below :

Bowles v. Stewart, 1 Sch. & Lef. 209.

Lumb v. Milnes, 5 Ves. 517.

Lord Redesdale's Pleadings, 161, 4th ed.

12 & 13 Vict. c. 106. s. 181.

24 & 25 Vict. c. 134. s. 149.

THE LORD CHANCELLOR.—This is a singular bill, and met by a defence equally singular. The plaintiff sues as a married woman, by her next friend, claiming separate estate in some freehold property which is the subject of the suit. The object of the suit is to reduce or set aside a charge affecting that freehold property. The whole right to sue depends, therefore, upon the fact of the property being well limited to the separate use of the plaintiff. The title of the plaintiff to the alleged separate estate depends upon the will of her former husband. At the time of making that will, and of his decease, he was seised in fee simple in remainder expectant on the decease of a tenant for life of certain freehold estate. By the will he devised and bequeathed all his real and personal estate to the plaintiff, then his wife, for her sole use and benefit. There is no trust created by the will. There are no words indicative of exclusive enjoyment beyond those that I have mentioned. There is no machinery, in short, provided by the will, which is requisite in effect for the creation, or at all events for the administration of the separate estate of a married woman. The devise is a legal devise,

and the proposition is, that the words, "for her sole use and benefit," manifest a clear intention on the part of the testator that, in the event of subsequent coverture by his widow, she should still remain entitled to the separate interest in the property. Now there is not, as far as I am aware, any single case containing simply these words, which has been made the foundation of a decision that they give a separate estate. The nearest case is that of *Adamson v. Armitage*, *ubi sup.*, before Sir William Grant. But in that case, money was given to trustees, upon trust to invest, and they were directed to pay the income to a woman unmarried, "for her sole use and benefit." There was, of course, the machinery of the trustees, and the direction to pay the income to the individual. The point does not appear to have been much argued, and Sir William Grant decided that the words would give a separate interest, citing a case of *Jones v. —*, as stated in 5 Vesey, 520, which appears to have been the case of *Johnes v. Lockhart* (1). But it turns out that *Johnes v. Lockhart* was erroneously stated in the place referred to by Sir William Grant, and that it is a decision of the very opposite conclusion to that for which it was referred to. There is no other case where those simple words, "sole use and benefit," occur, that I am aware of, except the case of — *v. Lyne*, reported in Mr. Younge's reports, and most erroneously reported ; for nothing of the kind was decided in that case as stated in the report of it. The incorrectness of that report has been commented upon by Lord Cottenham in *Tullett v. Armstrong* (2). There are, indeed, many other cases where there have been words superadded to the words "sole use and benefit"; as, for example, the case of *Ex parte Ray*, *ubi sup.*, where the words were "sole use and benefit, and disposal"; but the case of *Ex parte Ray* was one in which the words occurred in marriage articles, being the terms of a contract between an intended husband and wife ; but in a will containing a disposition to a woman either single or becoming discovert immediately on the death of the testator, there is no case in which these simple words, unconnected with a gift to trustees, have been made the

(1) Cited 3 Bro. C.C. 383, n. 4. (Belt's ed.).

(2) 4 Myl. & Cr. 408.

foundation of a decision that they give a separate estate. I entirely concur in the observations of Lord Brougham in the case of *Tyler v. Lake*, *ubi sup.*, that the words, to exclude the operation of the legal rule as transferring the estate to the husband upon subsequent coverture—the words to prevent the operation of that rule must be clear, and afford no room for doubt as to the intention of the testator. I should have had no difficulty in ruling, therefore, that those words do not confer upon the plaintiff a separate estate; and if so, the position of the ownership of the property in question would be, that her husband and herself would be seised of the estate in right of the plaintiff, but that the plaintiff alone would be unable to maintain the suit.

But the singularity of the defence is this, that I am unable to make the ground that I have mentioned the reason for my decision; for if it were available for the defendant, it must be used by him as a ground of demurrer *ore tenus*, but it is ruled that no demurrer *ore tenus* can be more extensive than the demurrer on the record. Now the demurrer on the record is to a part of the bill only, with an answer to the rest of the bill, thereby admitting, so far as the portion of the bill which is answered is concerned, that the plaintiff has a capacity to sue. It is, therefore, impossible to allow the defendant to avail himself of this objection to the bill, by reason of the form of defence which he has adopted. I proceed, therefore, to consider the nature of that defence, which is a demurrer to part of the bill, and an answer to the rest of the bill. Now, the bill states a case of this description, that the testator was fraudulently induced by a person of the name of Hunter to join in charging an annuity on the estate in question. The bill alleges, in various forms, that the annuity deeds were the result of a fraudulent contrivance, and were fraudulently obtained, but the circumstances constituting that fraud are nowhere stated. Fraud is a conclusion of law, and it is wholly immaterial and insufficient to allege that a deed has been obtained by fraud, unless the things done constituting the fraud are stated on the face of the bill. There is here not one single allegation of any fact constituting fraud, or tending to create a case of fraud, except an allegation

that the deeds were without consideration, and that the consideration did not pass, whatever may be the meaning of those words. Now, the fraud thus imperfectly stated is ascribed to the defendant Hunter, the demurring defendant, who was an attorney, but who obtained these deeds for his own benefit. He has since become bankrupt, and the singular character of this bill is, that the relief prayed for, the setting aside of those deeds, is prayed against Hunter as well as against his assignees. I am by no means disposed to hold that a bankrupt who, antecedently to his bankruptcy, has been engaged in a fraudulent transaction, whereby he has acquired property may not be made a party to a bill of discovery, even although the property has been transferred by law to his assignees. But then the bill must be constructed for the express purpose of obtaining that discovery from the bankrupt. If the discovery sought from the bankrupt is sought merely as incidental to relief prayed against the bankrupt, then the bankrupt, who is not a necessary party in respect of that relief, may demur to the bill seeking that relief, and demur therefore to the discovery which is sought merely as incidental to that relief. The singularity of this present demurrer is, that, whereas it might have been a demurrer to the whole bill, the demurring defendant exempts one allegation of the bill, which is, that the annuity deeds are in the possession of the bankrupt, and also one portion of the prayer, which is, that the deeds in the possession of the bankrupt may be delivered up to the plaintiff. Now the possession of the bankrupt is the possession of the assignees, and in respect merely of that possession it was unnecessary to have made the bankrupt a party. However, the bankrupt, demurring to the rest of the bill, exempts that particular portion of the relief, and of the discovery incidental thereto, and I cannot say that his partial demurrer is bad because he might have put in a general demurrer instead of that limited demurrer.

But then my attention was called to two arguments by Mr. Giffard and Mr. Reilly, one of which was of this special nature: Mr. Giffard said, that the bankrupt had demurred to a considerable portion of that discovery which is necessary to be

made, in order to understand the reason why the bankrupt is made a party in respect of that portion of the case which is excepted from the demurrer. His argument, therefore, was, that the demurrer was too extensive, as comprehending a discovery which was incidental to the part excepted out of the operation of the demurrer. But I am not of that opinion. If the bankrupt could with propriety be made a party to this bill, in respect of an allegation that he had the deeds in his possession, the only discovery that could be required from him—and his answer would have been sufficient if it had been limited only to that discovery—would have been the inquiry whether the deeds were or were not in his possession. I do not think, therefore, that the demurrer is open to any objection upon that ground. It was then said, that the plaintiff had a right to make the bankrupt a party to a bill for discovery in respect of his having been engaged in the transaction being a solicitor. But the answer to that is, that he engaged in the transaction for his own benefit as principal. It is perfectly true that a solicitor, who is implicated in a case of fraud, may be made a party to a bill, seeking relief in respect of that fraud, merely for the purpose of discovery, the only relief asked against him being that he should be ordered to pay the costs; but that is not the character of the case made by this bill against Mr. Hunter. I, therefore, must affirm the order that has been made in the Court below, and dismiss this petition of re-hearing, with costs.

LORDS JUSTICES. { THE NORTH-EASTERN RAIL-
 Nov. 20. { WAY COMPANY v. CROSS-
 { LAND.

Railway Company—Purchase of Land and Right to make a Tunnel—Adjacent Minerals.

A railway company, under the powers of their act, bought land for the purposes of their line, and purchased also, for trifling sums, from various landowners, the right of making a tunnel through their lands. Under this act minerals were excepted from purchases, and vendors were enabled to work the minerals, so that no damage be done to the railway. C, who derived title as landowner from the vendors to the company, gave

notice, under the assumed powers of a subsequent act, of his intention to work for minerals within a certain distance of the line and the tunnel. The company filed a bill to restrain C. from so doing, and the Court being of opinion that the subsequent act was not applicable, and it appearing that his workings would endanger the line of railway, an injunction was granted by one of the Vice Chancellors, although it was admitted that the plaintiff would thereby be prevented from getting minerals of very great value; and, on appeal, the decision was affirmed.

By an act of parliament which received the royal assent on the 28th of May 1830, (11 Geo. 4. c. lix, hereinafter referred to as the act of 1830) for incorporating the Leeds and Selby Railway Company, section 30, after authorizing the compulsory taking of land, it was enacted as follows: "Nothing in this act contained shall extend to give the said company any mines, or any coals, stone, slate, or other minerals under any land purchased by the said company under the provisions of this act, except only so much of such coals, stone, slate or minerals as may be necessary to be dug or carried away, or used for the purposes of this act; but all such mines, coals, stone, slate or minerals shall be deemed to be excepted out of the purchase of such land, and may be worked by the respective owners or lessees thereof under the said lands, or the railway or other works of the said company, as if this act had not passed, so that no damage or obstruction shall be thereby done or occur to or in such railway or works. Provided, nevertheless, that in case any damage or obstruction shall be so done or occur to or in such railway or works, the same shall be forthwith repaired or removed (as the case may be) by and at the expense of the respective owners or lessees of such mines, coals, stone, slate or minerals as aforesaid; and if the same shall not be forthwith done, it shall be lawful for the said company to repair such damage, or to remove such obstruction, and to recover the expenses attending the same, in case of refusal or neglect to pay the same within fourteen days after demand thereof, by distress and sale of the goods and chattels of such respective owners

or lessees, or by action of debt or on the case in any of His Majesty's Courts of Record at Westminster."

Soon after the passing of the act the Leeds and Selby Railway Company contracted with Henry Hall for the purchase of lands of which he was seised in fee, and the price settled to be paid was 1,904*l.* 3*s.* 6*d.*, and by a deed dated the 30th of March 1833, Mr. Hall and Grace his wife granted to the company, their successors and assigns, the said lands, being parts of two closes numbered 20. and 21. on the parliamentary plan, "and also the right and privilege of making, and for ever hereafter maintaining, an arched tunnel or excavation through and under the remainder of the said close numbered 20, and through and under a certain other close of him the said Henry Hall," with the right and privilege of ingress, egress and regress to and from the said closes or any of them, for the purpose of making any alterations and repairs in the tunnel, making compensation as therein provided, "to hold the premises to the said company, their successors and assigns for ever, according to the true intent and meaning of the said act." The Leeds and Selby Company also contracted with "the Committee for the Execution of Charitable Uses" within the borough of Leeds, for the purchase of easements in certain lands of which the Committee were owners in fee; and by deed, dated the 1st of August 1835, the said Committee, in consideration of 33*l.* 19*s.*, granted to the company the privilege of making, and for ever maintaining, an arched tunnel or excavation, under certain lands of the committee, and the right and privilege of ingress, egress and regress to their lands for the purpose of alterations and repairs, "to hold and enjoy the said rights and privileges thereby granted to the said company, their successors and assigns for ever, according to the true intent and meaning of these presents." Similar grants of rights of making and maintaining tunnels were made to the same company by the trustees of a charity school at Leeds, in consideration of 22*l.* 13*s.*, and by one John Danby, in consideration of 88*l.*, the deeds of grant being dated respectively the 31st of August 1835, and the 29th of September 1835.

The York and North Midland Railway Company was incorporated in 1836, by act 6 Will. 4. c. lxxxi., (hereinafter referred to as the act of 1836) which contains the following clauses:

Section 51. "And be it further enacted that nothing in this act contained shall extend to give to the said company any coal, ironstone, limestone, stone, slate, clay, or other mines or minerals under any land purchased by the said company under the provisions of this act, except only so much of such coal, ironstone, limestone, stone, slate, clay, or other mines and minerals as may be necessary to be dug or carried away, or used for the purposes of this act, or as may be found not deeper than the line of the section hereinbefore mentioned and referred to, unless the said mines shall have been expressly purchased and conveyed by the owner thereof to the said company, but all such coal, ironstone, limestone, stone, slate, clay, or other mines and minerals not necessary to be so dug, carried away, or used as aforesaid, shall (unless the contrary be expressed) be deemed to be excepted out of the purchase and conveyance of such lands, and may, subject to the restrictions hereinafter contained for the purchase thereof by the said company, be worked by the respective owners or lessees thereof under the said lands or the railway or other works of the said company, as if this act had not been passed: provided that in the working of such mines or minerals, no damage be wilfully done to the said railway or works, and that the said mines and minerals be not worked in an improper manner."

Section 52. "Provided always, and be it further enacted, that when and so often as the proprietor or lessee or tenant of any mines of coal, ironstone, limestone, stone, slate, clay, or other mines and minerals lying under the said railway and works, or any of them, or within the distance of forty yards from such railway or works respectively, shall be desirous of working the same, then, and in every such case, such proprietor, lessee, or tenant shall give notice in writing to the said company, under his hand, of such intention at least twenty-one days before he shall begin to work such mines; and, upon the receipt of such notice, it shall be lawful for the said company to inspect such mines, or cause the same to be

inspected, and to contract and agree with any such proprietor, lessee, or tenant for the purchase of and to purchase any such mines or minerals, or any part thereof, the getting and working of which may appear to the said company likely to prejudice or damage the said railway or other works; and in case the said company and such proprietor, lessee, or tenant do not agree as to the amount or value of such mines or minerals, the same shall be ascertained and settled by the verdict of a jury, as is hereinafter directed with respect to the lands which shall or may be taken for the purposes of this act: Provided nevertheless, that, in case the said company do not before the expiration of such twenty-one days declare their desire to purchase the said mines, and do not treat with such proprietor, lessee, or tenant for the same, then it shall be lawful for the proprietor, lessee, or tenant of such mines, and he is hereby authorized to work and get such part of the said minerals as lie under the said railway and works, or within the distance aforesaid, without being liable to the said company for any damage that may be done thereby, unless such damage be wilfully done or be caused by the working of the said mines in an improper manner."

The company proceeded to make the tunnel and other works through and over the lands mentioned; and the same being completed, the railway was opened for use.

By an act of parliament which received the royal assent on the 23rd of May 1844 (7 Vict. c. xxi.) the Leeds and Selby Railway Company was empowered to sell, and the York and North Midland Railway Company to purchase, the first-named railway; and it was enacted as follows:

Section 4. "And be it enacted, that immediately on such payment of the said purchase-money as aforesaid, and upon publication of a notice thereof in the *London Gazette* and in some York and Leeds newspaper, of which payment the said receipt under the hands of three directors of the said Leeds and Selby Railway Company shall be sufficient evidence, the recited acts of—(the act of 1830, and a subsequent act giving additional powers were here mentioned), shall be and are hereby repealed, save and except as to the acts, matters, and things hereinafter to be made or

done by the directors of the same company: Provided always, that the repeal of the said recited acts shall not annul, or in anywise prejudice or affect, any purchase, sale, conveyance, grant, security, act, matter, or thing whatsoever theretofore made, done, executed, commenced or instituted under or by virtue or in pursuance of the said recited acts so repealed, or either of them; but that all such purchases, sales, conveyances, grants, securities, acts, matters and things shall be and remain as good, valid, and effectual to all intents and purposes whatsoever as if the same recited acts had not been repealed."

Section 6. "That from and immediately after the payment of the said purchase-money, and such publication of notice thereof as aforesaid, the said Leeds and Selby Railway, and all stations, houses and other buildings, wharves, weighing-machines and other works belonging thereto, and the ground and soil thereof respectively, and all and every other the lands, tenements and hereditaments, rights, easements and appurtenances whatsoever, of or to which the said Leeds and Selby Railway Company were by virtue of the said recited acts, or by any other means whatever, seised, possessed, or entitled at law or in equity, immediately before the payment of the said purchase-money, shall belong to and shall by virtue of this act be absolutely vested in the said York and North Midland Railway Company, and the undertaking of the Leeds and Selby Railway shall thenceforth become and form part of the undertaking of the York and North Midland Railway, subject nevertheless and without prejudice to the several mortgages, charges and incumbrances which at or immediately before the time of such vesting shall have been upon or affecting the said Leeds and Selby Railway, or any of the property of the said Leeds and Selby Railway Company.

Section 7. "That all contracts, agreements, conveyances, mortgages, bonds, covenants and securities made or entered into with, to, or in favour of, or by, or for the said Leeds and Selby Railway Company, before such payment of such purchase-money and the publication of such notice thereof as aforesaid, shall from and after such payment and such publication of notice thereof, be and remain as good, valid and

effectual in favour of, against and in reference to the said York and North Midland Railway Company, and may be proceeded in and enforced in the same manner by or against the said York and North Midland Railway Company to all intents and purposes as if the said York and North Midland Railway Company had been a party to and executed the same, or had been referred to or named therein, instead of the said Leeds and Selby Railway Company."

Section 9. "And be it enacted, that from and after the payment of the said purchase-money and such notice thereof as aforesaid, all and singular the powers and provisions, clauses, matters, and things in the recited acts of—(the act of 1836 and two acts giving further powers were here mentioned), or in any of them contained, shall, so far as they are not repealed, altered, varied, or otherwise provided for by this act, or by any statute, extend to this act and to the objects and purposes thereof, and to the said Leeds and Selby Railway, and the works, conveniences, lands, tenements, and hereditaments, so agreed to be purchased by the said York and North Midland Railway Company, when the same shall have so as aforesaid become vested in the last-mentioned company, to all intents and purposes as if the same railway and works, conveniences, lands, tenements, and hereditaments had in and by the said acts (mentioning the three acts before referred to,) been vested in and made part of the undertaking of the said York and North Midland Railway Company, and as if the enactments, powers, provisions, clauses, matters, and things in the same acts or any or either of them contained, had been in and by the last-mentioned acts expressly enacted in reference to the said Leeds and Selby Railway, and the works, conveniences, lands, tenements, and hereditaments of or belonging thereto, or connected or used therewith, and so agreed to be purchased as aforesaid, as well as to the said York and North Midland Railway, and also as if the same powers, provisions, clauses, matters, and things were expressly repeated in this present act with reference to the objects and purposes thereof."

By the North-Eastern Railway Company's Act, 1854, the York and North Midland Railway Company, and the Leeds

Northern Railway Company were dissolved and united with the York, Newcastle and Berwick Railway Company, and it was enacted that that company and the amalgamated companies should be thenceforth styled and designated as the North-Eastern Railway Company, and all the estate, rights, privileges, powers and authorities of the dissolved companies were vested in the North-Eastern Railway Company; section 7. enacted, "that all deeds, conveyances, grants, leases, purchases, sales, contracts, mortgages, bonds, covenants and securities which before the passing of this act shall have been executed, made or entered into, by, with, to, or in relation to the dissolved companies, or either of them respectively, and which shall be in force at the passing of this act, and all obligations and liabilities which before the passing of this act shall have been incurred by, or which, but for the passing of this act, might or would have attached upon the dissolved companies, or either of them respectively, shall, subject to the provisions in this act contained, be as valid and of as full force and effect, to, for, upon, against or in relation to the North-Eastern Railway Company as if the same had been executed, made or entered into, by, with, to, or in relation to, or had been incurred by or had attached upon that company by name."

On the 21st of January 1862 the secretary of the plaintiffs received from the defendant a written notice to the following effect, accompanied by a plan:

"I hereby give you notice that I am the proprietor, or lessee, of the beds or seams of coal commonly called the Crow Coal and the Black Bed Coal, and also of the bed of ironstone, commonly called the Black Bed Ironstone, lying and being under and extending forty yards on each side of the railway, formerly called the Leeds and Selby Railway, and now forming part of the North-Eastern Railway, from a line under the centre of the road called Accommodation Road, in the township of Leeds, in the county of York, where the said road crosses over the said railway, and marked on the plan, &c. &c.; and I further give you notice that I am desirous of working the same beds and seams of coal and ironstone, and that I intend so to do."

A correspondence ensued, and the plain-

tiffs' solicitors, on the 27th of January 1862, wrote thus to the defendant's solicitors :

"Are we to understand that Mr. Crosland intends to proceed to work out the coal and ironstone under the Leeds and Selby Railway, as mentioned in his notice, so as in any way to affect its safety or the stability of its works? If so, that cannot be allowed, both on private and public grounds. If he is merely going to make passages and driftways through, leaving ample supports, there will, probably, be no objection to his works; but, in that case, we shall feel obliged by your sending us a plan of the proposed workings, that we may consult the company's engineer upon it. In *Hall's case* we observe that compensation was paid in the sum awarded for all mines and minerals the company might take; though that is not stated in the conveyance, and probably does not affect the matter."

The defendant's solicitors replied, on the 30th of January, that their client's notice was given under the act of 1836 (6 Will. 4. c. lxxxi.) with a view to give the company the option to purchase the minerals; and they drew attention to the fact that by far the greater portion of the minerals in question were under the tunnel, and that the company only purchased a right to make the tunnel through the land, and did not take the land itself.

The bill charged that the Leeds and Selby Railway Company acquired by their purchases a right to the support of the minerals, whether immediately underneath the respective lands which were purchased, or easements in which were purchased, or so near to such lands that the abstraction thereof would affect or endanger the stability of the railway works, and that the right so acquired had passed to and was vested in the plaintiffs; and the 20th paragraph of the bill was in these terms: "The defendant derives his title to the minerals which are referred to in his said notice, and which he intends to work, from or under the said several grantors who executed the said deeds of the 30th of March 1835, the 1st of August 1835, the 31st of August 1835, and the 29th of September 1835, who, at the respective times when they executed the said grants were respectively the owners in fee simple of the mines under the lands to which such respective grants extend, and of the minerals under the lands extending

forty yards on each side of the line of railway made over and through the lands to which the said respective grants extend."

The plaintiffs alleged that they had enjoyed the support of the minerals referred to in the notice for upwards of twenty years without interruption or disturbance from any person until the notice was given; and the bill prayed that the defendant might be restrained from working the minerals referred to in his said notice, or any other minerals, to the support of which the plaintiffs were entitled in such a manner as to endanger any part of the said railway or works.

In April 1862 the plaintiffs moved for a decree, when Vice Chancellor Wood decreed a perpetual injunction to restrain the defendant from working any of the minerals referred to in his notice, or any other minerals to the support of which the plaintiffs were entitled under their contracts, in such a manner as to occasion damage to the railway or works by the abstraction of such minerals (1). The Vice Chancellor was of opinion that the 30th section of the act of 1830, gave the plaintiffs a right to vertical support, which was imported into the contract, and that the law gave a right to lateral support flowing out of the contract. He also considered that the 4th section of the act of 1844 transferred the land to the York and North Midland Railway, with the same mutual rights as to the minerals which had existed between the owners and the Leeds and Selby Railway Company, either by force of the provisions of the act so incorporated, or by the operation of the general rules of law; and that the 9th section of the act of 1844 did not bring the minerals under or near the land conveyed within the operation of the clauses of the act of 1836, the exception in that section being satisfied by the proviso at the end of the 4th section.

From this order the defendant appealed, and on the hearing of the appeal, it was admitted that danger to the railway might be occasioned by the proposed working; and that the estimated value of the minerals intended to be worked was not less than 11,500*l*.

Sir Hugh Cairns, Mr. Hobhouse and Mr.

(1) Reported 2 Jo. & H. 565.

Williamson, for the company, argued in support of the order.

Mr. Amphlett and *Mr. Prendergast*, for the appellant, the defendant.

During the argument the following cases were cited and commented on :

The Caledonian Railway Company v. Sprot, 2 Macq. H.L. Cas. 449.

The King v. the Leeds and Selby Railway Company, 3 Ad. & E. 683; s. c. 5 Nev. & M. 246.

Humphries v. Brogden, 12 Q.B. Rep. 739; s. c. 20 Law J. Rep. (N.S.) Q.B. 10.

The Dudley Canal Company v. Grazebrook, 1 B. & Ad. 59; s. c. 8 Law J. Rep. (N.S.) K.B. 361.

The North-Eastern Railway Company v. Elliott, 1 Jo. & H. 145; s. c. 29 Law J. Rep. (N.S.) Chanc. 808: and on appeal, 2 De Gex, F. & J. 423; 30 Law J. Rep. (N.S.) Chanc. 160.

The Caledonian Railway Company v. Lord Belhaven, 3 Macq. H.L. Cas. 56.

LORD JUSTICE KNIGHT BRUCE.—On the supposition that the 20th paragraph of the bill states merely what is accurate in point of fact, it appears to me that the injunction granted is substantially right, though it is not impossible that the particular terms in which the order or decree is expressed may be well susceptible of alteration. The 20th paragraph of the bill being taken to be correct in point of fact, and the notice given by the defendant having been such as it was, I think that he is proceeding or was proceeding to act in breach of a contract, whether express or implied, into which the sellers to the company of those lands which the defendant now has, entered. The land was bought by the company, who bought it expressly and merely for the purpose of making a railway; they could not have bought it for any other purpose, as must have been known to the sellers, nor could the land be used for any other purpose. Therefore, it was impossible, as it seems to me, according to the general law of the country, for the vendors afterwards to use any part of their own lands in such a way as to destroy the object with which, and render futile the purpose for which, alone the sales were made. It may be that a sufficient price was not obtained; it may be that the possibility of a right of this

description, or a demand or prohibition of this description, did not suggest itself to the minds of those concerned, and they may not have been aware, or may not have attended to the state of the law as it then was understood to be, or might thereafter be declared to be. It is, I think, possible that in some such mode a less payment was obtained than perhaps might have been obtained if all matters had been attended to, that might well have been attended to. To that, however, we cannot look. It seems to me that there was a contract, express or implied, on the part of the vendors, in breach of which the present defendant, who has succeeded to their estate, was proceeding to act. In substance, therefore, as I have said, the injunction appears to me to be right. If any alteration in terms can be suggested, we shall, I believe, both be willing to listen to any such suggestion.

LORD JUSTICE TURNER.—I am entirely of the same opinion. The first question which is argued here is, that by the effect of the 9th section the provisions of the act of 1836 are brought into operation as to the purchase made under the act of 1830. That depends on the words of the section, that the act shall apply so far as "not repealed, altered, varied or otherwise provided for by this act, or by any statute." The only argument which, it appears to me, can be used on those words is, it may be said, that this is not provided for by the act of 1830, or by the statute, because it is the result of a common-law right, and not of any statutory right which is conferred by the statute of 1830. Then, if that be so, the 4th section of the act comes into operation, and by the 4th section of the act of 1844, as I understand it, nothing which is done under the former acts is to be annulled or prejudiced or affected by that act. Now, it is impossible, according to the circumstances of the case, to say that the purchase which was made under the act of 1830 would not be affected by the bringing into operation the act of 1836 upon it, because the effect of that would be, to compel, as I have said before, the railway company to make the purchase of that in the support of which they have acquired a right under the purchase they made under the act of 1830. And, independently of that view of the case, there is the

common-law right which they acquired by virtue of the purchase of 1830. Whether, therefore, we look at the case as depending on the 4th section of the act, or as depending on the common-law right, it seems to me the injunction was rightly granted. On the terms of the injunction, if Mr. Amphlett is desirous to say more on it, I shall be glad to hear him; but I confess, though I have thought whether any alteration could be properly made in it, I cannot see my way to any terms in which the injunction can be expressed different to those in which it has been expressed, and which were used in the case referred to in the argument, namely, *Elliott's case*.

KINDERSLEY, V.C. }
Feb. 25, 26. } PEARCE v. GRAHAM.

Wills Act, Section 33. — Covenant to settle Future Property.

A testator, by his will, dated since the Wills Act, gave a legacy to his daughter, a married woman, who predeceased him, leaving issue, and also her husband, her surviving. The settlement made on her marriage contained a covenant that all property coming to her or to her husband in her right during the coverture should be settled:—Held, that notwithstanding the fictitious survivorship created by section 33. of the Wills Act, for the purpose of preventing a lapse, the legacy was not acquired during the coverture within the meaning of the covenant, and was therefore not bound by the settlement.

In this case Nathaniel Graham made his will, dated the 25th of April 1860, as follows: "I give and bequeath to my daughter, Jane Pearce, wife of Ravenhill Pearce, all my right, title and interest arising from a leasehold house, No. 89, Quadrant, Regent Street, London, for her sole use, benefit and disposal; also all my right, title and interest in my leasehold house, No. 25, Keppel Street, London, for her sole use, benefit and disposal; and I also bequeath to my said daughter 250*l.* 3*l.* per cent. consols." The will also contained a gift of other property to his son, upon which no question turned, using the words "for his sole use, benefit and disposal," as in the case of his

daughter. And the testator appointed his sons, Thomas Graham and John Laurence Graham, executors of his will.

Jane Pearce died on the 19th of May 1861, in the lifetime of the testator, who died on the 28th of October 1861; but she left a son and only child, Graham Pearce, who was living at the death of the testator; and, therefore, under the provisions of the 33rd section of the Wills Act, 7 Will. 4. & 1 Vict. c. 26, the legacy to Jane Pearce did not lapse. The section is as follows: "Where any person being a child or other issue of the testator to whom real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator; unless a contrary intention shall appear by the will."

The plaintiff, Ravenhill Pearce, as representative of his wife, Jane Pearce, applied to the executors to hand over to him the legacies; but they declined to do so, on the ground that it was doubtful whether the legacies were not bound by a covenant to settle after-acquired property contained in a settlement executed previously to his marriage with his late wife. This settlement was dated the 23rd of June 1857; and by that instrument certain real and personal estates belonging to the said Jane Pearce then Jane Graham was vested in Nathaniel Graham, Thomas Graham, and John Laurence Graham upon trust for Jane Pearce for life for her separate use, with remainder to the plaintiff, Ravenhill Pearce, for life, or until his second marriage, with the ordinary trusts for children. The deed contained the following recital: "And it is also agreed that any property real or personal to which the said Jane Graham, or the said Ravenhill Pearce in her right, shall become entitled during the coverture, shall be conveyed and assigned to and between the said Nathaniel Graham, Thomas Graham and John Laurence Graham, upon the trusts hereinafter declared concerning the same"; and also a covenant in the following words:

"And it is hereby further agreed and declared by and between the said parties hereto, and the said Ravenhill Pearce doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said Nathaniel Graham, Thomas Graham and John Laurence Graham, their executors, administrators and assigns respectively, that in case at any time during the said intended coverture any real or personal estate or property shall come to or vest in the said Jane Graham or the said Ravenhill Pearce, her said intended husband, in her right, by devise, descent or otherwise, exceeding in amount or value the sum of 100*l.* at any one time, he, the said Ravenhill Pearce, shall and will thereupon immediately join and concur with the said Jane Graham in releasing, conveying, assigning and transferring the same respectively unto the said Nathaniel Graham, Thomas Graham and John Laurence Graham, or the trustees or trustee for the time being of these presents, their heirs, executors, administrators or assigns respectively (according to the nature and quality of the same respectively), as to the personal estate, upon the same trusts and to and for the same intents and purposes, and with, under and subject to the same powers, provisos, declarations and agreements as are hereinbefore expressed concerning the said aggregate trust fund; and as to the said real estate, to such uses and upon such trusts as will best and nearest correspond with the said trusts hereinbefore declared concerning the said aggregate trust fund."

Under these circumstances, Ravenhill Pearce filed this bill, claiming, as the representative of his wife, to be entitled under the will of Nathaniel Graham to the legacy of 250*l.* 3*l.* per cent consols, on the ground that such legacy was not included within the terms of the covenant contained in her marriage settlement, inasmuch as it did not come to or become vested in her during the coverture.

Mr. Baily and *Mr. Horsey* appeared for the plaintiff.—The only question is whether this legacy "came to or became vested in" Mrs. Pearce during the coverture. The statute provided that the death of the legatee, in a case like the present, where there was issue living at the testator's death, should

be taken to have occurred immediately after the death of such testator, but that was, solely for the purpose of preventing a lapse. It is a simple legal fiction, and should not be carried further. It cannot be said that this legacy came to Jane Pearce at all, and *a fortiori* not during her coverture. The act only made her the medium by a fictitious life to carry the legacy through her to any one entitled in her right. The plaintiff is that person, and therefore entitled to it. It is not under the act a question of dates, more particularly with respect to the time of the testator's death, but simply a provision that as between parents and children, the legatee *pro hac* shall be assumed to be alive at the death of the testator.

Ramsden v. Smith, 2 Drew. 298; s. c.

22 Law J. Rep. (N.S.) Chanc. 757.

Hammond v. Hammond, 19 Beav. 29.

Johnson v. Johnson, 3 Hare, 157; s. c.

13 Law J. Rep. (N.S.) Chanc. 79.

Gilbert v. Lewis, 11 W. Rep. 223.

Mr. Toller and *Mr. Rawlinson* appeared for the trustees.—The legacy left by Nathaniel Graham's will, inasmuch as the legatee became entitled to it, it does not matter how, must be regarded as coming to her during her coverture; and if so, it is within the terms of the covenant. The statute must be taken not only to prolong the life but all its incidents, and therefore, although it is true it is by a fictitious process, yet the coverture must be considered as prolonged co-extensively with the life. The case of *Johnson v. Johnson* is a very strong case in favour of the trustee's contention.

KINDERSLEY, V.C.—This is a somewhat singular case, the question being whether certain property left to Jane Pearce, a married woman, who predeceased the testator (her father), but which by the terms of the Wills Act did not lapse, by reason of her leaving issue living at the testator's death, is within the terms of a covenant to settle future property contained in her marriage settlement?—(His Honour read the section of the act, and the recital and covenant contained in the settlement.)—The property left to Mrs. Pearce according to the words of the covenant, must "come to or be vested in" her during the coverture; and therefore it is

clear that if it did not "come to or become vested in" her during the coverture, it is not subject to the trusts of the settlement. It must be admitted, at the outset, that the legacy would be subject to the debts or contracts of the legatee, and be assets for that purpose; but for the purposes of the covenant, my opinion is that it did not come to or become vested in her whilst the coverture lasted. The effect of the 33rd section of the Wills Act was simply to prolong her life by a fiction for a particular purpose, namely, that the legacy might not lapse, but certainly not for any other purpose; whereas the covenant applies to the actual coverture; and even therefore if the act had prolonged the coverture, it would have been a fictitious one only, and not an actual one within the terms of the covenant. The plaintiff is therefore entitled to a decree.

ROMILLY, M.R. }

Dec. 18; }

Jan. 14. }

HOGG v. JONES.

Heirlooms.

A testator devised freehold estates to trustees upon trust during the life of his son J. M. to make certain payments out of the rents, and after J. M.'s decease in trust for his first and other sons successively in tail male, then in trust for his daughter A. L. for life, with remainder to her first and other sons successively in tail male, with ulterior trusts. The testator gave the use and enjoyment of his plate to his daughter during her life, and after her decease he gave the same in the nature of an heirloom to the person who for the time being should be in the actual enjoyment and possession of his freehold estates under the limitations of his will. The testator died, and in 1844 (J. M. being then alive) A. L. and her eldest son H. W. M. L. executed a disentailing assurance. A. L. and H. W. M. L. died in 1856, and the latter left E. M. L. his eldest son. J. M. died in 1861 without issue:—Held, that the words "actual enjoyment and possession" did not import as a condition that the legatee of the plate should be in the physical perception of the rents and profits of the devised estates, and therefore that notwithstanding his estate had been barred by the disentailing assurance, E. M. L. as

NEW SERIES, 32.—CHANC.

being the person who under the limitations contained in the will, would have come into possession of the freehold estates in the natural order of events, was entitled to the plate (1).

The Rev. William Maxwell, D.D., by his will, dated the 25th of March 1818, devised his real estate to trustees, upon trust to receive and accumulate the rents, and make certain payments thereout during the life of his son, John Maxwell, who was of unsound mind, and after his decease, in trust for the first and other sons of his said son in tail male; and in default of such issue male, in trust for his daughter, Anne Lyte, for her life, with remainder to her first and other sons in tail male, remainder to the use of the daughters of his son successively in tail general, remainder to the use of the daughters of his daughter, Anne Lyte, as tenants in common in tail general. The testator then declared his mind and will to be, that he has so given and devised his freehold estates to his trustees in manner aforesaid, in order and to the end and intent that the legal estate and inheritance of his said estates, whether the same should be held in fee simple or by special occupancy, might be thereby vested in his trustees, and that they and their heirs should and might stand seised thereof in trust, and for the purpose of supporting and preserving the future contingent limitations to the issue of his children respectively as fully and effectually, to all intents, constructions and purposes as if he had limited particular estates to trustees during the life of his son, John Maxwell, as well as during that of his daughter, Anne Lyte, or otherwise upon or for such express trust or purpose; it being his intent and meaning that no person should, under the limitations and trusts aforesaid, become entitled to the same lands in possession or to the rents and profits thereof during such time as any antecedent limitations remained in contingency and capable of taking effect; that is to say, whilst there was any possibility in the eye of the law of any other persons or person coming *in esse*, or who, if then *in esse*, would take a prior estate in the same lands, hereditaments and premises under the trusts and limitations therein.

(1) See *Ellis v. Maxwell*, 3 Beav. 587; s. c. 10 Law J. Rep. (N.S.) Chanc. 266; 12 Beav. 104.

3 A

before expressed or contained, and if there should be a total failure of issue either of his son John Maxwell or of his daughter Anne Lyte, then over to certain other persons. This was followed by a disposition of his personal estate, after which the testator said, "*But as to my plate, I give the use and enjoyment thereof to my said daughter during her natural life only; and after her decease I give the same in the nature of an heirloom to the person who for the time being shall be in the actual possession and enjoyment of my freehold estates under the limitations of this my will.*"

The testator died on the 8th of September 1818.

John Maxwell the son died on the 29th of November 1861, without issue.

Anne Lyte had issue three sons and one daughter. The eldest son, Henry William Maxwell Lyte, was the first tenant in tail *in esse*, subject to the possibility of his uncle John Maxwell recovering his sanity and having issue male, which would have deprived him of his right to the real estate.

On the 27th of September 1844 Anne Lyte, the tenant for life in remainder on failure of the issue male of her brother John, the son of the testator, together with her son Henry William Maxwell Lyte, the tenant in tail in remainder after the determination of the estate for life of his mother, joined, and together executed a disentailing deed.

Anne Lyte died in January 1856.

Henry William Maxwell Lyte died on the 3rd of June 1856; he left Emily Lyte, his widow, and the defendant Edward Maxwell Lyte, his eldest son, surviving.

By his will he devised all his real estates to his widow (who subsequently married Watson Gooch) and Charles John Henry Mundy, on certain trusts therein mentioned, and he made them his executors.

Jane Maxwell, the widow of Dr. Maxwell, the original testator, was the sole residuary legatee under his will. She died on the 21st of May 1847.

The plate bequeathed as an heirloom was claimed, first, by the representatives of Henry William Maxwell Lyte, who executed the disentailing deed; secondly, by Edward Maxwell Lyte, his son, who would have been entitled to the actual possession and enjoyment of the real estate of the original

testator, but for the disentailing deed which had been executed; and, thirdly, by Robert Francis Ellis, the representative of Jane Maxwell, the residuary legatee.

Mr. Selwyn and *Mr. W. T. Bovill*, for the plaintiffs, the Rev. John Roughton Hogg, Francis James Roughton and the Rev. George Powys Stopford.

Mr. Baggallay and *Mr. Lewin*, for William Hope Jones, Richard Owen, Catherine Humphreys Jones, Watson Gooch and Emily his wife, and Charles John H. Mundy.

Mr. Lloyd and *Mr. Jenkinson*, for the Rev. George Rhyds Birch, Henry Bryant and Charles Richard Hoare.

Mr. Osborne and *Mr. G. L. Russell*, for the Right Hon. John Buller Baron Churston and Francis Henry Hogg.

Mr. Macnaghten, for Robert Francis Ellis, the personal representative of Jane Maxwell, deceased.

Mr. Druce, for Edward Maxwell Lyte.

Mr. Baggallay, in reply.

For the representatives of H. W. M. Lyte it was contended that, under the word "heirloom," these chattels vested absolutely in the person who was the first tenant in tail, and that thereupon they became a portion of his property, and passed as such to his representatives. For the defendant E. M. Lyte it was contended, that the effect of the will was to vest the chattels in the person who in the events would, if no disentailing deed had been executed, have been the first person in the actual possession and enjoyment of rents of the real estate; that such legatee was a designated person, and that the circumstance that a disentailing deed had been interposed, and prevented the enjoyment of the estate, could not affect the devolution of the chattels, which could not be subject to any such deed. For the representative of Jane Maxwell, the widow, it was contended that the chattels were given after the decease of the widow to a person who should be in the actual possession and enjoyment of the freehold estates under the limitations contained in the will; that this imposed on the legatee as a condition precedent, not merely that the legatee should be a person in the actual possession and enjoyment of the freehold estates, but also that he should be in such enjoyment by virtue of the limitations contained in the will;

that the representatives of H. W. M. Lyte were in the actual possession and enjoyment of the estate, not by virtue of the limitations contained in the will, but under the disentailing deed and will of H. W. M. Lyte; that, therefore, they did not fulfil the condition any more than a mere stranger to whom they might have sold the estate, and that they therefore were excluded from the legacy; that in like manner E. M. Lyte could not take the legacy, for that he did not fulfil the first part of the condition, namely, that of being in the actual enjoyment and possession of such rents; and that consequently no one could take the chattels under the words of the bequest, and that, as a matter of course, they fell into the residue as undisposed of, and as such must go to the widow as residuary legatee, and ought now to be delivered to her legal personal representative.

The following cases were referred to:

Lord Scarisdale v. Curzon, 1 Jo. & H. 40; s. c. 29 Law J. Rep. (n.s.) Chanc. 249.

Foley v. Burnell, 1 Bro. C.C. 274.

Vaughan v. Burslem, 3 Ibid. 101.

Potts v. Potts, 3 Jo. & Lat. 353; s. c. 9 Ir. Eq. Rep. 577; 1 H.L. Cas. 671.

THE MASTER OF THE ROLLS.—The question is, to whom, under the words of this will, and the circumstances which have happened, do the chattels given in the nature of heirlooms belong? Under the limitations of this will, no one could be in the actual possession and enjoyment of the testator's freehold estates during the life of the testator's son, John Maxwell. None of the cases usually cited on these gifts exactly govern this case. *Foley v. Burnell* and *Vaughan v. Burslem* were relied on for the representatives of Henry W. M. Lyte; but they do not apply. These cases determined that where an estate was limited to one for life, with remainder to his first and other sons in tail male, and in addition to those chattels were bequeathed to go as heirlooms, in conjunction with the real estate, as nearly as the rules of law and equity would permit, the chattels in that event vest absolutely in the tenant in tail in remainder as soon as he is born; and it is argued that such is the case here, that Henry William Maxwell Lyte filled that character, and

that consequently the chattels vested in him. But there is an obvious distinction between those cases and the present. If those cases apply, it necessarily follows that the chattels vested absolutely in Henry William Maxwell Lyte immediately on his birth; and that if he had died on the following day, still they would have passed to his legal personal representatives. But it is impossible so to hold. It is true that his interest in the freeholds was a vested interest; but still it was an interest liable to be divested. It was an interest dependent on the circumstance of John Maxwell, the son of the testator, dying without leaving issue. In *Foley v. Burnell* and *Vaughan v. Burslem* the son had an indefeasible interest as tenant in tail. If he lived long enough, no circumstance could have prevented his becoming absolutely entitled to the possession and the enjoyment of the devised real estate. That is not so here. If it were now held that the chattels vested absolutely in H. W. M. Lyte this result would follow: that if a testator having five or six sons were to devise the estate to each in succession for his life, with remainder on the death of each to his first and other sons in tail male, that is, to A. the first son for life, with remainder to his first and other sons in tail male, and in default of such issue to B. the second son for life, with remainder to his first and other sons in tail male, and so on; and if chattels were limited to go with the real estate as heirlooms, then the first grandson of the testator born would take the chattels. The birth of a son to B, or to any one of the younger sons, two or three months before the birth of a son to A, the eldest, would deprive A.'s son of the whole of the interest in the chattels which were limited to go with the estate. This certainly is not decided by *Foley v. Burnell* or *Vaughan v. Burslem*, nor are any words to be found in those decisions, as it appears, from which any such conclusion, or anything approaching to such a conclusion, can be formed. It would also appear to be a very strained and technical construction, and one leading to a result which obviously defeats the intention expressed by the testator.

All that is decided by these cases, if applied to the limitations and bequest con-

tained in this will, is, that these chattels would have vested in a son of John Maxwell, had any one been born to him at any time before his death, and that they would have vested in such son on his birth; but they do not decide that, while that event was doubtful, and while in the mean time no one was in the possession or enjoyment of the rents under the limitations contained in Dr. Maxwell's will, these chattels would vest absolutely in any one.

If this be so, these cases have no application; and as the tenancy in tail in Henry William Maxwell Lyte was defeasible during the whole period of his life, I am of opinion that he took no interest in the chattels bequeathed, and that no one claiming under him can support any claim to them for that purpose.

Then, as to the case of Edward Maxwell Lyte, and how his claim would have stood if no disentailing deed had been executed. In that case it seems clear that Edward Maxwell Lyte would have been entitled to these chattels absolutely. Immediately on the death of John Maxwell, the son, Edward Maxwell Lyte would, but for this disentailing deed, have become indefeasibly tenant in tail in the actual possession and enjoyment of the real estate. It is not easy to perceive what sound argument could have been alleged to deprive him of the right to these chattels. It is the plain meaning of the words used by the testator; he would have fulfilled the words of the description of the legatee contained in the will with perfect accuracy; he would have been the first person in actual possession and enjoyment of the real estate under the limitations contained in the will. If the chattels had been given, or if the Court finds the words of the will to import a gift of them to the first person who had a vested indefeasible estate of inheritance in the real estate, he was the first person who had such estate; and if the matter then stood between the representatives of Henry William Maxwell Lyte and his son, Edward Maxwell Lyte, there could be little hesitation in determining the son to be entitled to the plate.

Has the disentailing deed, executed by his father and grandmother, deprived him of the right to such chattels? This deed could only operate to create a base fee in

the property in remainder in Henry William Maxwell Lyte. If it did, and it must be assumed to be the case, then, if the construction of the decisions of *Foley v. Burnell* and *Vaughan v. Burslem* is correct, the only question that can arise lies between the residuary legatee and Edward Maxwell Lyte, as to their respective rights.

For the residuary legatee, it is contended that the words "actual possession and enjoyment of the estate," import, as a condition precedent, that the legatee should be in the physical perception of the rents and profits arising from the devised estate. But this is not my opinion. The words of the will are satisfied by the vesting in the legatee of the right to the actual possession and enjoyment of the real estate. If so, Edward Maxwell Lyte is clearly the person entitled to the plate. He is the person who, under the limitations contained in the will, that is, regarding them and them alone, undisturbed by any foreign cause, is entitled to such possession and enjoyment, unless such limitation had been defeated by a foreign circumstance over which neither the testator nor the legatee had any control, and would have been so entitled. It is plain that the disentailing deed, which has no operation over chattels, could not in any degree affect the devolution of them. They must go exactly as if such deed had never been executed; but the effect of the contention of the residuary legatee is to hold that a disentailing deed operated so as to create an intestacy in this disposition of the chattels against the will of the testator.

The consideration of the cases of *Potts v. Potts* and of *Lord Scarsdale v. Curzon* confirms the view I take; in the last case it was never intended to draw or establish any distinction between the right to the enjoyment of the estate under the limitations of the will being united to the actual enjoyment of it and the mere right to such enjoyment, not coupled with the actual possession, which failure of the actual possession was occasioned by reason of some disturbing causes having destroyed the further operation of those limitations upon the estate devised. Whether such failure be occasioned by a disentailing deed or by natural causes cannot make any difference. In both cases the right would exist under the limitations of the will

taken alone; but in neither case could that right be enforced.

My meaning may be illustrated by suggesting such a case as this. Suppose that the chattels had been given in the words of this will, and that the real estate in the actual possession and enjoyment of which the legatee was to be, had been a small messuage on the east coast of England, and that during the life of John Maxwell, the house and ground had been swept away by some inroad of the sea, so as to render it impossible after that calamity for any one to be in the actual possession and enjoyment of it—could it be contended that such an event created an intestacy in the bequest of the testator? It would be impossible so to hold. But if this be so, and if, in such an event, Edward Maxwell Lyte would have been entitled to these chattels, how does the case differ, because the act which prevents such enjoyment is the act of man instead of being the act of God? The rights under the will remain the same. The meaning expressed by the will is obvious. The testator, in the events which have occurred, has expressed his intention in plain words in his will that Edward Maxwell Lyte should take the estate and the plate. A disentailing deed, which the testator could not prevent, has enabled two persons, now deceased, to defeat this intention as far as regards the estate. The intention of the testator as regards the plate could not be defeated by them. No deed would affect it. Why is that intention not to take effect? I am of opinion that no valid reason can be assigned against that proposition; and, in every way of viewing this case, I am of opinion that Edward Maxwell Lyte is entitled to the plate bequeathed.

ROMILLY, M.R. }
Dec. 18. } LAVER v. FIELDER.

Pleading—Parties.

If a father, on the marriage of his daughter, makes the intended husband a promise for her benefit she alone cannot file a bill to enforce it. The husband and wife must be co-plaintiffs.

This bill was filed, by a wife through the medium of "a next friend," against the

executrix and heir-at-law of her father's will to carry into effect a promise made by her father to her intended husband before their marriage to leave her a share of whatever property he might die possessed of.

The husband was made a defendant to the suit.

Mr. Selwyn and *Mr. Piggott*, for the plaintiff.

Mr. Southgate and *Mr. F. H. Colt*, for *Emma Fielder*, the executrix, at the hearing of the cause, objected to the frame of the suit. It was informal. If there was any agreement it was made with the husband to leave property to the wife, not to the husband. He, however, would have a right to receive it; but she was entitled to a settlement on herself. They ought, therefore, to be co-plaintiffs.

THE MASTER OF THE ROLLS.—The engagement was made by the father through a letter written to the husband. The promise was made to him to leave a benefit to her; but if the wife had died, would not the husband have been entitled to it? It was clear that the contract was intended for the advancement of both. The bill must therefore be amended. The name of the next friend must be struck out, and the name of the husband introduced as a plaintiff with his wife.

The bill was then amended, and the cause proceeded.

ROMILLY, M.R. }
Dec. 18, 19. } LAVER v. FIELDER.

Contract—Marriage—Daughter's Portion—Promise.

A father, in contemplation of the marriage of his daughter, wrote to her intended husband, saying "that she should be entitled to her share in whatever property he (the father) might die possessed of." The father by his will gave to his daughter only a life interest in a portion of his property, and died, leaving real and personal estate. Upon a bill by the husband and wife,—Held, that the letter did not affect the real estate, but that it bound the father to leave his daughter a legal share of the personalty equal to

what she would have taken if he had died intestate.

Henry Laver, in 1844, made proposals of marriage to Elizabeth, the only daughter of John Fielder by his first marriage. He wrote to her father stating the particulars of his property, and asking him to make a suitable settlement on his daughter.

Mr. Fielder asked for an interview, and after stating the position of his property, made propositions to Mr. Laver, which, after consideration, he found himself unable to comply with, and he requested that some other arrangement might be made.

Mr. Fielder accordingly said he would give his daughter 100*l.* a year for his life, and that at his death he would give her one-third of his property during his widow's life, and upon her death an equal half with his son, John Henry Fielder, by his second marriage.

Mr. Laver considered that the allowance by J. Fielder of 100*l.* a year during his life was not a proper provision considering their position in life; and in consequence of an angry letter from Mr. Fielder, the negotiation for the marriage was broken off.

Subsequently, Mr. Laver wrote to Mr. Fielder, and received in reply a letter containing the following passages :

"Trafalgar Square, 1st of April 1845.

"Dear Sir,—My daughter has given me a letter from you, in which you say you are willing to marry her, if I will give my consent. * * I still adhere to my last proposition, viz., to allow Elizabeth 100*l.* per annum, and (if you like the situation) one of my houses to reside in; and that at my decease *she shall be entitled to her share in whatever property I may die possessed of.* As to all other matters, I shall leave it entirely to you and her, she being now, as I consider, of sufficient age to judge for herself."

The marriage was solemnized in July 1845. No settlement was ever made; but the 100*l.* a year was paid by Mr. Fielder to his daughter up to the time of his death; but Mr. and Mrs. Laver never occupied any of his houses.

John Fielder, by his will, dated the 22nd of July 1847, after a legacy of 500*l.* to his widow, gave the whole of his real and per-

sonal estate to his wife, Emma Fielder, and his daughter, Mrs. Laver, their heirs, executors, administrators and assigns, as to one third part thereof, upon trust to pay the rents and annual proceeds to his daughter for life; and after her decease, upon trust for his son John H. Fielder, his heirs, executors, administrators and assigns, upon his attaining twenty-one. As to one other third, upon trust to pay the rents, &c., to his wife for life; and after her decease, upon the trusts declared of the remaining one-third of his real and personal estate. As to the remaining one-third, upon trust for his son, his heirs, executors, administrators and assigns, upon his attaining the age of twenty-one years; and he appointed his wife and daughter executrices of his will.

By a codicil to his will, dated the 7th of June 1854, the testator directed his trustees to stand possessed of his residuary real and personal estate, upon trust out of the rents, &c., to pay his wife 350*l.* a year, so long as any mortgage debts should be unpaid, if his wife should so long live, and to his son J. H. Fielder 200*l.* a year, and unto his daughter, Elizabeth Laver, 150*l.* a year; and in case of the death of his wife before the mortgage-debts should be wholly paid, then, after her decease, his son was to receive 400*l.* a year and his daughter 200*l.* a year, in lieu of the 200*l.* and 150*l.* a year respectively; and the residue of the rents and annual proceeds of his residuary estate was to be set apart for the payment and liquidation of the mortgage debts and incumbrances.

The testator died the 29th of January 1859, leaving Emma Fielder, his widow, and Mrs. Laver, his daughter, by his first marriage; and John H. Fielder, his son by his second marriage, an infant, surviving.

On the 18th of November 1859 a suit was instituted, by Emma Fielder, against Henry Laver and his wife, for the administration of the estate of the testator; and on the 11th of February 1860 a decree was made for taking the accounts, but no certificate has been made.

John Henry Fielder attained the age of twenty-one on the 15th of October 1861.

In April 1862 Mr. and Mrs. Laver were informed that the promise made by John Fielder, in the letter of the 1st of April

1845, amounted to a contract which could be enforced against his estate.

This bill was then filed, asking that it might be declared that the testator was bound so to leave or dispose of his real and personal property, that after his death his daughter, Elizabeth Laver, might have a share of all, equal to that of his son and other children, and that such a share might be set apart for her.

On the 29th of May 1862 Henry Laver sent a printed copy of the bill to J. H. Fielder, accompanied by a letter, in which, after referring to the letter of the 1st of April 1845, he said that he had been advised that it contained a promise which took precedence of the will, and that he had refrained from opening the question until he attained his majority; but that he had considered himself bound to act on the opinion given to him.

The cause came on upon a motion for a decree. The plaintiffs desired to introduce parol evidence to shew what previous proposals were referred to in the letter of the 1st of April 1845.

Mr. Selwyn and *Mr. Piggott*, and *Mr. Davey*, for Mr. and Mrs. Laver, insisted upon the validity of the contract, and that the words "whatever property" extended to the real as well as to the personal estate. It was not vitiated by lapse of time, or by the omission to raise the claim in the suit of *Fielder v. Laver*. It was not until April 1862 that the plaintiffs were informed of the effect of the letter.—

Loxley v. Heath, 27 Beav. 523; s. c. 29 Law J. Rep. (n.s.) Chanc. 313; 1 De Gex, F. & J. 489.

Bold v. Hutchinson, 20 Beav. 250; s. c. 24 Law J. Rep. (n.s.) Chanc. 285; 5 De Gex, M. & G. 558; 25 Law J. Rep. (n.s.) Chanc. 598.

De Beil v. Thomson, 3 Beav. 469; s. c. nom. *Hammersley v. De Beil*, 12 Cl. & F. 45.

Hutton v. Rossiter, 7 De Gex, M. & G. 9; s. c. 24 Law J. Rep. (n.s.) Chanc. 106.

Barkworth v. Young, 4 Drew. 1; s. c. 26 Law J. Rep. (n.s.) Chanc. 153.

Goldicutt v. Townsend, 28 Beav. 445.

Mr. Southgate and *Mr. F. H. Colt*, for Emma Fielder and J. H. Fielder.—The only agreement is the letter of the 1st of April

1845. Parol evidence is inadmissible to support it or any subsequent declarations. The parol evidence, however, has proved an agreement distinct from any possible construction of the written agreement: it may therefore be made available for defence when the agreement is vague.

The agreement is of twenty years' standing, and for three years there has been no impediment to the claim. It has been argued that the payment of the 100*l.* a year by the father to his daughter was a part performance of the agreement: it has no reference to the words "her share"; these words alone create ambiguity, even the plaintiff himself understood them in a different sense: they, no doubt, meant an equal share with his children, but they referred to something which had taken place in conversation between Mr. Fielder and Mr. Laver. In *Kay v. Crook* (1) a promise made by a father to recognize a son in his will in common with the rest of his family in future provisions was considered too vague. It is very clear, according to all the evidence given in this suit, that no contract such as this was in the view of either party. It is also equally clear, according to the settled practice of the Court, that the fact of a parol conversation being distinctly proved is, in itself, sufficient to bar the suit of the plaintiff for the specific performance of a written agreement, which in itself is vague and uncertain.

The agreement also cannot interfere with the legacy given to the wife. Upon the strictest construction it would not have prevented Mr. Fielder from giving away any part of his property during his life, or from leaving any part of it to a stranger. The legacy to the widow therefore stands precisely upon that footing.

The term "share" can only apply when the class to take is ascertained; it must then mean an equal share; nothing more is decided in *Barkworth v. Young*. In this case there is no contract either to make a will, or to die intestate: he did not say he would not make an eldest son. The class to take is not ascertained, consequently it is impossible to fix any definite meaning to the words "her share." The word "property" also introduces additional ambiguity: does

(1) 3 Sm. & G. 407.

it include real estate? The words in the context are "die possessed": if they are susceptible of any construction, it must mean some aliquot part with other persons, and the construction would be different in the case of real and in the case of personal estate. In the case of personal estate the persons are ascertained with sufficient certainty: the widow would take her third, and the children their shares of the remaining two-thirds; but in the case of real estate the widow takes her dower, and except in gavelkind there can be no class to take: in other cases there is always one particular person to take, as here, who is either the eldest or the youngest son. With regard to acquiescence, the plaintiffs ran the chance of taking the whole estate. It was not until after J. H. Fielder attained twenty-one that this suit was instituted. In a common case a delay of three years would be sufficient to bar a right to specific performance, even supposing that there was not, as in this case, a good reason for waiting until the brother attained his majority. Before this there was a contract in existence: the plaintiffs knew its nature and meaning, though they might have been under an erroneous impression that the will overrode it; but a neglect to institute a suit could not be excused by ignorance of the law.

The plaintiffs knew also that a decree was made in the suit of *Fielder v. Laver*: it must have proceeded upon the fact, that the will was unimpeachable. There was scarcely any case more within the Statute of Frauds, 29 Car. 2. c. 3. s. 4. It may, however, be concluded that the letter was the actual agreement between the parties: still it is so vague and ambiguous, that it is impossible to make a decree for specific performance upon it.

Mr. Piggott, in reply.

THE MASTER OF THE ROLLS.—It is impossible to admit parol evidence to vary the terms of the letter. If the words, "I will adhere to my last proposition," had stood alone, parol evidence might have been given to explain what that last proposition meant; but he went on and explained, by a *videlicet*, what he meant by his last proposition, in words which must now receive construction. It was said that the words were too vague or ambiguous, and that no

distinct meaning could be put upon them, and *Kay v. Crook* was referred to, in which a person promised to recognize his son, in common with the rest of his family, in the future provisions of his will, and it was held to be too vague to entitle him to any specific interest. It is not necessary to consider what the effect would have been in this case if the words had been "*a share*," instead of "*her share*," of the property. What is a daughter's share?—a lawyer would, no doubt, say the share to which by law she would become entitled—an equal share with her brothers and sisters in two-thirds of the personal estate. The share of the widow would be one-third, and her share would be an equal share with all her brothers and sisters in the two remaining thirds. The promise was, that she shall have her share of the property, and this must be pressed most strongly against the party who promised, upon the same rule as against a person who grants. This leaves it open for the birth of other children; and if any had been born they would have taken their share, and the daughter would only have taken her proportion of the two-thirds. So far, therefore, as the personal estate is concerned, this has a definite meaning.

It was argued that the words "whatever property" would include real estate, and it was suggested, on the one hand, that the plaintiff or his wife should take one-third of the real estate; and, on the other hand, that if the real estate was intended, and she took no share in it, the whole promise would be void for uncertainty. A difficulty might have arisen if there had been nothing but real estate; she would then have been entitled to no legal share at all; still a decision would have been necessary, and it might possibly have been considered too vague to say what share he intended her to take; but where there is personal property, in which by law she does take a share, the words are defined and the promise satisfied, though he might have said, if I buy more land she will lose something still; if I sell land she will gain, the promise being that she shall have "*her share*" of whatever personal estate I may leave. The use of the words "*her share*" merely introduces the words, her legal share, her lawful share, her rightful share, the share

which the law gives, the share which, according to statutes, the legislature and the law of this country have thought it right and reasonable that she should have in her father's property. That is a distinct and plain meaning, and it is the apparent meaning of the words "her share."

It is impossible to say that it means an equal share with the brothers and sisters. There must, in that case, be some reference to the class intended to take; and it would be necessary to say a share with her brothers and sisters, or a share with the rest of the other children, in which cases a share would mean an equal share. But nothing of that description has been stated, and the words are merely "her share in my property, whatever it may be"; that share is no more than her legal share in the personal property.

So the matter would have stood if the bill had been filed immediately after the death of the testator. It is, however, said that the plaintiffs have been guilty of *laches*, and that they have acquiesced, and that they have elected to run the chance of obtaining more. As regards the *laches*, it is upwards of three years since the testator's death; but in cases of this description that is not a time which ought to operate as a bar to the plaintiffs: it is always to be considered that the parties are members of one family, and not mere strangers, and that such suits as these tend to loosen the ties naturally existing between members of the same family.

It was said that the testator evidently put a different construction upon the promise. It is, however, by no means clear that it was not present to his mind. He may probably have thought that he was not bound by it; and the plaintiffs say that they did not know but that they were concluded by the will. The testator may have thought that he had made a mere promise, and that he had a right to change his intention by his will; but no statement of the testator can be allowed to say what must be considered as the fair and true construction of the promise which he made.

It is impossible to put any stress upon the letter written by the plaintiff to his brother-in-law on the 29th of May 1826, shortly after he came of age, or to agree with the argument that he intentionally

delayed the suit, and ran the chance of the death of the son under twenty-one, in the expectation that he might acquire the whole of the property; and if not, then that he might institute this suit. The evidence is clear that the plaintiff did not know what he was entitled to by law until April 1862. The law does not allow ignorance of the law to excuse any man from his acts, whether they are criminal or civil, and this evidence will not protect him from the lapse of time which has occurred; but it will protect him so far, that it shews he did not act from the motive attributed to him, when that motive is relied upon as a personal reason why he should be barred of the relief he asks for in this suit. The evidence, therefore, disproves the motive, and the letter merely shews a desire to break his intention to his brother-in-law in a manner he considered the least disagreeable.

The decree in the suit of *Fidler v. Laver* can have no effect in this case: it is a suit for administration. A claim can be made on the estate either by an application in the cause itself, or by a substantive proceeding. If it can be made in the cause, then it is a matter of course to allow any claim to be made upon the estate prior to the certificate being made, and, indeed, subsequent to that period, before a division of the funds, provided the claimant makes an application to the Court, and pays the costs which he has occasioned by not applying earlier. If it cannot be made in the suit, a substantive proceeding is necessary; but this does not alter the right. When, however, a man makes a solemn engagement upon an important occasion, such as the marriage of his daughter and the like, it is of consequence that he should understand that he is bound by the promise he then makes, and that when he induces a person to act in a manner which affects the particular interests in life of his own children, and the persons who become united with them, this Court, adhering to the rules of equity, will not permit him afterwards to forego his words, and say that he was not bound by what he then said. It is the enforcement of truth—not that the man intended to say what was false at the time—but it is the enforcement of truth to make his acts square with his words, and compel him to perform that which he has

undertaken to perform. It is therefore possible that the letter when it was written was intended to go further; but acting upon it in the best view, the extent of the relief to which the plaintiffs are entitled must be confined to one-third of the clear personal estate before the payment of any legacies; they must also have their costs out of the estate of the testator, the same as if they had proved a debt in the administration suit. I cannot make the defendants pay them personally.

I shall not allow any costs of amending the bill, or of the separate appearance of Henry Laver in the suit.

ROMILLY, M.R. { *In re* THE WATERLOO LIFE,
Dec. 6. { EDUCATION, CASUALTY,
AND SELF-RELIEF ASSUR-
ANCE COMPANY.

Winding-up — “*The Companies Act, 1862*,” 25 & 26 Vict. c. 89. ss. 209, 210.—*Omission to register—Right to sue.*

A company originally constituted under the 7 & 8 Vict. c. 110. neglected to register, as directed by the 25 & 26 Vict. c. 89. s. 210. On a petition for winding up being presented by the company and the chairman jointly,—Held, that the company was precluded from petitioning by reason of its not having registered, and that it could not be permitted to evade the provisions of the 25 & 26 Vict. c. 89. s. 210. by joining a shareholder as a co-petitioner, and that no order could therefore be made upon the petition.

Under the Companies Act, 1862, several petitions were presented for winding up this company. One was by the company and Joseph Bishop, their chairman, who was a shareholder; a second was by a shareholder; another was by creditors.

On the 24th of November 1851 the company was registered under the 7 & 8 Vict. c. 110. for effecting life assurances and divers other objects.

The petition by the company prayed that the company might be wound up under the powers of 25 & 26 Vict. c. 89, or any other statute; and that certain resolutions passed at a meeting of the board of directors, on the 8th of August 1862, for a

voluntary winding up might be adopted; and that the company's late manager might be appointed as official liquidator.

The shareholders were willing that the resolutions should be adopted, but they asked that an official liquidator might be appointed unconnected with the company.

Mr. Selwyn and *Mr. T. H. Terrell*, for the company and their chairman.

Mr. Everitt, for a creditor who had brought an action against the company, contended that no order could be made on the company's petition as it had not been registered as required by the 25 & 26 Vict. c. 89. ss. 209, 210 (1). In the absence of registration the company could not sue, and it was not entitled to be wound up under section 199. as an unregistered company.

Mr. Speed, for another creditor, opposed the order.

(1) Section 209. provides that every insurance company completely registered under the 7 & 8 Vict. c. 110. shall, on or before the 2nd of November 1862, register itself as a company under the Companies Clauses Act, 1862.

Section 210. is as follows: “If any company required by the last section to register under this act makes default in complying with the provisions thereof, then, from and after the day upon which such company is required to register under this act until the day on which such company is registered under this act (which it is empowered to do at any time) the following consequences shall ensue; (that is to say)—(1.) The company shall be incapable of suing either at law or in equity, but shall not be incapable of being made a defendant to a suit either at law or in equity.—(2.) No dividend shall be payable to any shareholder in such company.—(3.) Each director or manager of the company shall for each day during which the company so being in default carries on business incur a penalty not exceeding 5*l.*, and such penalty may be recovered by any person, whether a shareholder or not in the company, and be applied by him to his own use. Nevertheless, such default shall not render the company so being in default illegal, nor subject it to any penalty or disability, other than as specified in this section; and registration under this act shall cancel any penalty or forfeiture, and put an end to any disability which any company may have incurred under any act hereby repealed by reason of its not having registered under the said Joint-Stock Companies Acts, 1856, 1857, or one of them.

Mr. Baggallay and *Mr. Swanston*, for the shareholders.

Mr. H. Humphreys and *Mr. Roxburgh*, for other parties.

Mr. Selwyn, in reply, relied upon the fact that resolutions were passed by the board for voluntarily winding up the company before the act came into operation, and referred to section 129. of the act.

THE MASTER OF THE ROLLS.—The provisions of the 25 & 26 Vict. c. 89. make it imperative on every company to register, whatever may be the state of it; and section 209. directs the compulsory registration of companies in the situation of the present. It is obvious that even where steps have been taken for winding up a company, it would be necessary to register the company under the provisions of this act; and there is a penalty inflicted upon the company not registering in case of default. Suppose an order were made to wind up a company, and the company was not registered, and it was necessary that it should sue anybody, and that the name of the company should be used for the purpose of recovering a debt of the company, section 210. would absolutely prevent their suing until registration made.

This is a petition by the company; it is suing here, but being incapable of suing either at law or in equity, it cannot present a petition to wind up in this Court; and it cannot be permitted to evade the express provisions of the act of parliament by joining a shareholder in the petition. If the petition had been *bonâ fide* that of a shareholder, instead of the company, it might have been allowed to stand over, that the name of the company might be struck out; but it is not necessary on the present occasion, as there is a petition presented, which is good, upon which an order for winding up may be made. I shall, however, only make an order to wind up the company upon the petition of the shareholder. I cannot make any order upon the petition of the company. The costs of all parties, except those of the company's petition, must be paid out of the estate.

ROMILLY, M.R. { *In re* THE WATERLOO LIFE,
Dec. 11. { EDUCATION, CASUALTY,
AND SELF-RELIEF ASSUR-
ANCE COMPANY.

Winding-up — “*The Companies Act, 1862,*”—*Official Liquidator*—*Injunction to restrain Execution.*

After an order has been made for winding up, a judgment creditor will be restrained by injunction from proceeding to execution under a fl. fa. against the company.

On Saturday the 6th of December an order was made to wind up this company. An official liquidator was at the same time appointed.

On the same day, Mary Ann Nind, a judgment creditor, issued a *fl. fa.* against the effects of the company, and she lodged it with the sheriff the same afternoon.

On Monday the 8th the sheriff proceeded to levy execution; he then found the official liquidator in possession under the winding-up order.

The judgment creditor insisted upon the sheriff proceeding to levy.

Mr. Swanston, for the official liquidator, moved for an injunction to restrain execution.—The judgment creditor cannot obtain any individual advantage after this Court has made a winding-up order without leave of the Court—25 & 26 Vict. c. 89. ss. 87, 202. The Court therefore will restrain her and the sheriff from taking any further proceedings under the writ.

Mr. Ware, for M. A. Nind, the judgment creditor, claimed priority; and argued that if she was not entitled to priority, section 163. of the act would make the execution void if there was anything irregular, and no benefit would result to her, and no injunction could be needed. This Court, therefore, would not grant an injunction.

Mr. Miller, for the sheriff, who had been served with the notice of this application, asked for his costs.

THE MASTER OF THE ROLLS.—I must make the order asked; the act gives no option. If the judgment creditor desired to proceed to execution, an application upon notice ought to have been made to this Court for leave to do so. It is, however, impossible to encourage any such applica-

tion in this case. The injunction, therefore, must be granted, but without any order as to costs. The sheriff must obtain payment of his costs from the party who employed him (1).

KINDERSLEY, V.C. }
Feb. 16. } YOUNG v. DAVIES.

Offspring—Legatee Witness—Wills Act, s. 15.

A testator gave certain dividends to his son, and at his death, to his (the testator's) surviving daughters and their lawful offspring. The testator left his son and also four daughters him surviving. The will was attested by two of the daughters, and of these two one died in the son's lifetime and the other survived the son:—Held, that the period for ascertaining the survivorship was the death of the son; that the word "offspring" meant "issue," and that therefore the daughters took absolutely as joint-tenants. Also, that the gift to the attesting daughter who survived the son being, by section 15. of the Wills Act, simply void, the other daughters, as joint-tenants, took the whole, and there was no lapse.

This bill was filed for the purpose of putting a construction upon the will of Joseph Bolton, which was as follows: "Last will and testament of Joseph Bolton. It is my will and pleasure, with the blessing of God, that the dividends arising from my eight shares purchased in the Birmingham and Staffordshire Gaslight Company shall, after my death, be paid to my son Alexander Bolton, to whom I bequeath it, with the interest of 70*l.* deposited in Messrs.

Attwood & Spooner's bank, Birmingham, being balance due to the gas company. And at his death to my surviving daughters and their lawful offspring. It is my further pleasure that after my decease my money shall be drawn from St. Pancras Savings Bank (as per printed book of regulations) and the amount thereof divided equally and paid to my surviving daughters and housekeeper. My ready cash found in my possession at my death, after paying all funeral expenses, is to be divided between my son and daughters, including my housekeeper, to buy themselves mourning, &c. My wearing apparel and furniture are to be mutually divided amongst them, if not sold. This will and testament is written in my full senses and signed by me at Walbro' Buildings, St. Albans, on the 1st day of August. As witness my hand in presence of two witnesses. "Joseph Bolton."

"Catherine Martin.

"Elizabeth Young."

The testator died on the 28th of July 1858, and left surviving him his son Alexander Bolton and four daughters, Elizabeth Young, who died in the son's lifetime, Ann Davies, Catherine Martin and Margaret Imrie, who had in all fifteen children and eleven grandchildren. The testator's son died on the 14th of December 1861, having received the dividends and interest of the testator's property during his life; and the executor, William Young, in consequence of doubts arising upon the construction of the will, instituted this suit to determine those questions.

Mr. Hoffman, for the plaintiff, said, the questions were, whether the word "offspring" included grandchildren, and what was the period of division, and whether the signature of Catherine Martin, the daugh-

(1) The sections referred to in argument are as follows:

87. "When an order has been made for winding up a company under this act no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose."

163. "Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the

company after the commencement of the winding-up shall be void to all intents."

202. "Where an order has been made for winding up an unregistered company, in addition to the provisions hereinbefore contained in the case of companies formed under this act, it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the Court, and subject to such terms as the Court may impose."

ter, to the will, which forfeited her share, caused it to survive as if she were dead, or created a severance by force of the statute.

Mr. W. W. Cooper, for the children of Catherine Martin, contended that offspring meant "children," and that the daughters and their children took as joint tenants.

Mr. Haddan, for other grandchildren of the testator, supported that argument.

Mr. Martin (of the common law bar), for Margaret Imrie, simply submitted the points.

Mr. J. H. Palmer, for Ann Davies and Catherine Martin.

Mr. Waller, for the grandchildren of the daughters, argued that all took *per capita*, the class to be ascertained at the death of the son.

Cases cited—

Thompson v. Beasley, 3 Drew. 7; s. c. 24 Law J. Rep. (N.S.) Chanc. 327.

De Witte v. De Witte, 11 Sim. 41; s. c. 9 Law J. Rep. (N.S.) Chanc. 271.

Lister v. Tidd, 29 Beav. 618.

Gordon v. Whieldon, 11 Ibid. 170; s. c. 18 Law J. Rep. (N.S.) Chanc. 5.

Bustard v. Saunders, 7 Beav. 92.

2 *Jarm. on Wills*, 336, 347, 2nd edit.

Clay v. Pennington, 7 Sim. 370; s. c. 6 Law J. Rep. (N.S.) Chanc. 183.

Dowset v. Sweet, Amb. 175.

Leigh v. Norbury, 13 Ves. 341.

As to the etymology of the word "offspring," *Todd's Johnson* and *Webster's Dictionaries* were referred to.

KINDERSLEY, V.C.—It is not often that so short a will as this presents a case surrounded by so many difficulties; but I have come to a conclusion so far satisfactory that I do not feel any serious doubt as to its correctness. The word "it," though incorrect, evidently refers to the dividends and interest, and it is clear that it is only a life estate which is given to the son, although not in express terms, because at his death they are given to some one else. First, whom did he mean by his surviving daughters? According to the plain rule, where there is a gift to one for life, and afterwards to a class with terms of survivorship, unless there is something in the context shewing a different intention, it refers to the death of the tenant for life, and there

is nothing in this will shewing a different intention. It should not be overlooked that in the next clause he speaks of "surviving daughters," but evidently referring to his own death; but where in two consecutive clauses a testator uses the same language, it does not necessarily follow that it must be used in the same sense, but it is quite consistent that with respect to separate gifts he may use the same words in different senses; and that is the case here. In the second instance, his daughters are to take *instanter*; in the first, at the death of the son. That being so, what interest do they take on the words "and their lawful offspring"? At first I thought he might have meant to the daughters surviving the tenant for life and the offspring of those who were dead; but on consideration I am of opinion that that would in fact be making a will for him.

The only other alternatives, then, are to the surviving daughters absolutely, or the surviving daughters for life, with a limitation to their offspring or to them and their offspring as joint tenants, that is, children, grandchildren, and even great-grandchildren. But it is obvious, as to the last, that nothing can be more utterly improbable, although it is a conclusion that the Court has been sometimes forced to arrive at, but only because no other could be found. With regard to their taking a life interest and then to their offspring, it is not unreasonable or improbable; but there is nothing to lead to it. The word "offspring" is at the very threshold, and what does it mean? When a man uses the terms "offspring," "issue" or "descendants," they are vague expressions, which, no doubt, on the particular context, may mean "children" or remote descendants; but, *prima facie*, it can hardly be supposed to mean "children" when that simple word is so obvious a one to use. The word "offspring," in its proper and natural sense, extends to any degree of lineal descendants, and has the same meaning as "issue," and I consider that I ought to construe the word "offspring," as used in this will, to mean "issue." If this was real estate, and the word "issue" was used, it would confer an estate tail; but being personalty, it confers the absolute interest, and is a word of limitation, not of purchase.

For some reason which does not appear, the testator excludes those who pre-decease the son. With regard to the question as to the surviving daughter, who was a witness to the will, and thereby forfeited her share, upon the cases I am of opinion that the statute created no severance, and therefore her share survived to her sisters.

KINDERSLEY, V.C. }
March 4, 5. } HIBON v. HIBON.

Premises—Separate Garden—Marshalling Assets.

*A testator directed payment of his debts, &c., and gave all the residue of his real and personal estate to his wife and another person, appointing them executrix and executor, upon trust to pay the income to his wife for life, for her own use and the bringing up and educating his children; and after her decease he made certain specific gifts, one being to his daughter Fanny Charlotte of his messuage and premises situate No. 4, Turnham Green Terrace, held of the Prebend Manor. And there was also a general residuary gift to the wife. The wife borrowed 600*l.* in aid of the personalty and residuary realty, and therewith paid debts and died:—Held, that in marshalling the assets, the whole income received by the wife during her life, as well as the corpus of the first residuary gift to her, was liable for costs, before resorting to the specific gifts.*

Held, also, that a small piece of garden severed from the house No. 4 by a road, but held under the same manor and usually occupied therewith, passed by the devise.

This suit was instituted to administer the estate of John Hibon and to determine certain questions arising under his will, and the mode in which his assets were to be marshalled, having regard to the dealings of his widow and executor with his property. The will was dated the 2nd of April 1856, and as far as material was as follows: "I desire all my just debts, funeral and testamentary expenses, to be fully paid and satisfied. I give to my wife, Elizabeth, all my household furniture, plate, linen and china for her own use absolutely, and appoint her and James Routledge executrix and executor. All the rest, residue

and remainder of my real and personal estate and effects whatsoever and wheresoever, I give, devise and bequeath the same unto my executrix and executor, their heirs, executors, administrators and assigns, upon trust to permit and suffer my said wife to receive the rents and dividends thereof (except one moiety of my business as a chemist, which I give to my son William Henry Hibon) during her life for her own use, and the bringing up and educating my children; and from and after her decease I give, devise and bequeath my said real and personal estate and effects as follows: that is to say, I give the whole of my said business of a chemist to my said son William Henry, and also my freehold and copyhold estate situate in East Molesey, in the county of Surrey, called Melrose Villa, with all and every the land, buildings and appurtenances thereto belonging, to hold, to my said son William Henry Hibon, his heirs, executors, administrators and assigns for ever. I give to my daughter Fanny Charlotte Hibon my messuage and premises situate No. 4, Turnham Green Terrace, Chiswick, in the county of Middlesex, held of the Prebend Manor, to hold to my said daughter, her heirs, executors, administrators and assigns for ever." The testator also made various other specific gifts of real and personal estate; but no question arose upon them: in none of them, however, did the word "premises" occur, and the word "appurtenances" only once, and the testator gave all the rest and residue of his estate and effects, both real and personal, to his wife, her heirs, executors and administrators. The testator died on the 13th of October 1856, leaving his widow, the plaintiff Fanny Charlotte Hibon, the defendants Elizabeth Emily Augusta Hibon, William Henry Hibon and three other children, one son and two daughters, surviving, some of whom were still under age. The widow and James Routledge paid the funeral and testamentary expenses and some of the debts, and thereby exhausted the whole of the personal estate and the residuary real estate; and for the purpose of paying the remaining debts, they borrowed 600*l.* of Peter Matthews, at 4*l.* 5*s.* per cent., transferring and conveying to him by way of security certain portions of the specifically devised property. The residue of the debts were then paid. The widow died

on the 8th of March 1861, and by her will, dated the 18th of January 1860, she gave the whole of her property, real and personal, to James Routledge and Townsend Smith, on trust to sell and convert and hold the proceeds (subject to the payment of her debts, funeral and testamentary expenses) upon trust for the plaintiff and Elizabeth Emily Augusta Hibon, with a contingent remainder over to her two sons. A question arose with respect to the gift of the house in Turnham Green Terrace, whether a strip of garden-ground separated from it by the road and extending the whole length of the terrace, (only No. 4 being the property of the testator,) passed under the gift of the house and premises situate No. 4, &c., it appearing that the testator had acquired the piece of land subsequently to the house, that both were, in fact, copyhold holden of the Prebendal Manor of Chiswick, and that shortly after acquiring the land, which was in 1851, the testator ceased to occupy the house, and that he had since let both house and land together, and that they had been always held by the same tenant. The other question was, whether the income as well as the *corpus* received by the widow under the first devise and bequest was applicable in discharge of the costs, before resorting to property specifically devised and bequeathed? The bill was filed for the determination of those questions, and particularly as to the proportion in which the plaintiff and the other parties beneficially interested under the will were to contribute towards the repayment of the 600*l.* borrowed by the widow. The chief clerk had made his certificate, and the cause now came on for further consideration.

Mr. Glasse and *Mr. Surrage*, for the plaintiff, contended that the piece of land held with the house in Turnham Green Terrace passed by the gift of the house and premises as part of the curtilage. With regard to the question of marshalling, the rule laid down in *Dady v. Hartridge* (1) must be adhered to—

Lethbridge v. Lethbridge, 31 Law J. Rep. (N.S.) Chanc. 737.

Pearmain v. Twiss, 2 Giff. 130; s. c. 29 Law J. Rep. (N.S.) Chanc. 802.

(1) 1 Dr. & Sm. 236.

Mr. J. W. Chitty, for William Henry Hibon, argued that the piece of land did not pass with the house, the words "situate No. 4," being the description—

Buck v. Nurton, 4 Bos. & P. 53.

Evans v. Angell, 26 Beav. 202.

The widow ought not to have raised the 600*l.* she was liable to contribute, before specific devisees.

Mr. Baily, for the representatives of the widow, submitted that *Dady v. Hartridge* did not apply.

Mr. Lawson, for the infant children, argued that the land did not pass with the house—

Irvin v. Ironmonger, 2 Russ. & M. 531.

Doc v. Collins, 2 Term Rep. 498.

Mr. Glasse, in reply.

KINDERSLEY, V.C.—Two questions are raised in this case. I will dispose of that which relates to the gift to the widow and her dealings at once. If any portion of the real and personal estate is not specifically bequeathed that is first liable to the costs of the suit, assuming that debts are paid. The reason for the distinction between realty and personality formerly made was that a man could only devise what he was actually seised of at the date of the devise; but the Wills Act having taken away the reason, there is no object in keeping up the distinction; and a residuary devise of realty in general terms is general, and not specific. Assuming that as the right principle, how does it apply here? It is clear that the residuary gift to the wife at the end of the will is first applicable for costs before resorting to the specific devises. But now comes this curious question. There is at the outset a residuary devise and bequest to the wife for life, and after payment of debts a gift of plate, &c. to her, and then a gift of all the rest and residue of the real and personal estate, that is, with an exception, a general bequest to her of the income of the realty and personality, and after her death various specific gifts, the income of the wife consisting partly of that arising from property falling under the ultimate residuary devise and bequest; and the question is, whether the income as well as the *corpus* received by her under the first devise and bequest is applicable in discharge of the costs before

resorting to the property specifically devised and bequeathed. I do not see how to escape the conclusion. It is clear that property not specifically devised is applicable for payment of costs before property specifically devised,—first *corpus*, and if that is not sufficient, then the income,—and this is really the same thing. Therefore in marshalling the assets you must first exhaust the *corpus* and the income taken by the wife, and if that is insufficient the specifically-given portions must be resorted to *pro rata*, and the interest on the debts must be payable out of income. With regard to the gift of the house at Chiswick, I shall consider the authorities.

KINDERSLEY, V.C. (March 5).—I have looked into the authorities bearing on this question, and have found no case—as it was not likely I should—exactly in point. *Lethbridge v. Lethbridge* so far bears upon it that the word “premises” also occurred there, but not in the sense of a messuage. The only difficulty here is, not on the word “premises,” but on the words “situate No. 4.” If it had only been “situate in Turnham Green Terrace” there would have been no difficulty; but there is no doubt that this piece of land is not “situate No. 4,” nor, in strictness, does it form any part of the terrace: but I cannot help feeling that the testator clearly intended to pass the messuage and premises including this piece of land, mentioning No. 4. by an inaccuracy of expression. On the whole, I think that he has sufficiently expressed his intention to enable the Court to arrive at the conclusion that this gift to his daughter comprised the small piece of ground in front of the house No. 4.

WOOD, V.C. }
March 19. } FULLER v. TAYLOR.

*Practice—Injunction—Interim Order—
Delay—Suppression of Facts.*

On the 16th of March F. and S. obtained an interim order restraining T. from obstructing their ancient lights by continuing the erection of certain buildings. On the hearing of the motion for an injunction, it appeared that the parties had been at issue as to their

rights since the 27th of January:—Held, that this ought to have been stated to the Court on the application for the interim order, and that after the delay which had occurred such an ex parte application was improper.

This was a motion for an injunction to restrain the defendant, Thomas Taylor, from obstructing the plaintiffs' ancient lights.

The plaintiffs, John William Fuller and Thomas Styring, as trustees under the will of Thomas Fuller, were the owners of the Duckit Mill at Bradford.

It appeared from the bill, which was filed on the 14th of March 1863, that the defendant, Taylor, had purchased certain cottages and premises in Nelson Court, at Bradford, opposite to the Duckit Mill; that shortly after the defendant had purchased the aforesaid cottages and premises, and a few months before the date of filing the bill, he pulled down and removed the said cottages, and had since commenced and proceeded with certain new buildings thereon; that the plaintiffs, upon hearing of such new buildings being commenced, caused their solicitors, Messrs. Makinson & Son, to write to the defendant, Taylor, and to call his attention to the ancient lights enjoyed by them in respect of their said mill; but that they did not discover until the commencement of the present month of March that the said new buildings were intended to be above the height of the said cottages; that in the present month of March the tenants of the plaintiffs' said mill complained to the plaintiffs that such new buildings had been already carried to a height exceeding that of the old cottages, and that such new buildings obstructed and interfered with the lights of the plaintiffs' mill, and that it appeared that they were about to be carried to a still further height.

It appeared from the evidence that, on the 26th of January 1863, Messrs. Makinson & Son had written a letter to the defendant, complaining of the deprivation of light caused to the Duckit Mill by the building erected or in course of erection by the defendant, and informing him that unless the objection was at once removed an action or other legal or equitable proceeding would be commenced against him. To such letter the defendant's solicitors

replied, on the 27th of January 1863, "We think you must be acting under a misapprehension, as Mr. Taylor's buildings are on the opposite side of the street to Duckit Mill. Mr. Taylor absolutely denies that he is infringing in any way on the rights of your clients; and if they determine to proceed, you may send process to us." And after such letter the buildings were continued.

The plaintiffs, on the 16th of March 1863, obtained an interim order, restraining the defendant from proceeding to build any building on the land belonging to him opposite the plaintiffs' mill of a greater height than the cottages pulled down by him.

On the 19th of March the motion for an injunction was heard.

Mr. Rolt and *Mr. Beaumont*, for the plaintiffs.

Sir H. Cairns and *Mr. J. Pearson*, for the defendant, opposed the motion.

Wood, V.C.—It is really time something should be done with reference to interim orders and the mode in which they are obtained. It is quite true that they are not exactly like *ex parte* injunctions, which put the other side to the necessity of coming here to dissolve them; and in many respects there is a convenience in the present course of proceeding. But, on the other hand, it is necessary that the Court should be informed of every fact, whenever an *interim* order is asked for. This rule ought not perhaps to be carried to that extreme degree of nicety to which it formerly was in the case of *ex parte* injunctions, when the very smallest scrap of paper that was omitted was held almost to disentitle to the injunction. But when, as in the present case, a portion of the correspondence is not disclosed to the Court, and the effect of it is represented in such a manner as to mislead the Court, I think the Court should in some way mark its sense of the course which has been taken. I always make a point of inquiring—"When did you first know of this matter?" and Mr. Beaumont very properly told me that the plaintiff knew of it as early as the 26th of January, and he read the following passage from the plaintiff's affidavit: "The solicitors were instructed to write to the defendant with

reference to such erection or proposed erection, and they did as I am informed and believe, write to him a letter on the 26th of January last, and received in reply thereto a letter from the defendant's solicitors stating that they, Messrs. Makinson & Son, were acting under a misapprehension, and denying that the said defendant was infringing in any way on our rights of lighting in connexion with the said mill." That struck me at once, and I remarked to Mr. Beaumont, I did not quite understand it. His answer was that it certainly was of an ambiguous character. It turns out now that they intended to dispute the right altogether; but as far as the letter was disclosed, there was no knowing whether it did not mean simply that they were not in fact going to do any thing which would interfere with the mill. Then the solicitors of the defendant write to Messrs. Makinson & Son—"Mr. Taylor, for whom we act, has brought us your letter of yesterday. We think you must be acting under a misapprehension, as Mr. Taylor's buildings are on the opposite side of the street to Duckit Mill. Mr. Taylor absolutely denies that he is infringing in any way on the rights of your clients; and if they determine to proceed, you may send process to us." That last passage is just the point of the whole letter, because it interprets the whole. I quite agree that the defendant's solicitors in effect say, "We are not about to infringe any of your rights"; and that might mean, if it ended there, "We are not putting our ground so high as to deny you have any rights"; but when it says, "We are ready to accept service," that is a distinct challenge. They were at arm's-length; and from that moment it appears to me that the plaintiff ought not to have applied for an *ex parte* order.

Then other letters are written, but the application for the interim order was not made here until the 16th of March; and I think at that time the plaintiffs must have been aware of the correspondence.

The main point is with regard to these letters that first passed. I think that the Court ought to have known that the parties had been *de facto* standing at arm's-length since the 27th of January, and therefore that there had been great delay, which might be of considerable importance at the hearing of the cause, and certainly

was of great importance upon the first application for the interim order.

Now, on the facts before me, the defendant filed his affidavits as soon as he could; there has been no delay on his part. But, of course, the case cannot be considered ripe for hearing so as to determine the question of undertaking as to damages or anything of that kind now. After all the delay which took place between January and March, I shall not interfere at the present moment; the case is not a case for an interlocutory injunction; it must be prosecuted to a hearing. Of course delay will always be an ingredient in the case; but if it is thought proper to grant an injunction at the hearing, I have no doubt the Court has ample jurisdiction from the time the bill is filed; and therefore it will not interfere any further with the continuance of the building now. I think that I sufficiently mark my sense of the impropriety of the proceeding by *ex parte* application after the previous correspondence by taking care that the plaintiffs shall have no costs on this motion. The defendant's costs will depend upon the merits of the case, and therefore I make them costs in the cause.

The result is this, that I make no order on the motion, except that the defendant's costs shall be costs in the cause; and that the question as to the plaintiffs' undertaking shall stand to the hearing. And the interim order is discharged.

ROMILLY, M.R. }
Dec. 19;
Jan. 14.

SARAZIN v. HAMEL.

Demurrer—Pleading.

In a bill to restrain the infringement of a design for ornamenting lace, registered under the 5 & 6 Vict. c. 100, compliance with the act is sufficiently pleaded by alleging that the design and proprietorship have been duly registered, and a bill containing those allegations is not open to a demurrer for not alleging in detail that the plaintiff has complied with the various requirements of the act. And if a defendant insists that a plaintiff has lost his copyright by non-compliance in respect of matters subsequently to

registration, he must raise the defence by plea or answer.

This was a demurrer.

The plaintiffs were Jules Sarazin, Louis Sarazin and Auguste Bonneville, carrying on business as merchants and dealers in lace, at Calais, under the style of "Sarazin frères et Bonneville," and John Gower and John Gower, the younger, carrying on business as commission-agents at Bread Street, in the city of London; and the defendant was Leopold Hamel, a manufacturer and seller of lace, carrying on business at Nottingham.

The bill prayed that the defendant, his agents, &c., might be restrained from selling, offering or exposing for sale any lace manufactured according to the plaintiffs' registered designs or any of them, without the plaintiffs' leave and licence, and from parting with the possession of any such lace, except to the plaintiffs, and from applying the designs so registered, or either of them, to the manufacture of lace, or any other article comprised in the 13th class mentioned in the 5 & 6 Vict. c. 100, during twelve months from the 12th of August 1862, unless with the consent of the plaintiffs; that the defendant might deliver up to the plaintiffs his stock of such lace, and pay what, upon taking accounts, it should be found he had received in respect of the sale of such lace. The bill also asked for damages.

The bill alleged that the plaintiffs, having become the joint proprietors of two original designs applicable to ornamenting lace, which had not been previously published in Great Britain or Ireland, or elsewhere, caused the same designs and the plaintiffs' proprietorship thereof respectively to be duly registered by the Registrar of Designs in accordance with the provisions of the 5 & 6 Vict. c. 100; and that the said designs and the plaintiffs' proprietorship thereof were respectively so registered under the numbers 153,721 and 153,723 respectively on the 12th of August 1862, the plaintiffs being registered as proprietors by their trading styles of "Sarazin frères et Bonneville," and "John Gower & Son."

The bill then alleged that, such designs and the plaintiffs' proprietorship having been respectively so registered, the plain-

tiffs, from the time of registration, became entitled to the sole right of applying the same for the term of twelve calendar months from the date of such registration to articles of manufacture comprised in the 13th class mentioned in the Designs Copyright Act, viz., to lace and any other article of manufacture or substance not comprised in either of the twelve other classes in the said act mentioned.

The bill then alleged that the defendant, without the leave or licence of the plaintiffs, had, either by himself or his servants, &c., been applying the designs to lace manufactured either by himself or by other persons by his direction, and that he or his agents had sold or disposed of great quantities of the lace which had been so manufactured.

The bill then charged that the defendant copied or caused the designs to be copied from patterns thereof registered under the act, or from patterns of lace manufactured by the plaintiffs or by their order or for their use, well knowing that the designs had been registered under the act, or, at any rate, taking no trouble to ascertain that fact; and that the lace so made had been sold in large quantities to foreign buyers and to other persons trading in Great Britain and Ireland, and that he still had large quantities which he proposed to sell; that he had received large sums of money for what he had sold, and made large profits, and that the plaintiffs, by his acts, had sustained great damage.

The defendant demurred to the bill generally for want of equity.

Mr. Selwyn and *Mr. Freeling*, in support of the demurrer.—The act was passed for the benefit of the public, among whom foreigners were included; they must, however, comply with the requirements of the act if they contemplated participating in its advantages. In the present case the terms of the 5 & 6 Vict. c. 100. s. 4. had not been complied with (1); there was no proof

that the registration was made before the design was published abroad. The name of the proprietor was also not stated, and the letters "R^d" with a number, were omitted. The 21 & 22 Vict. c. 70. s. 4. explained what was meant in the previous act; and this was further explained by the 24 & 25 Vict. c. 73, which declared that the former acts should apply to every such design, whether the application thereof be done within the United Kingdom or elsewhere, and whether the inventor or proprietor of such design be or be not a subject of Her Majesty.

Mitford on Pleading, 164, 4th edit.

Heywood v. Potter, 1 E. & B. 439; s. c. 22 Law J. Rep. (N.S.) Q.B. 133.

Mr. Baggallay and *Mr. Fooks*, for the bill, said that there were abundant allegations on the bill, shewing the plaintiffs' right to come to this Court. The design was duly registered, and after this it could not be lost if the letters "R^d" were omitted upon articles of foreign manufacture. The Patent Acts were analogous, but in those cases no allegation was necessary that every article manufactured and sold had the marks mentioned in the acts. The objection should have been taken by plea or answer, and not by demurrer, especially as the defendant had ignored the registration by using the designs.

Friedas v. Dos Santos, 1 You. & J. 574.

De la Branchardière v. Elvery, 4 Exch. Rep. 380; s. c. 18 Law J. Rep. (N.S.) Exch. 381.

THE MASTER OF THE ROLLS.—The question raised by the demurrer is, whether the bill is defective for not alleging that the plaintiff has complied with all the provisions of the 5 & 6 Vict. c. 100, or for not alleging in express terms that he affixed the letters "R^d" in some convenient place on every article of manufacture in question which has been published by him. The principle upon which a demurrer lies to a bill may

(1) The 4th section of the act is as follows:

"Provided always and be it enacted, that no person shall be entitled to the benefit of this act, with regard to any design in respect of the application thereof to ornamenting any article of manufacture or any such substance, unless such design have before publication thereof been registered according to this act, and unless at the time of such registration such design have been registered in respect to the application thereof to some or one

of the articles of manufacture or substances comprised in the above-mentioned classes, by specifying the number of the class in respect of which such registration is made, and unless the name of such person shall be registered according to this act as a proprietor of such design, and unless after publication of such design every such article of manufacture, or such substance to which the same shall be so applied, published by him, hath thereon, if the article of manufacture be a woven fabric for

for the purposes of this question be stated thus. If a plaintiff proves all the facts alleged in his bill, will he in the absence of any other evidence be entitled to a decree at the hearing? If the question must be answered in the affirmative, the demurrer must be overruled. Here the plaintiff first alleges that he has duly registered his design. At the hearing he must prove this. The proof is by the production of the certificate of the registrar, the only proof. This is provided for by section 16, and the same clause enacts—"that such certificate made on every such original design, or on such copy thereof, and purporting to be signed by the registrar or deputy registrar, and purporting to have the seal of office of such registrar affixed thereto, shall, in the absence of evidence to the contrary, be sufficient proof, as follows: of the design, and of the name of the proprietor therein mentioned, having been duly registered; and of the commencement of the period of registry; and of the person named therein as proprietor being the proprietor; and of the originality of the design; and of the provisions of this act, and of any rule under which the certificate appears to be made, having been complied with." Therefore, the production at the hearing of this cause assuming the defendant to admit nothing, and to require the plaintiff to prove everything, he will by the production of this certificate establish the five propositions enumerated in this section, and will throw on the defendant the burthen of disproving them, or such one or more of them as he shall contest. It follows, therefore, upon this, that upon the plaintiff's proving what he has alleged in his bill, he will at the hearing be entitled to a decree upon the principle stated, and this demurrer must be overruled. I am confirmed in this by the circumstance that the form of information which is given by the act in section 8. contains merely the allegation that the informant is the proprietor of a new and original design and nothing more, which proprietorship can only be proved by the production of the certificate, which production will

printing, at one end thereof, or, if of any other kind or such substance as aforesaid, at the end or edge thereof, or other convenient place thereon, the letters 'Rd.' together with such number or letter, or number and letter, and in such form as shall correspond with the date of the registration of such

also establish the fact of the registration, and also the compliance by the informant with the other provisions of the act. The analogy also to the cases of patents assists this view of the case, in which I am not aware that this Court does require the plaintiff to allege in his bill or to prove at the hearing, unless put in issue by the defendant, that he the plaintiff has paid the instalments necessary for the purpose of keeping his patent alive. If the defendant, in the case of a patent, insists that the patent is lost by reason of this neglect, or if in the present case the defendant insists that the plaintiff has lost the monopoly by reason of non-compliance with the provisions of it as to matters to be performed subsequently to registration, he must raise this question either by answer or by plea, in which case the plaintiff will simply produce his certificate of registration, and thereupon the burthen of proof that the plaintiff has not complied with such provisions of the statute will fall upon the defendant, liable to be rebutted by fresh evidence to be produced. As it is, the demurrer must be overruled with costs.

ROMILLY, M.R. } SARAZIN v. HAMEL.
Jan. 15. }

Copyright of Designs—5 & 6 Vict. c. 100, 24 & 25 Vict. c. 73.—*Foreign Sales—Registration Marks—Limited Monopoly.*

The proprietor of a design duly registered under the acts for the copyright of designs, whether he be a British subject or a foreigner, forfeits the benefit of the acts unless the proper registration marks are attached to all articles and substances to which the design is applied, whether the same are sold abroad or in the British dominions.

The plaintiffs asked for an injunction to restrain the defendant from copying designs for ornamenting lace, of which they were the proprietors. They proved that the de-

design according to the registry of designs in that behalf; and such marks may be put on any such article of manufacture or such substance either by making the same in or on the material itself of which such article or such substance shall consist, or by attaching thereto a label containing such marks."

fendant's patterns were exactly the same; thread for thread, and different only in the materials, which were very inferior.

It was proved that the plaintiffs were the registered owners of the design.

On behalf of the defendant, it was in evidence that the same pattern was purchased by him in Paris from a piece on which there was no registered mark. It was also proved that the plaintiffs sold three pieces of the lace in France without any English registered mark upon them; and the plaintiffs admitted that it was not the custom of the trade so to mark them; and they submitted that the terms of the English acts did not require them to mark goods made and sold abroad with English marks. It was further proved that Messrs. Sarazin sent small patterns to intending purchasers without any mark being affixed to them; and they submitted that it was not the custom of the trade to mark patterns which were only intended to precede an order for goods which would be marked. It was also in evidence, that Messrs. Sarazin had sold lace to Messrs. Copestakes with the registered mark, but without the registered number.

Mr. Baggallay and *Mr. Fooks*, for the plaintiffs, said that they had been most anxious to comply with the requirements of the 5 & 6 Vict. c. 100. and the other laws relating to registration, and that they had supposed it had been duly attended to by their agents; they had therefore duly registered the design. It could not however be denied but that, in following the custom of the trade, they had issued patterns without marks, and they had sold goods abroad without marks. It was however insisted that this could not affect their rights in England, as many of the objections raised were not within the acts of parliament; and they submitted that the plaintiffs were entitled to the injunction asked for.

Mr. Selwyn and *Mr. Freeling* said, that a publication of the designs abroad without the marks giving protection to the goods in England, was a publication for the benefit of mankind at large of which any person might avail himself. As therefore the plaintiffs had sent out patterns and goods, not only in France, but also in England, without the marks required by the 5 & 6 Vict. c. 100, and without the number attached,

they had no right to the injunction which they now sought to obtain; because the design had been previously published both abroad and in England, without the goods being properly marked, and because the plaintiffs, as proprietors, had not brought themselves within the provisions of the acts—*Heywood v. Potter* (1).

THE MASTER OF THE ROLLS.—The question is whether the plaintiffs, who as manufacturers are, as they admit, in the habit of selling large or any quantities of lace abroad without anything to indicate that it has been registered in England, without the letters "R^d" and the figures upon it, are entitled to preserve the monopoly given to them by the 5 & 6 Vict. c. 100. From the evidence of the defendant, it would seem that he bought these patterns subsequent to the time when the motion for an injunction was first before the Court. The plaintiffs themselves also admit that they have sold and that they have been in the habit of selling, and that it is the common practice of manufacturers to sell, large quantities of this lace abroad without anything to indicate that the act of parliament has been complied with.

It would be a most singular anomaly if the act does not apply to whatever they sell wherever it is sold. The plaintiffs are manufacturers in Calais; if they sell a large quantity of these goods in Calais to A. B, an Englishman, for import to this country, it is contended that they need not have any mark upon them to shew that they are registered, but if they sell the same goods to the same man in Dover then that they must shew that they are registered; and yet the only difference is that one man transports it across the Channel instead of the other.

The object of the act obviously is, that the public should be warned against pirating any designs which are registered, that they should not by that means get into a lawsuit by reason of their imitating any designs which are previously registered. It is unnecessary to go into any question about the degree or amount. Whatever the original manufacturer who has got a registered design sells, a separate piece it may

(1) 1 E. & B. 439; s.c. 22 Law J. Rep. (N.S.) Q.B. 133.

be, he must give notice upon that piece that it is registered. No doubt the person to whom he sells the article may take off the mark and sell it again; but that will not affect the person who originally sold it, as there is no privity between them, unless they should happen to be the agents for the purpose of sale. The only question is, whether the act of parliament does direct that the notice to be affixed, the letters "R^d," should be limited to sales made in this country, and not apply to sales not made in England, but made elsewhere. (His Honour here read the 3rd section of the 5 & 6 Vict. c. 100. and the 24 & 25 Vict. c. 73). The latter act extends the former to everybody; it applies to a design made anywhere, and it applies to foreigners as well as to English subjects. It is not in the slightest degree compulsory. It is merely a beneficial act. If you want to have the benefit of the act any foreigner or Englishman can have the benefit of the act in respect to any manufacture or any design made at any place whatever if they comply with the provisions of the act. But what are you to do? (His Honour here read section 4. of the 5 & 6 Vict. c. 100.) Here is an act of parliament of which every foreigner and Englishman may have the benefit. But he is to lose the benefit of the act unless after the publication of such design every article to which it has been applied, published by him, hath upon it the letters "R^d" and the number. Has this been done? The plaintiff says, "No; I am a foreigner, and though I seek to have the benefit of this act it does not apply to articles published by me abroad." Why not? What limitation is there in the act, shewing that the words, "Every such article manufactured by him" mean every such article manufactured and published by him within the United Kingdom? What power has the Court to introduce such words into a general act of parliament relating to all foreigners as well as to all persons in this country? The proviso limiting and making the condition, the performance of which is necessary for obtaining or preserving the benefit of the act, is just as general as the benefit given by the act and just as extensive. It extends to everyone; but if he is to have it he must put upon each article "R^d" and the number; if he does

not, he loses the benefit of the act whenever and wherever he chooses to do it; and when he sells goods the circumstance whether he sells at Calais or at Dover can make no difference. The spirit and meaning of the act, and the plain words used, apply everywhere wherever he sells the goods. As, therefore, the plaintiffs have not complied with the requirements of the act, they are not entitled to the benefits given by it. The motion, therefore, must be refused, with costs.

The plaintiffs intimated their intention of not appealing, and by consent the bill was dismissed, with costs, as if it had been heard upon a motion for a decree.

WOOD, V.C.	} THE GREAT WESTERN RAILWAY COMPANY v. THE METROPOLITAN RAILWAY COMPANY.
March 13.	
LORDS JUSTICES.	
May 23, 25.	

Railway Company—Trustee for—Application of Funds—Parliamentary Powers—Ultra Vires—Demurrer.

The G. W. Railway Company were empowered to take shares in the M. Railway Company, and accordingly took shares to the full extent of their powers, in the names of trustees, who were registered as the holders of such shares. Afterwards the M. Railway Company were authorized to extend their railway, and to create new shares; and they resolved at a general meeting to allot the new shares rateably amongst the proprietors of the original shares. The G. W. Railway Company claimed to be entitled to a proportion of these shares, and filed a bill to enforce their claim, the trustees being joined as co-plaintiffs:—Held, by one of the Vice Chancellors, on demurrer, that it was ultra vires for the G. W. Railway Company to take any of the new shares. That the M. Railway Company could not be compelled to allot shares either to the G. W. Railway Company or to their trustees, as payment by the G. W. Railway Company of calls on such shares would involve a breach of trust; and that the bill being framed so as to assert a claim on the part of the G. W. Railway Company alone, any possible title in their co-plaintiffs, the trustees, to have the shares allotted to themselves individually,

could not be relied upon for the purpose of sustaining the bill.

Also, that where a public company is engaging in a transaction which is ultra vires, the Court, in adjudicating upon that transaction, can only deal with the law as it exists, and will not take into consideration the possibility of further powers being obtained by the company.

On appeal, the Lords Justices considered that the points involved were of too great difficulty to be decided conveniently upon demurrer; and they overruled the demurrer, making the costs on both sides costs in the cause.

The bill in this suit was filed, by the Great Western Railway Company and certain persons, the nominees and trustees for the Great Western Railway Company, as plaintiffs; against the Metropolitan Railway Company and John Hinchman, the secretary of the last-mentioned company; and stated, that by the Metropolitan Railway Act, 1854, by which the North Metropolitan Railway Act, 1853, was repealed, it was enacted that the company thereby incorporated should, for the purposes of the now stating act, remain as from the passing of the said act of 1853, and continue incorporated by the name of the Metropolitan Railway Company; that the capital of the new company should consist of the original capital of 300,000*l.*, authorized to be raised by the said thereby repealed act, and an additional capital of 700,000*l.*; that the Great Western Railway Company might subscribe towards and become shareholders in the said undertaking to any extent not exceeding 175,000*l.*, and might pay the said sum of 175,000*l.*, or any part thereof, by and out of any monies which they had raised, or were then authorized to raise by shares or mortgage under the provisions of any act or acts, and not required for the purposes for which such monies were authorized to be raised; and that it should be lawful for the Great Western Railway Company to raise, by creating new shares or by mortgage, in addition to any sums they were authorized to raise by any act or acts other than the now stating act, any sum not exceeding 175,000*l.*, and apply such money to the purposes of the said undertaking, and in carrying the purposes of the

now stating act into execution; and by section 192. the directors of the Great Western Railway Company were empowered when and so soon as the Great Western Railway Company should have subscribed to and become shareholders in the said undertaking to the extent of 175,000*l.*, and from time to time, so long as the Great Western Railway Company should continue to hold shares in the undertaking to that amount, to appoint from amongst their own body so many persons as directors of the Metropolitan Railway Company as should be equal in number to one-third of the whole number of directors of that company inclusive of the directors appointed by the Great Western Railway Company.

In paragraph 5. it was stated that, in pursuance of the powers given to them by the said last-mentioned act, the Great Western Railway Company, out of their own monies, duly paid up the said sum of 175,000*l.*, and became entitled to 17,500 shares in the Metropolitan Railway Company, and the proprietors thereof. That the said 17,500 shares were registered, and had ever since been and were still standing in the register of the Metropolitan Railway Company, in the names of certain persons who were the nominees of and the trustees for the Great Western Railway Company; but that it was well known to the Metropolitan Railway Company that the Great Western Railway Company were entitled to the said shares, and were the proprietors thereof; and that the persons whose names appeared in the register were the nominees of and the trustees for the Great Western Railway Company; and that the Metropolitan Railway Company always acknowledged and dealt with the Great Western Railway Company as the real owners of the said shares, and as having the control thereof; and that the notices of calls upon the said shares were all addressed to and paid by the Great Western Railway Company, and that the receipts for their monies were always expressed as having been received from the Great Western Railway Company.

The bill further stated that by the Metropolitan Railway (Finsbury Circus Extension) Act, 1861, the Metropolitan Railway Company were authorized to raise for the purposes of that act, by the creation of

50,000 new shares of 10*l.* each, a capital of 500,000*l.* That by the Metropolitan Railway Act, 1862, it is enacted, that upon the issue of the Metropolitan Extension shares for raising the sum of 500,000*l.*, authorized to be raised by the Extension Act of 1861, the company may attach such conditions as they think expedient with reference to the limitation of the dividend upon those shares, and the application of the profits arising from the railway, authorized to be made by that act; and with reference to the time when the original and extension capital shall become amalgamated, and such conditions shall be expressed in the resolutions of the company creating such shares. That at the half-yearly general meeting of the Metropolitan Railway Company, held on the 11th of February 1863, a resolution was passed "That for the purposes of the Metropolitan Railway (Finsbury Circus Extension) Act, 1861, and under the powers of that act, and of the Metropolitan Railway Act, 1862, the sum of 500,000*l.* be raised by the creation of 50,000 Metropolitan Extension shares, of 10*l.* each, subject to the terms and conditions therein stated. That the registered proprietors of ordinary shares in the company, on the 14th day of February instant, shall rateably and in the proportion of their registered holdings on that day of ordinary shares, or as near thereto as may be conveniently practicable, have the option to be exercised in such manner as the directors may prescribe, of subscribing on or before the 23rd day of February instant, for such new shares at par. That any shares not taken under the last resolution, shall, and rateably according to their respective holdings on that day, be apportioned, at par, amongst such of the registered proprietors of preference shares as shall make application in writing to the secretary on or before the 23rd day of February instant, for an allotment of the same. That any shares not disposed of under the last resolution may be sold or disposed of at such prices, in such manner and upon such terms as the directors may consider expedient." That the Great Western Railway Company claimed to have their proportion of the said new shares in right of their said 17,500 shares, and on the 19th of February 1863 sent

to the directors of the Metropolitan Railway Company a formal application for their proportion of the said new shares. That the Metropolitan Railway Company deny the right of the Great Western Railway Company to have, either by themselves or by their said nominees and trustees, any of the said new shares.

The bill prayed that the Metropolitan Railway Company might be compelled to allot and give to the Great Western Railway Company, or their nominees or trustees, at par, their rateable proportion of the said new or extension shares. And that the Metropolitan Railway Company, their officers, servants and agents, might be restrained by injunction from making any allotment or other disposition of the said new or extension shares to any person whatever until they should have allotted to the Great Western Railway Company, or their nominees or trustees, their rateable proportion of the same shares pursuant to the aforesaid resolution.

A general demurrer to this bill was filed by the defendants.

The Solicitor General, Mr. Giffard and Mr. J. W. Bovill, in support of the demurrer, contended that the rights and powers of the Great Western Railway Company depended entirely upon various acts of parliament; and as those acts gave the Great Western Company no power to subscribe for or take these shares the demurrer must be allowed. That by the 5 & 6 Will. 4. c. cvii., by which act the Great Western Railway Company was incorporated, and by the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16. (section 65), it was provided that all the money raised by the company, whether by subscriptions of the shareholders, or by loan or otherwise, should be applied, firstly, in paying the costs and expenses incurred in obtaining the special act and all expenses incident thereto; and, secondly, in carrying the purposes of the company into execution. The Great Western Railway Company, therefore, had no power to expend their money on these shares, and if they did so spend it it would be a breach of trust which could not be upheld in a Court of equity — *Salomons v. Laing* (1). And the interposition of trustees would make no differ-

(1) 12 Beav. 339, 377; s. c. 19 Law J. Rep. (n.s.) Chanc. 225, 291.

ence where the substance of the transaction was known and understood—

The Great Western Railway Company v. Rushout, 5 De Gex & Sm. 290.

Lawes's case, 1 De Gex, M. & G. 421; a. c. 20 Law J. Rep. (N.S.) Chanc. 295; 21 Law J. Rep. (N.S.) Chanc. 688.

Sir H. Cairns and *Mr. G. L. Russell*, in support of the bill, submitted that no question was raised between the Great Western Company and their nominees, or between the Great Western Company and their shareholders. The legal title of the trustees was complete; the Metropolitan Company had no right to inquire into the trusts. The trustees were the registered proprietors of the original shares, and if they chose to pay for them it was competent to the Great Western Company to ratify what was done. The purchase of these shares by the Great Western Railway Company did not necessarily involve a breach of trust, as they might obtain an act of parliament authorizing such an expenditure of their funds, or they might raise the requisite amount by the sale of the 17,500 shares; that there was no question before the Court as to the application of the funds of the Great Western Railway Company. The only questions were, first, whether the trustees had any option to take these further shares? and, secondly, whether that option had been exercised? both of which questions must be answered in the affirmative.

Wood, V.C., without calling for a reply. —I think the case is too plain for any possible doubt on the bill as it stands. The only conceivable way in which it can be argued is to argue upon an imaginary bill, the exact contrary of that I have before me. *Sir Hugh Cairns* contended that this bill must be taken as if the Great Western Railway Company were applying as agents of the registered shareholders. The bill from the beginning to the end shews that the registered shareholders are the mere agents or nominees of the Great Western Railway Company. It is not a question of words, it is a question of fact; and I cannot enter into the moral question as to whether there is propriety or impropriety in resisting a demand of this nature. I must take the bill as it is, and examine the nature of the

NEW SERIES, 32.—CHANC.

case that is raised by it. You have a case which has not been met by a single argument on the other side if this is the bill of the Great Western Railway Company seeking to take more shares in this new and extended speculation: in fact it is not disputed that the Great Western Railway Company have no power to take a single share more in this new undertaking; they have expended the whole of the 175,000*l.*, and are not entitled to spend a sixpence of their money in shares in the new company; and this bill on the part of the Great Western Railway Company asking this Court to force another company to assist them in a breach of trust cannot be sanctioned by the Court. If it is asked what right have the Metropolitan Railway Company to enter into this question, the answer is afforded by the case of *Salomons v. Laing*. The Metropolitan Railway Company in the first place could not be compelled by this Court to assist in a breach of trust; and in the next place if the shares were taken and should fall to a discount (of course nothing could turn upon the circumstance of their being at a premium at the present moment) and a call should be requisite, it is quite clear that the Metropolitan Railway Company could not enforce the payment of a single call by the Great Western Railway Company: and therefore if the bill were taken as a simple bill between the Great Western Railway Company and the Metropolitan Railway Company, it would be no answer to the demurrer to say that this is not a contest between the shareholders of the Great Western Railway Company and the directors of their company, because the Metropolitan Railway Company cannot be compelled to accept, as shareholders, the Great Western Railway Company (who they know have no power of becoming shareholders) on two grounds, first, because they cannot be compelled by this Court to assist in a breach of trust, and, secondly, because they cannot be compelled to take shareholders against whom the payment of calls cannot be enforced. That would be the case if the bill stood simply as a bill on the part of the Great Western Railway Company. It is clear that they are not entitled upon anything I have before me on this bill to come as plaintiffs in this Court asking for relief for the purpose of enabling them

3D

to expend their funds in a manner in which they have no power to spend them. Therefore it is wrong to bring them here as plaintiffs in any sense. Then it might be said that a demurrer would not lie in respect of misjoinder. If it were a case of simple misjoinder or alternative prayer, if the bill had been a bill by the shareholders and the Great Western Railway Company in the alternative saying either let the Great Western Railway Company take these shares or let us, as registered shareholders in respect of our being admitted by the Metropolitan Railway Company to stand upon the register of their company, and having become liable to them and being willing to adopt that liability—asking that in the alternative—it is just possible that an argument might have been used that the Court, it not now holding itself bound to allow a demurrer in respect of misjoinder, might pass by the case of the Great Western Railway Company, who must be out of sight altogether; and the Court might have acceded to that view of the alternative relief. But that is utterly inconsistent with the frame of this bill, which is a claim by the Great Western Railway Company alone, and not a claim that their nominees are entitled to take these shares as registered shareholders, because they have incurred any liability, or because they have been put upon the register as shareholders *per se*, or are liable *per se* to the company. Upon the statements in this bill as framed, suppose any one of the nominees was to apply for the shares in order to appropriate them to his own use, the Great Western Railway Company, informed of that fact, would be entitled to say to the Metropolitan Railway Company, Do not hand over the shares to that gentleman, he is going to misapply them, they are ours—we ask you to hand them over to another nominee of ours—they would be entitled to demand that, assuming that the difficulty as to misappropriation of funds was out of the way. That is quite plain upon the averments of this bill, because it deliberately tells you that these persons were selected, not as persons who should be answerable to the Metropolitan Railway Company *quod* shareholders, and liable therefore in respect of the shares, but they were put upon the share-list to represent the Great Western Railway

Company; and the defendants, the Metropolitan Railway Company, knew very well that they were dealing with the Great Western Railway Company as the real owners of those shares, and as having the control thereof, as, in truth and in fact, they had. The notices of calls were all addressed to the Great Western Railway Company, and not to the other plaintiffs, or any one of them. The calls were always paid by the Great Western Railway Company, and the receipts were always expressed as being received, as the fact was, from the Great Western Railway Company; and in pursuance, in fact, of the Great Western Railway Company being so *bond fide* shareholders in the concern, they exercised their privilege of electing directors, which they were only authorized to exercise upon becoming holders of shares. Then, in the second paragraph of the prayer, the plaintiffs (that is, the whole body) “offer to subscribe for and take the said shares, and do all such matters and things necessary in the premises.” That is to say, the Great Western Railway Company offer to pay for the shares, and they cannot carry out their offer. They cannot pay a sixpence in respect of the shares; it is impossible that they should be allowed so to do. The circumstance that the other co-plaintiffs joined them in the offer only amounts to this, that on this bill it must be held that that offer meant, as regards the Great Western Railway Company, their nominees also; but you cannot say “my trustee is bound to make the payment for me, and I am not bound to indemnify him.”

By the statement in the bill, as regards the co-plaintiffs, the company are bound, and the co-plaintiffs at any time would be entitled to say, “You are bound upon the statement in the bill; we being your mere tools, agents and nominees, you are bound in every respect to keep us indemnified in respect of this;” and on the frame of this bill it must be taken as stated in paragraph 5. They say we have always paid all calls; and so in paragraph 2. of the prayer, where they make the offer, they say, we intend to pay the calls in all time to come in respect of the shares. The only other argument which has been used is this: that these gentlemen, having chosen to incur these liabilities, are entitled to have the allotment. I say that is inconsistent with

the frame of this bill, which cannot be taken in any sense or on any construction as a bill by the nominees to have these shares allotted to them, or to stand on the register of shareholders in their own right. But it was said in argument, "What do the Metropolitan Railway Company know about the trust?—there is no breach of trust on their part." The answer to that is, you told them in the bill the whole story, honestly as it is; and it appears to me that if a gentleman were to apply to a railway company to be put on the list of shareholders for so many more shares, and were to inform the company that he had not a sixpence of his own, but intended to pay for such shares out of money which he held as trustee, there is no doubt the railway company, taking the money upon those representations, would be liable for that money, and would have to refund it when any claim was made by the *cestui que trust*. Here the statement all through is, that these shares are applied for for the Great Western Railway Company, in breach of the duty which they owe to their shareholders and to the public, as represented by the Attorney General. And in breach of that duty, and telling the whole story, they come here for the assistance of a Court of equity. It is suggested that they might possibly obtain an act of parliament, but I can only deal with the law as it exists; the law may be altered by an act of parliament to-morrow; but I cannot speculate on that. Another suggestion was, that they might sell part of the 17,500 shares, and then they might claim the assistance of this Court; but I am by no means clear that that would be so; having once exhausted their powers, it is doubtful whether their powers could be revived; but it is not necessary to say more upon this part of the case.

It appears to me, therefore, that the case is as plain as possible; it is a bill of the Great Western Railway Company, and no one else; these gentlemen, who are plaintiffs, merely come in as their trustees; all through the bill they are so called and described; and it is a bill therefore by this company seeking to do that which this Court would restrain them from doing if they were attempting to do it themselves, either at the instance of a shareholder or the Attorney General, and against which,

in respect of calls, the defendants would have no remedy.

I think, therefore, that I must allow the demurrer.

From this decision the Great Western Railway Company appealed, and the appeal was heard on the 23rd of May.

Sir Hugh Cairns, *Mr. Giffard* and *Mr. G. L. Russell*, for the appellants, argued that the case of *Salomons v. Laing*, cited in support of the demurrer in the Court below, did not apply, and that on the issue of new shares bearing a premium in the market, a pecuniary advantage would accrue to the Metropolitan Railway Company, in which the shareholders, whether infants, idiots, married women, trustees or corporations, aggregate or sole, would be entitled to participate. Here the company might have sold the shares in open market, in which case the moneys produced by such sale would have become the property of the shareholders, *pro rata*, according to their number of shares; but, instead of resorting to that mode of application, they divided the shares themselves, *pro rata*, among the shareholders. The mere accident that a class of shareholders, from the fact of infancy or other disability, were unable to covenant for the due payment of calls, could not be held sufficient to warrant a confiscation of their shares if allotted to them, if those shareholders could procure persons, as guardians or otherwise, who were able and willing to covenant on their behalf.

The Solicitor General and *Mr. J. W. Bovill*, for the respondent company, contended that the whole transaction was *ultra vires*, for that the Great Western Railway Company had no legal power to apply the money of their shareholders in the purchase of shares in another undertaking, and therefore they could not do so by the device of indirectly effecting the same by the intervention of trustees.—They again relied upon the cases of *Salomons v. Laing* and *The Great Western Railway Company v. Rushout*.

Sir Hugh Cairns, in reply.

LORD JUSTICE KNIGHT BRUCE (May 25).—I think that this is a case of difficulty, and not fit to be decided on demurrer, and

that it is right to follow the course adopted in several instances by Lord Hardwicke and other eminent Judges, viz., to overrule the demurrer, reserving the benefit of it to the defendants at the hearing of the cause. To that conclusion I have not less willingly come because the discussion which has taken place will probably lead to amendments in the bill. The costs on both sides will be costs in the cause, and the deposit returned.

LORD JUSTICE TURNER.—I agree. The cause does not seem to be in a position in which a final adjudication can be made. With all respect to the judgment of the Vice Chancellor, it seems to me that too much weight was given to the circumstance that the claim was made on the part of the Great Western Railway Company, and too little to the mode in which the claim was to be worked out. The nature of the claim also seems to be withdrawn from the notice of the Vice Chancellor. The resolution gave a right to an option to all the registered proprietors of shares. It is said that the option was not exercised by the registered proprietors of the shares in question, but the registered proprietors were known to be trustees of the Great Western Railway Company, who did exercise the option in respect of those shares. Whether they could be validly trustees of the shares to be created in the new undertaking or not, they were clearly trustees of the original shares, and were registered proprietors of these shares; and although they themselves did not appear personally in the claim, yet a claim was made on their behalf by the Great Western Railway Company claiming to be their *cestuis que trust* in respect of the shares in question. It is said that the Great Western Railway Company could not be *cestuis que trust*, by reason that they could not hold a greater interest in the Metropolitan Railway than they then held, and that they could not hold any interest at all in the new undertaking. But that argument branches out into two questions: first, whether they could take these shares as continuing holders of the original shares, as to which, of course, this is not the stage of the suit in which an opinion can be given; and, secondly, whether, if not entitled to take and hold such shares, they are placed

in such a position that they might receive for themselves any benefit to be derived from these shares. They may not be entitled to hold these shares, but they may be entitled to have them allotted for their benefit. They may have a right to have them sold; and I have not been able to satisfy myself that they are not entitled to have them allotted to trustees, to be sold by such trustees for their benefit. It is said that there are no allegations in the bill of any intention on the part of the Great Western Railway, except the intention of holding them in a way they are not authorized to do. It may be that on a motion for an injunction, or at the hearing, acts may be proved as evidence of an intention to hold the shares in the manner above mentioned; but that is a point at which we have not yet arrived. The case at present does not furnish any such presumption. The demurrer must be overruled, reserving the costs and the benefit of the objections made by the defendants.

STUART, V.C. }
Jan. 23, 24. } SWAINSTON v. CLAY.

Bankruptcy—Lien on unfinished Ship in Building-yard of Bankrupts—Order and Disposition.

On the 11th of April 1862, A, a ship-builder at Sunderland, contracted, in writing, to build a vessel for B. On the 12th of April 1862, A. by deed assigned the contract to C, to secure an antecedent debt, an advance then made (amounting together to 500l.), and future advances; and by the assignment it was declared that C. should be entitled to a lien on the vessel for the above sums. On the 19th of May 1862 the agreement of the 11th of April 1862 was cancelled, and on the 20th of May 1862 A. contracted to complete the vessel for and to sell it to C. for 1,150l., of which the 500l. already advanced was to be taken in part payment. On the 2nd of June A. became bankrupt; and the vessel was then incomplete. The deed of the 12th of April 1862 was not registered under the Bills of Sale Registration Act. Upon a bill by C, against the assignees in bankruptcy of A, for the purpose of obtaining a declaration

that C. was entitled to a lien or charge on the vessel, or for specific performance of the agreement of the 20th of May 1862,—Held, that C. was entitled, under the deed of the 12th of April 1862, to a lien or charge upon the vessel, and a sale thereof was ordered.

By an agreement, dated the 11th of April 1862, Brown & Briggs agreed to build a schooner for a Mr. Fisher, a shipowner, who had been introduced to them by the plaintiff. While the negotiations for the agreement were pending, the plaintiff advanced to Brown & Briggs 400*l.*, upon the understanding that the repayment was to be secured as well by an assignment of the before-stated agreement, when signed, as by a lien or charge on the vessel itself.

Accordingly, by an indenture dated the 12th of April 1862, and made between Brown & Briggs of the one part and the plaintiff of the other part, Brown & Briggs assigned to the plaintiff the memorandum of agreement of the 11th of April 1862, as a security for the repayment of the sum of 500*l.* and further advances not exceeding the sum thereafter named and interest; and for the purpose of better securing to the plaintiff the repayment of all such sums as aforesaid, it was thereby agreed and declared that (subject to the lien mentioned and given in and by the said agreement) the said vessel and the outfit thereof, and materials, stores, goods and chattels then being, or which from time to time, or at any time during the continuance of that security, might be upon the building-yard of Brown & Briggs, should be and become, and should be deemed and taken to be for all intents and purposes whatsoever, the absolute property of the plaintiff, his executors, administrators or assigns, to be held by him and them in lien to the extent of all such sums as might from time to time or at any time during the continuance of the security, be due from Messrs. Brown & Briggs, their executors or administrators, to the plaintiff, his executors, administrators or assigns, with interest. It was provided that the amount to be thereby secured should not exceed 600*l.*

Of the sum of 500*l.* mentioned in the foregoing deed, 400*l.* had already been advanced as before stated; and the remain-

ing 100*l.* was the only sum paid upon the execution of the deed.

On the 19th of May 1862 the agreement of the 11th of April preceding, between Fisher and Brown & Briggs, was cancelled, and at the time of such cancellation, there was due to the plaintiff the sum of 500*l.* upon the security of the deed of the 12th of April 1862.

The bill alleged that Brown & Briggs, for the express purpose of further and more effectually securing the plaintiff against any loss by reason of the cancellation of the said agreement, proposed, and indeed strongly urged, that the plaintiff should become the absolute owner of the vessel, and to such proposal the plaintiff, believing that he would not thereby lose the benefit of the agreement of the 12th of April 1862, consented.

Accordingly, by a memorandum of agreement, dated the 20th of May 1862, made between Brown & Briggs and the plaintiff, the latter agreed to purchase from the former the hull of the schooner then in course of being built by the owner, to be completed for the sum of 1,150*l.* It was agreed that the before-mentioned sum of 500*l.* should be taken in part payment of the purchase-money for the said vessel; that in case Brown & Briggs should not complete and launch the vessel by the 21st of June then next, or if they should at any time before the vessel should be finished, cease working at her, it should be lawful for the plaintiff, his agents, servants and workmen, to enter into and upon the said building-yard, and to complete the said vessel, using the materials, stores and tools of the said Messrs. Brown & Briggs for that purpose; and that all costs thereby incurred should be paid by and be recoverable against Brown & Briggs.

After the 20th of May 1862 Brown & Briggs made no further progress with the vessel, and on the 2nd of June 1862 they were adjudicated bankrupts, and the defendants, John Clay and Edward Iliff, were elected creditors' assignees.

The bill was filed on the 13th of October 1862, and it prayed, first, for an account; second, a declaration that the plaintiff was entitled to a lien or charge on the vessel for what should be found due to him; third, that if the plaintiff should be held not

entitled to such lien or charge, then for specific performance of the agreement of the 20th of May 1862.

The defendants in their answer said, that the deed of the 12th of April 1862 had not been registered under the 17 & 18 Vict. c. 36, the Act for the Registration of Bills of Sale; that the agreement of the 20th of May was signed when the bankrupts were in a hopeless state of insolvency, and had not, and were not likely to have, the means of completing the vessel; and the defendants submitted that such agreement was a fraudulent or undue preference of the plaintiff to the other creditors of the bankrupts, and they insisted that the cancellation, if any such cancellation there was, of the agreement of the 11th of April 1862 put an end to the plaintiff's security and lien (if any) thereby created in his favour, and that he had no rights as against the assignees under the agreement of the 20th of May 1862. The defendants also insisted that the agreement of the 12th of April 1862 did not create a valid lien or charge in favour of the plaintiff for the sum of 500*l.*, or for any other sum, and that the possession by the bankrupts of the vessel at the time of their bankruptcy was not, and ought not to be treated as, the possession of the plaintiff, and that, on the contrary, the vessel ought to be treated as having been at that date in the possession, order or disposition of the bankrupts, and that the plaintiff was not entitled to specific performance of the agreement of the 20th of May 1862.

On the 20th of May 1862, Brown & Briggs certified that they had built at Sunderland the vessel in the certificate called the *Spartan*, for and on behalf of the plaintiff; and they in such certificate stated the number of her decks, and her build, measurement and tonnage. It was admitted, however, that the vessel was not completed, and that it could not have been registered.

There was evidence, on the part of the defendants, to shew that Brown & Briggs were in a hopeless state of insolvency on the 20th of May, and that they stopped payment on the 22nd of May 1862.

Mr. Bacon and *Mr. Waller*, for the plaintiff.—The deed of the 12th of April 1862 created a valid lien or charge upon the vessel in the plaintiff's favour for the

sum of 500*l.* and interest, and any further sum, not exceeding together the sum of 600*l.*, and the subsequent dealings between the plaintiff and the bankrupts in no way prejudiced or affected that lien or charge. The possession of the vessel by the bankrupts, and subsequently by their assignees, must, as against the bankrupts' estate, be treated as the possession of the plaintiff—*Holderness v. Rankin* (1). If, however, the plaintiff were not entitled to such lien or charge, then he was entitled to have the agreement of the 20th of May 1862 specifically performed.

They also referred to—

Woods v. Russell, 5 B. & Ald. 942.

Ex parte Watts, in *re Attwater*, post, 35, Bankr.

Mr. Malins and *Mr. T. Stevens*, for the defendants, the assignees of Brown & Briggs.—The deed of the 12th of April 1862 fell with that of the preceding day. The plaintiff, knowing this, obtained from the bankrupts the deed of the 20th of May 1862. This latter deed was, in fact, not a purchase, but only a security for the repayment of money. As the vessel could not have been registered under the Merchant Shipping Act, the deeds of the 12th of April and the 20th of May, if otherwise valid, should both, as securities for money, have been registered as bills of sale under the Bills of Sale Act (17 & 18 Vict. c. 36). This had not been done with regard to either of them, and they were both thereby rendered inoperative. If the plaintiff had been a *bond fide* purchaser, the vessel would not have been within the order and disposition of the bankrupts at the time of their bankruptcy; but the transaction of the 20th of May 1862 was not a *bond fide* purchase, and the vessel was in the order and disposition of the bankrupts when they became bankrupt. But, further, that deed was void as a fraudulent preference of the plaintiff to the bankrupts' other creditors, for at the date of it they were hopelessly insolvent, and they stopped payment two days afterwards.

STUART, V.C.—The question is whether the plaintiff has established his case by

(1) 28 Beav. 180; s.c. 2 De Gex, F. & J. 258; 29 Law J. Rep. (N.S.) Chanc. 753.

which he claims to have a lien or charge upon this incomplete vessel in respect of monies advanced by him to the bankrupts. If the plaintiff can prove what he alleges, that these advances were made by him upon an understanding that he was to have a charge upon the vessel in respect of them, I see no ground upon which the defendants can resist the claim.

The answer of the defendants states, as to these advances in the fourth paragraph, that "when the terms of the said contract for building the said vessel were arranged with the plaintiff, he agreed that if the bankrupts required funds to enable them to build the vessel, he would make them an advance out of his own monies for that purpose, and we believe it to be the fact that the plaintiff did on or about the 28th or 29th of March 1862, advance and lend to the said bankrupts the sum of 400*l.*, and that on or about the 4th of April 1862, he advanced and lent to them the further sum of 100*l.*" That was the statement as to the advances. Then, as to the understanding upon which the 400*l.* was advanced, they say, "But whether the said sum of 400*l.* was so advanced and lent upon the understanding that the repayment of the same, with interest, was to be secured as well by an assignment of the said agreement or whether or not as soon as the same should be duly signed and perfected, or at any other time as by a lien or charge upon the said vessel itself, or upon what other understanding such sum was advanced, or upon what other security, we are unable to state as to belief or otherwise." That is not a denial of the case of the plaintiff, for he, in his affidavit, in most distinct terms, says, "I agreed to and did in fact lend them the same," that is, the monies in question, "upon condition that the same should be secured as well as by an assignment of the said purchase agreement when completed, as by a lien or charge upon the said vessel itself." As to the instruments stated in the pleadings, first, the agreement of the 11th of April 1862, then that of the 12th of April, which is in favour of the plaintiff, and ultimately the memorandum of the 20th of May, whereby, one Fisher, the person for whom the vessel was originally to be built, abandoning the agreement of the 11th of April 1862, it was agreed that the plaintiff should become the purchaser, they are all

of no other value than as evidence of a contract, which in my opinion is a valid lien and must be enforced.

It is perfectly well established that where a ship is in course of construction in the yard of a shipbuilder, or in any other case where goods are in the hands of a manufacturer for the purpose of being manufactured, and the shipbuilder or the manufacturer becomes bankrupt a possession of that kind on the part of the builder or maker who becomes bankrupt, does not constitute that sort of possession which gives a reputed ownership on which the operation of the clauses in the Bankrupt Act makes the property to be in the order and disposition of the Bankrupt. That being so, it seems to me the plaintiff's case is established.

Declare that the plaintiff is, under and by virtue of the indenture of the 12th of April 1862, entitled to a lien or charge upon the vessel, for what upon taking an account might be certified to be due to him, and decree the same accordingly. Order an account and a sale of the vessel, and tax the plaintiff's costs; and order, that the proceeds of the vessel should be applied in payment of what is due to the plaintiff for principal, interest and costs of this suit, and the residue, if any, be paid to the defendants (1).

WESTBURY, L.C. }
March 14. } BUCKLAND v. GIBBINS.

*Injunction to restrain Proceedings at Law
—Inequitable Use of a legal Right.*

The underlessee of certain premises entered into an agreement with the freeholders for a new lease, dating from a period anterior to the expiration of the underlease. Disputes, however, having arisen between them, the defendant purchased a reversionary interest of ten days, and, on the expiration of the underlease, brought his action of ejectment against the underlessee, who still remained in possession with the avowed object of getting into possession and obtaining a lease to himself. The cause was tried after the determination of the reversionary interest, and a verdict was

(1) Affirmed, June 11th, by the Lords Justices, except that the plaintiff's true title was held to be under the agreement of May 20, 1862. The appeal will be reported *infra*.

returned for the plaintiff at law. Upon a bill filed by the underlessee to restrain him from issuing a writ of possession, it was held, that the proceedings at law were vexatious and contrary to bona fides; and an injunction was granted.

The bill was filed to restrain the defendant, who had recovered judgment in an action of ejectment against the plaintiff, from issuing or executing any writ of possession or other process to dispossess the plaintiff of the cottage and premises the subject of the action.

By a lease dated the 13th of December 1842, three dwelling-houses with the gardens and premises, situate in Church Buildings, Clapham Common, were demised to Thomas Puckle for a term of years, expiring at Christmas 1862, and by an indenture, dated the 24th of June 1843, one of the houses called "The Cottage," was underleased to E. N. Thornton for a term expiring at Michaelmas 1862, and afterwards by another indenture, dated the 26th of September 1849, "The Cottage" was again underleased by Thornton's executors to J. W. Harris, for a term expiring on the 19th of September 1862. This term was afterwards assigned to the plaintiff, who entered into possession of "The Cottage" in April 1860.

On the 26th of September 1860 the whole of the premises comprised in the lease of the 13th of December 1842 were assigned to the defendant for the residue of the original term; and he subsequently entered into negotiations with the freeholders for a surrender of the residue of the term and for a new lease of the premises, with the exception of "The Cottage" and a piece of garden-ground, a lease of which had been arranged to be granted to the plaintiff.

The plaintiff had been negotiating with the freeholders for a lease of the cottage for twenty-one years from Christmas 1862; but subsequently, in consequence of the defendant having (as he understood) surrendered the premises, it was agreed that he should have a lease for twenty-one years from Christmas 1860; and a draft lease was accordingly prepared, and a counterpart executed by the plaintiff. The freeholders, however, refused to execute the lease, on the ground that the plaintiff had

deceived them as to the amount of rent formerly paid by him, and that the rent proposed to be reserved by the new lease was insufficient; and the plaintiff, on the 23rd of January 1863, filed a bill against them (*Buckland v. Atkins*) for specific performance. During the dispute between the plaintiff and the freeholders the defendant procured an assignment of the underlease created by the deed of the 24th of June 1843, and on the 26th of September 1862, after the expiration of the term for which the plaintiff held, but three days before the expiration of the term created by the underlease of the 24th of June 1843, commenced an action of ejectment in the Court of Exchequer against the plaintiff to recover possession of "The Cottage," and on the 10th of December 1862 obtained a verdict. A rule afterwards obtained by the plaintiff (the defendant at law), for the defendant to shew cause why he should not be restrained from issuing his writ of possession, was discharged; and the plaintiff now filed his bill for an injunction in the terms stated above, alleging that the defendant had surrendered or agreed to surrender to the freeholders all his interest in the premises; and the plaintiff therefore was entitled thereto for a term of twenty-one years from Christmas, 1860, and, under the circumstances, it was contrary to equity that the defendant should be permitted to issue any writ of possession.

An application to the Master of the Rolls for an injunction *ex parte* was refused; but on the application being renewed before the Lord Chancellor, his Lordship granted an interim injunction.

The Master of the Rolls, on motion, continued the injunction till the 13th of March, in order to give the plaintiff time to appeal, and directed that it should stand dissolved from and after that day (1).

(1) His Honour's judgment was as follows: The question on this motion is, whether the plaintiff is entitled to any injunction. I must look at the case upon the facts, and consider if the matter were now before me upon the hearing whether I could upon the facts established say that the plaintiff is entitled to any injunction. The case is one of considerable singularity. The freeholders of a certain property in Clapham granted, in December 1842, a lease for twenty-one years, which expired at Christmas last. In June 1843, the first underlease of this was made, which was to expire at Michaelmas last. Afterwards, a second underlease was made, which was to expire ten days earlier, on the 19th of September

The plaintiff appealed from this decision.

In the interval between the decision of the Master of the Rolls and the hearing of the appeal, the defendants, in the suit of *Buckland v. Atkins*, submitted to the plaintiff's claim for specific performance, and gave him a lease of the premises. This was admitted before the Lord Chancellor, by the counsel for the defendants.

Mr. Baggallay and *Mr. Schomberg* appeared for the plaintiff.

Mr. Selwyn and *Mr. W. Joyce*, for the defendant.

The LORD CHANCELLOR (without hearing a reply) said this was one of those painful cases which embarrassed the administration of justice by reason of the antagonistic proceedings taken in the Courts of law and equity. Here judgment had been obtained

at law in an action of ejectment by the defendant in equity, who was making a deliberate attempt to issue a writ of possession under that judgment, although at the time he had not a particle of interest in the premises, and although he well knew that the plaintiff in equity, who was the defendant-at-law, had acquired a different right; and this he was enabled to do under that rule of law which compelled the Court to treat the lessor as having a continuing interest, if he had an interest at the time of the action being brought; and the unfortunate defendant-at-law in the action of ejectment was not at liberty to allege that the interest had determined. Now the equity upon which the bill was founded, and which was to be collected, not merely from the allegations contained in the bill, but from the facts stated and admitted

last. The second underlease was finally assigned to the plaintiff in the month of January 1861, by a gentleman named Mackrell. This was in pursuance of a previous agreement and arrangement between them, for the plaintiff had been in possession from the month of April previous, and had enjoyed the property during that time. It is proper to state that although the original lease was of three houses, Nos. 12, 13 and 14, in Church Buildings, Clapham, the two underleases were of No. 14, "The Cottage." Then it appears that in the month of January 1861, a species of conversation and arrangement took place between the freeholders and the holders of these three houses with a view to the renewal of their leases, and the freeholders required 30*l.* additional; and it was a question how this should be apportioned, and it was proposed to be apportioned in a particular manner. In the mean time what occurred was this: in September 1860, the defendant in this cause had procured the assignment of the residue of the original lease, and therefore he was entitled to the reversion of the premises from Michaelmas to Christmas last. After this proceeding had taken place between the parties in January 1861, it appears that the freeholders possibly, and the defendant certainly, thought that the plaintiff had not behaved properly in stating the rent of his house at 45*l.*, when in reality it was 55*l.*, although the additional 10*l.* was, as it appears upon the evidence, for fixtures and certain advantages and furniture in the house. Thereupon, having surrendered the residue of the lease to the freeholders, the defendant, in September 1862, procured an assignment of the residue of the first underlease of the property which the plaintiff held, and brought his ejectment, because there were ten days of that underlease unexpired at the determination of the plaintiff's underlease. The plaintiff in equity, the defendant at law, defended that action; of course, there was no defence to it, and accordingly, in December, there was a verdict found for the plaintiff at law; then the defendant

at law moved in arrest of judgment, and the Court of Exchequer decided that although it was after the expiration of the lease, still the Court must look at the state of the title at the time when the action was brought, and that the plaintiff at law was entitled to execution, and thereupon they granted him execution on the last day of Hilary Term—*Gibbins v. Buckland* (1). Upon this the plaintiff in equity applied for an *ex parte* injunction, and I had such doubts about it that I declined to grant it. From my decision he appealed to the Lord Chancellor, who thought that it was a case for an *ex parte* injunction, and he granted an interim order with leave to move before me to have the injunction continued, and I have now to consider what I ought to do in the matter.

I have considered the case very carefully, and I have had some conversation with the Lord Chancellor about it, but I am bound to decide it according to what I conceive to be the rights of the parties, and I do not think the plaintiff is entitled to the injunction which he asks. Probably I am wrong in the view that I take of the case, and I am going to state the grounds upon which I hold that opinion; but I will put the matter in such a form that the defendant cannot possibly get possession till after the opinion of the Lord Chancellor has been taken upon the additional facts which will be before him.

In the first place, there is one ground, which may be called a technical ground, which is not what I proceed upon at all, but which is also a matter of very considerable importance in this Court, namely, that the right of the plaintiff in equity was exactly the same when the action was brought in September as it is now. If he has proceeded upon any equitable ground it was exactly the same then as it is now, and yet he does not file his bill or ask for an injunction from the month of September until the

(1) 11 W. Rep. 380.

at the Bar, arose upon the following state of facts. The plaintiff in equity was the under-lessee of certain houses for a term which expired on the 19th of September, and there was an immediate reversion of ten days expectant on that term vested in the defendant, and there was also a reversion of three months in the defendant in equity. In 1860 negotiations were entered into between the freeholders and the plaintiff for a new lease of the premises held by him, and it appeared that an agreement was come to between them for such new lease. There was, however, some dispute as to the agreement, and, pending that dispute, it appeared from the facts stated and admitted at the Bar that the freeholders promised to give to the present defendant in equity a lease of the premises. In the mean time the defendant

in this suit became entitled to an immediate interest in the property, and he proceeded at law to advance that interest to the prejudice of the plaintiff. Accordingly, he bought the reversion of ten days, and his object in buying it was plain. Having got the assignment of the reversion on the 8th of September, on the 26th of September, when only three days of his term remained, he brought his action of ejectment, admittedly because he considered that the freeholders would grant the lease to the party who was in possession, and he thought therefore to get into possession, having notice of the agreement between the plaintiff and the freeholders, with the express object of diverting the lease to himself. It turned out that the plaintiff was entitled to the renewal, and that what the defendant sought to obtain was a thing

month of February. There would be a very great difficulty certainly in allowing a person to proceed in a case of that description, but I will look at it upon the merits and as if this were now the hearing. The plaintiff prays by his bill no relief at all, except an injunction, and I have to consider in what cases the Court of Chancery grants an injunction. In the first place, it grants an injunction in all those cases where the defendant interferes with the property of the plaintiff. It also grants an injunction in all those cases where there is a question between the parties, and the Court considers it proper that matters should be kept *in statu quo* until the question is decided. Then will either of those cases assist the plaintiff on the present occasion? There is no property of the plaintiff that the defendant is interfering with. The plaintiff's lease had expired on the 19th of September 1862. I will consider in a minute any question of equity, but his lease had expired at that time, and he had no legal right to possession after that period. From that period, had it not been for some arrangement between the defendant and the freeholders, with which, as it appears to me, the plaintiff has nothing to do, the defendant was entitled to the possession from the 19th of September down to Christmas, and he was also entitled to something in the nature of goodwill if there is any benefit which a tenant may have by being in possession at the expiration of his lease. The defendant was entitled to that, and the plaintiff seeks to remove him from that. Now, has he any right at law, or if he has no right at law has he any right in equity? The Court of law has determined that the defendant in equity was entitled to the legal possession of the premises. They are the judges of what the law is and where the legal estate is, and they have so determined. It is not the province of this Court, nor could this Court with propriety sit on appeal from the Court of Exchequer sitting in banco, and decide that upon a purely legal question, for it is none other than a legal question, the Court of Exchequer was wrong,

and that they ought to have decided that the legal possession was in the plaintiff in equity, and not in the defendant in equity. I am bound by their decision. Therefore, at law, the plaintiff in equity had no right against the defendant. Then, what equity has he against him? If I look at his bill, I find none at all. He does not ask for any. He prays no relief whatever except the injunction. The equity he endeavours to make out is this: he says, as to this arrangement which I have already spoken of, that in January 1861 an agreement was entered into by the freeholders, who are not now before the Court, and the plaintiff in equity, to grant him a renewed lease of this house from the time of the expiration of it, and that all the leases were to be surrendered; that they have refused to perform their contract, and he has filed a bill for specific performance. That may be so; but how is the defendant here to ascertain what the result of that suit may be? I cannot try that question here. No doubt, if the plaintiff here had filed his bill for specific performance against the freeholders, and stated that they were colluding with the defendant here for the purpose of endeavouring to defeat him by underhand means, there might possibly have been some question to be determined in this Court; and if that case had been made out, that might have entitled the plaintiff to relief against the defendant, and have given him some equity. But assume that this were now the hearing, what have I to decree, supposing the bill to be taken *pro confesso*? There is no privity between the plaintiff and the defendant; there is no contract alleged between them; there is no collusion alleged with any person who is a defendant to the suit. Relief there could be none, except, if I am wrong in the view I take of this case, there may be a perpetual injunction against taking possession. But what would be the effect of that? What is to become of the other suit for specific performance? The defendant cannot press that on to a hearing. He cannot tell what may take place in that suit. How

he had no title to. It was plain, therefore, that this was a most vexatious proceeding; vexatious it would have been under any circumstances, when the plaintiff-at-law's interest in the term must be determined long before the action could be tried, and the whole ten days' reversion represented a value of a few shillings only, but still more vexatious when, as was now admitted, the action was brought with a view to promote a rival agreement, and deprive the plaintiff of the performance of his agreement. It was true the Court had no right to interfere with the enforcement of a legal title, though the interest might be infinitesimal; but when he came to look into the *bona fides* of the matter he found the interest sought to be enforced at law was so minute that the action must necessarily be vexatious. If the legal title were used

at law for a purpose inconsistent with good faith, then, undoubtedly, this Court would interfere, on the established principle of preventing a legal right from being enforced in an inequitable manner and for an inequitable purpose. It was clear the whole thing was an attempt on the part of the defendant to enforce his right after he had become well aware that the plaintiff had obtained the agreement from the reversioners. It was admitted that the costs of the action were not in dispute, nor was there any question about the mesne profits; and the Court was bound to restrain the defendant from using his legal rights for a sinister and inequitable purpose. The matter had been argued before his Lordship with an admission of those painful facts, but they were not presented to the Master of the Rolls; and although therefore his

is he to deal with it? Assume that the plaintiff does not go on with it, is he still to have this injunction against the defendant, whom the Court of law has determined to be entitled to possession? I leave out of consideration the question whether the legal estate is vested in the freeholders, and whether, if they thought fit, they might take possession. They are not in question. Then, being at a loss to make any declaration against the defendant, I do not see my way to making a decree for an injunction, upon the ground that the property of the plaintiff is interfered with; nor do I see my way to saying that matters ought to be left in *status quo* by reason of some litigation, for that must be a litigation between the plaintiff and the defendant, not a litigation existing between other parties. The difficulty I feel in that case is certainly one of the strongest description.

Those are the grounds on which it has occurred to me that I am totally unable to deal with this case so as to interfere with the legal possession. If there be an equity between these parties, it ought to have been prayed; and if their equities are equal, I am not to interfere with the legal possession in the mean time.

I do not go into the question whether the conduct of the plaintiff was right or not with respect to the particular matter which occurred in January 1861, when the plaintiff is said to have got an agreement for the renewal of his lease, upon the supposition that the rent was only 45*l.* instead of 55*l.* I think I have nothing to do with that; but I have to look at this solely upon equitable and legal grounds; and I find the legal possession is vested in the defendant here, the plaintiff-at-law; that he is entitled to it, and that the plaintiff in equity is not entitled to it; and that he has no equity, and prays no equity against the defendant. How, then, is it possible that this Court can interfere and grant any injunction?

I certainly give this judgment with very considerable hesitation and doubt, because my belief

is, that the Lord Chancellor does not agree with me in that view of the case; but it is my duty, upon considering the matter as fully as I can, to decide according to what I consider to be the rights of the parties, and what appears to me to be just; and I am also strongly influenced by this, which I have already referred to once, that that species of benefit, which is rather of a visionary character, and which in cases of partnership is called "goodwill," which attaches to property, and which may be had by a tenant holding over after the expiration of his lease, and which belongs to the defendant in this case, has been taken forcibly away from him by the plaintiff by means of his resistance to the action. I think the justice of this case is with the defendant, and the plaintiff is not entitled to the injunction which he asks.

It was suggested, on behalf of the plaintiff, that if he succeeded in the suit for specific performance, the defendant here being no party to that suit, he would have to bring an ejectment against him to get him out of possession. That would be at very great expense; and I think the defendant ought, therefore, to give an undertaking to abide by any order that the Court may make in the other suit.

I propose, therefore, to make an order to this effect: The defendant undertaking to abide by any order or decree for specific performance which may be made in the suit of *Buckland v. Atkins*, to obtain specific performance of the agreement alleged by the plaintiff to have been entered into with him, and also undertaking to submit to the jurisdiction of the Court in this suit as to any order the Court may make to deliver up possession of the messuage to the plaintiff, and to account for the rent thereof, or to fix him with an occupation-rent, in case the Court should think fit so to order, this Court doth direct that the injunction now in force shall be continued until the 13th of March next, and shall stand dissolved from and after that day. Liberty to apply. Costs to be costs in the cause.

decision would be in favour of the plaintiff, he had a difficulty in giving him his costs. There would be a declaration that the plaintiff, paying the costs of the action of ejectment, and also the mesne profits, was entitled to a perpetual injunction. No costs.

ROMILLY, M.R. }
Dec. 4. } WATKINS v. WESTON.

Will—Absolute Gift—Devesting.

A testator gave real and personal estate to trustees upon trust to receive the rents of certain leasehold premises, and pay the same to his daughter E. upon her sole receipt, for her separate use, but in case of the death of E. before the expiration of the lease then upon trust for her children. E. died before the expiration of the lease without children:—Held, that she was entitled to the leasehold premises absolutely.

Joseph Kay, by his will dated the 23rd of December 1847, devised and bequeathed all his real and personal estate to Charles Turpin and William Leonard Watkins, (whom he appointed his executors and trustees,) their heirs, executors, administrators and assigns, upon trust for the purposes therein expressed, and after declaring the trusts of some leasehold premises at Kingston, he said, "As to all my estate and interest in three several leasehold houses in Bolingbroke Row, Walworth, upon trust to receive the rents and profits thereof, and, subject to the rent and covenants in the lease under which I hold the same, to pay the same unto and for the sole and separate use and benefit of my daughter Emma, now the wife of Thomas Wheeler, and I declare that the same shall not be subject or liable to the debts or control, &c. of her present or any future husband, and that her receipts alone shall be sufficient discharges for the same, but in case my daughter shall depart this life before the expiration of the lease, then upon trust to invest such rents and profits in the public securities of Great Britain, and allow the same to accumulate for the benefit of all and every the child and children of my daughter who shall be living at her decease, the same to become payable to them upon their attaining their

respective ages of twenty-one, share and share alike."

The trustees were then to hold other leasehold houses upon trust to receive the rents and profits, subject to the payment of the rents, and to pay the same unto and for the use and benefit of my son Joseph, but in case he should depart this life before the expiration of such lease, then in trust for his children.

Another trust in similar words was declared of another leasehold house for the testator's son Edwin and his children. This was followed by a general residuary bequest.

The testator died on the 20th of October 1850, leaving his daughter and two sons surviving.

Emma Wheeler survived her first husband; she afterwards intermarried with John Weston, and died without ever having had a child.

Messrs. Joseph and Edwin Kay were both living, and had children.

John Weston took out letters of administration to his wife, and died on the 20th of April 1862, having appointed his sister Ann, the wife of William Peet, his executrix.

This bill was filed, by W. L. Watkins, to carry into execution the trusts of the will of his testator.

Mr. Druce, for the plaintiff.

Mr. Selwyn and *Mr. Kay*, for Mrs. Ann Peet, the executrix of John Weston.—The whole estate in these leaseholds was vested in the trustees for the sole benefit of the testator's daughter, without any words of limit; her interest therefore was absolute upon the principle that a gift to a party is not diminished by a gift over which never arises. As therefore the testator's daughter Emma had no children, there was nothing to divest her interest, and the estate became hers absolutely.—

In re Corbett's Trusts, Johns. 591; s. c.

29 Law J. Rep. (N.S.) Chanc. 458.

Norman v. Kynaston, 29 Beav. 96; s. c.

30 Law J. Rep. (N.S.) Chanc. 189.

Salmon v. Salmon, 29 Beav. 27.

Newland v. Shephard, 2 P. Wms. 194.

Knight v. Selby, 3 Man. & G. 92; s. c.

3 Sc. N.S. 409; 10 Law J. Rep. (N.S.) C.P. 263.

Jackson v. Noble, 2 Keen, 590; s. c. 7

Law J. Rep. (N.S.) Chanc. 133.

Whittell v. Dudin, 2 J. & W. 279.

Mr. Baggallay and Mr. Alder, for Joseph Kay.—The gift over to the children of the testator's daughter could not affect her interest; it was merely a right to receive the rents from the trustees as long as she could give a receipt for them. Her personal enjoyment was alone contemplated, and as there was a failure of children, the property at her decease fell into the residue.

Mr. Cotton, for the assignees of Edwin Kay, who had become bankrupt.

Mr. Welford, for a mortgagee of the interest of Edwin Kay under the will.

THE MASTER OF THE ROLLS.—There is little doubt but that Emma took an absolute interest in the leasehold estate. If the testator had given the houses to his daughter directly, instead of vesting the legal estate in trustees, she would have taken the absolute interest; even if it had been freehold, it would have been impossible to say that any interest remained outstanding. The intervention of trustees made no difference, the directions which secured the property to her for her separate use were evidently inserted for the mere purpose of excluding the marital right of the husband. If it were held to be a gift for life only, the words "for life" must necessarily be introduced; as it stood, however, the absolute gift was only to be cut down in the event of Emma having children: it was a benefit exclusively for them: she had none; the event therefore had not happened, and the gift for her remained unaffected and absolute.

WESTBURY, L.C. }
Jan. 15, 16, 23. } PARKER v. NICKSON.

Will—Construction—"I acknowledge T. N. to be my heir-at-law."

A testator made a codicil to his will in these words: "I acknowledge T. N, my second cousin, to be my next-of-kin and heir-at-law to all my real and personal property situate in the parish of M":—Held, a good devise to T. N. of property in the parish of M.

A codicil contained the following expression: "T. N, my second cousin, is my next-of-kin and heir-at-law, as my brother J. is dead, and has left no issue."

Held, that it could not be inferred from this that the testator was ignorant of the state of the family of another brother, who had left issue.

In this case, which came on upon appeal from a decision of Stuart, V.C., allowing a demurrer to the plaintiffs' bill, the question turned upon the construction of a codicil to the will of Samuel Newns, by which he acknowledged the defendant, Thomas Nickson, to be his next-of-kin and heir-at-law to all his real and personal property in the parish of Manchester.

The testator, by his will, dated the 3rd of December 1832, devised real estate at Chorlton-upon-Medlock, in the county of Lancaster, and his residuary personal estate, to Thomas Airey and Thomas Bromiley, upon trust for his wife during her life, and after her decease, as to one moiety, in trust for his brother John Newns, or if he should not be living at his death, for his issue, and in default of issue upon the trusts declared of the other moiety; and as to the other moiety, upon similar trusts, substituting the name of his brother William for that of John; and he appointed Airey and Bromiley his executors.

John Newns died without issue in the lifetime of the testator, and William Newns also died in his lifetime, leaving a son and two daughters surviving.

On the 3rd of February 1843 the testator made a codicil to his will as follows:

"I, Samuel Newns, of Greenhays, in the parish of Manchester, in the county of Lancaster, acknowledge Thomas Nickson, my second cousin, shopkeeper, No. 21, Chester Street, Chorlton-upon-Medlock, in the parish of Manchester, to be my next-of-kin and heir-at-law to all my real and personal property situate in the parish of Manchester, in the county of Lancashire. If my wife survives me, in two years after my wife's death my second cousin, Thomas Nickson, and next-of-kin, to take possession of all my real and personal property, and to pay all my just debts, according to my will. Thomas Nickson, my second cousin, his my next-of-kin and heir-at-law, as my brother John is dead and has left no issue. The reason I give Thomas Nickson this written document is, I am afraid my executors will not put my will into court, as

they wanted me to burn my will. Executed this 3rd day of February in the year of our Lord 1843.

"The mark + of
"Samuel Newns."

"Witnesses,
"Samuel Ankers,
"John Jones."

The testator died in 1845, leaving no personal estate, and the will was not proved till 1861, when, both the executors named in the will being dead, probate of the will and codicil was obtained by the defendant, Thomas Nickson. At the death of the testator Enoch Newns, the son of William Newns, was his heir-at-law.

The testator's widow died on the 27th of January 1857.

The bill was filed, by the children of William Newns, for the purpose of determining the rights of all parties in the real estate of the testator; and it prayed, amongst other things, an injunction to restrain the defendant, T. Nickson, from selling certain portions of the premises in the parish of Manchester. To this bill Nickson demurred; and Stuart, V.C. allowed the demurrer, on the ground of the insufficiency of the allegations, with leave to amend.

The plaintiffs now appealed from that decision.

The question argued upon the appeal was whether, upon the construction of the codicil, the defendant, Nickson, was entitled to the real estate in the parish of Manchester.

Mr. Malins and *Mr. Bird*, for the plaintiffs, the appellants, argued that there was not sufficient in the codicil to constitute the defendant devisee of the property in question. There was no case which went so far as to treat an acknowledgment of heirship as equivalent to a devise.—

Jackson v. Craig, 20 Law J. Rep. (N.S.) Chanc. 204.

Taylor v. Web, Style, 301, 319.

Adams v. Adams, 1 Hare, 537; s. c. 11 Law J. Rep. (N.S.) Chanc. 305.

Kennell v. Abbott, 4 Ves. 802.

Doe d. Evans v. Evans, 10 Ad. & E. 228; s. c. 2 P. & D. 378; 8 Law J. Rep. (N.S.) Q.B. 284.

Mr. E. K. Karlake, for the defendant Nickson, referred to

Sheppard's Touchstone, 416.

Giles v. Giles, 1 Keen, 685; s. c. nom. *Penfold v. Giles*, 6 Law J. Rep. (N.S.) Chanc. 4.

Rishton v. Cobb, 9 Sim. 615; s. c. 5 Myl. & Cr. 145; 9 Law J. Rep. (N.S.) Chanc. 110.

Schloss v. Stibel, 6 Sim. 1.

Doe d. Gains v. Rouse, 5 Com. B. Rep. 422; s. c. 17 Law J. Rep. (N.S.) C.P. 108.

Pratt v. Mathew, 22 Beav. 328; s. c. 25 Law J. Rep. (N.S.) Chanc. 409.

Longstaff v. Rennison, 1 Drew. 28; s. c. 21 Law J. Rep. (N.S.) Chanc. 622.

Campbell v. French, 3 Ves. 321.

Doe d. Hickman v. Haslewood, 6 Ad. & E. 167; s. c. 1 Nev. & P. 352; 6 Law J. Rep. (N.S.) K.B. 96.

Tilly v. Collyer, 3 Keb. 589.

Mr. Bird replied.

The LORD CHANCELLOR (Jan. 23).—The plaintiffs' title is derived under the will of Samuel Newns, dated in 1832. The defendant's title rests upon the codicil to that will dated in 1843. Under the will the plaintiffs claim to be entitled to certain plots of land and messuages of the testator situate in Chorlton-upon-Medlock, which, as I collect from the bill, is within the parish of Manchester. The defendant, Nickson, alleges that, in the first sentence of the codicil there is a specific devise of the whole of this property to him in fee simple, and therefore a revocation of the devise in the will. In the Court below the judgment was not founded upon the construction of the codicil, which is really the true subject for decision, but upon the insufficiency of the allegations in the bill; and the Vice Chancellor, allowing the demurrer, gave leave to amend. As I cannot upon this petition discharge the leave so given, and it is possible that the construction of the codicil may in some respects be affected by more accurate statements as to the locality of the property, I shall decide upon the construction of the codicil, without prejudice to any question that may hereafter arise upon an amended bill.

The first part of the codicil is in these words: "I, Samuel Newns, acknowledge Thomas Nickson, my second cousin, shopkeeper, No. 21, Chester Street, Chorlton-upon-Medlock, in the parish of Manchester,

to be my next-of-kin and heir-at-law to all my real and personal property, situate in the parish of Manchester." And I am of opinion that these words are a good devise to Thomas Nickson in fee simple of all the testator's lands in the parish of Manchester. Nothing is better settled in our law than that the words "I make A. B. my heir," or, "I declare A. B. to be my heir," or even the words, "A. B. is my heir," amount to a devise to A. B. in fee of all the inheritable lands of the testator. Thus in *Taylor v. Web* the words were, "I do make my cousin Giles Bridges my sole heir and my executor"; and it was said by Roll, C.J., "we may collect the testator's meaning to be, by making of the party his heir, that he should have his lands, and it is all one as if he had said 'heir of his lands.'" And Jerman, J. said, "the word 'heir' implies two things: first, that he shall have the lands; secondly, that he shall have them in fee simple." In the first volume of Mr. Powell's book *On Devises*, edited by Mr. Jarman, p. 309, it is said, and I think correctly, "If one claim under the description of heir, he must shew that he is heir in that sense in which the testator has used the term. Now an heir may be in four ways: first, heir with relation to the ancestor of the person so described as heir general; secondly, heir by particular description of the testator, as heir special; thirdly, heir with relation to property or to the thing to be inherited; fourthly, heir by inference." And on the second head it is said, at p. 313, referring, although not very correctly, to the language of Lord Chief Justice Hobart, in the case of *Cownden v. Clerke* (1), "If one devise in these words, 'I give to my heir male, which is my brother A. B,' this will be a good devise, although the testator have a son who is heir general. In *Spart v. Purcell* (2), it is said, 'Though none can be truly heir but he that the law makes so, yet there is an heir by appellation and vulgar acceptance, which intimates the state of a true heir, and therefore, if by my will I appoint that J. S. shall be heir of my land, he shall have it in fee, for such estate as the ancestor hath, such he is to inherit.'"

It was contended for the plaintiffs that the word "acknowledge" was not sufficient

to constitute a devisee, and that it indicated an intention only to recognize a degree of relationship. But the answer is, that he is acknowledged to be next-of-kin and heir-at-law of all the testator's real and personal property in the parish of Manchester, which words plainly shew that he is named heir and next-of-kin, not with relation to the testator personally but with relation to the property to be taken and enjoyed; and this is put beyond doubt by the subsequent part of the will. Neither is the word "acknowledge" an insufficient expression: it is enough to indicate an intention that the person named shall be recognized as filling that character, which would entitle him by the law to the whole of the real estate. By the Civil law before the Code a particular form of words was required for the institution of an heir, but by the *Sixth Book of the Code*, tit. 23, sec. 15, "*De solemnitate verborum sublata*," this necessity is taken away, and it is said, "*Quibuslibet confecta sententiis, vel in quolibet loquendi genere formata, institutio valeat, si modo per eam liquebit voluntatis intentio*." And this certainly is the rule of law.

But it was then insisted for the plaintiffs that the concluding words of the will—"Thomas Nickson, my second cousin, is my next-of-kin and heir-at-law, as my brother John is dead and has left no issue,"—must be taken as meaning not merely what is expressed and which was true, namely, that John was dead without issue, but also as proving that the testator believed William had died without issue, which was not true, and consequently that the devise to the defendant Nickson was founded upon an erroneous supposition and therefore fails. It is scarcely necessary to observe that no such inference can be derived from the words. The death of John without issue might have been a very sufficient reason with the testator for making Thomas Nickson his general devisee to the exclusion of the plaintiffs claiming to be issue of William. I cannot presume that the testator made his codicil under the belief that his brother William was dead without issue unless he had said so.

My opinion is that all the testator's real estate in the parish of Manchester, which upon this bill must be taken to include the lands and messuages claimed by the plain-

(1) Hob. 29, see p. 34.

(2) Ibid. 75.

tiffs, is well devised to Thomas Nickson in fee, and that this demurrer ought to be allowed. I must therefore dismiss the petition of rehearing with costs, but I leave untouched that part of the order which gave leave to amend. It is unnecessary to add to what I have already intimated, that the allowance of the demurrer will not affect any question upon the amended bill.

Wood, V.C. }
 April 15. } DAVIDSON v. WOOD.
 LORDS JUSTICES. }
 June 4. }

Baron and Feme—Money Advances to Wife—Necessaries—Lunacy of Husband.

T. W. having become lunatic, was taken to an asylum in London. His wife, who at the time of her marriage was entitled to separate property, removed to London in order to be near her husband, and borrowed money on his credit to meet the expense of such removal of herself and husband, and to provide herself with necessities. T. W. died, and a bill was filed for the administration of his estate. The persons who had made the advances to the wife carried in their claim for the amount against T. W.'s estate :—Held, by one of the Vice Chancellors and affirmed on appeal, that the claim must be allowed.

Semble—that a woman possessed of separate estate is entitled to maintenance by her husband, although he be lunatic, and is not bound to pledge her separate estate in order to provide herself with necessities.

In 1836 Amelia Storey, a widow, who, under the will of her former husband, was entitled to a life interest in certain real and personal estate of the annual value of 108*l.*, intermarried with Thomas Wood, of Downham Market. On this marriage her property was by deed settled to her separate use, but the income was always received and applied by T. Wood.

In August 1858 T. Wood became a lunatic, and in September 1859 he was removed to a private lunatic asylum in London. His wife took a house near the asylum, and removed the furniture belonging to her husband from Downham Market to her house in London.

T. Wood, previously to his lunacy, had been living at the rate of 400*l.* per annum.

On the 1st of February 1860 it was found by inquisition that T. Wood was a person of unsound mind, and that he had been so since the 1st of August 1858, and his wife was appointed committee of his person.

On the 9th of November 1861 T. Wood died at the asylum in London.

From September 1859 up to the time of her husband's death Mrs. Wood received nothing from him or his estate towards her maintenance and support.

In order to meet the expense of the above-mentioned removal of herself and husband to London, and afterwards for her own maintenance and support from September 1859 to November 1861, Mrs. Wood borrowed from Messrs. Davidson, Bradbury & Hardwick, her solicitors, various sums of money amounting in all to 135*l.* on her husband's credit.

On the death of the said T. Wood a suit was instituted for the administration of his estate.

Messrs. Davidson, Bradbury & Hardwick carried in their claim before the chief clerk for the above amount. The case was adjourned into Court, and now came on for hearing.

Mr. Marten, in support of the claim, contended that a Court of equity would allow a person who had advanced money to a wife living apart from her husband, to claim the amount against the husband, when such money had been employed in paying for necessities, and on this point he cited—

Jenner v. Morris, 1 Dr. & Sm. 218;

s. c. 3 De Gex, F. & J. 45; 29 Law J.

Rep. (N.S.) Chanc. 923; 30 Law J.

Rep. (N.S.) Chanc. 361.

Harris v. Lee, 1 P. Wms. 482.

In *May v. Skey* (1), the Vice Chancellor (Sir L. Shadwell) had apparently come to a different decision, but in that case, as was remarked by the Lord Chancellor Campbell in *Jenner v. Morris*, the Vice Chancellor, proceeded upon the notion that the debt was a legal debt, and that the proper remedy was at law, and not by bill in equity.

By marriage a wife acquired a right to be maintained according to the estate and con-

(1) 16 Sim. 588; s. c. 18 Law J. Rep. (N.S.) Chanc. 306.

dition of her husband, and of this right she could only be divested by her own misconduct; and it had been decided in *Read v. Legard* (2) that a husband was liable for necessities supplied to his wife during the period of his lunacy.

Money expended for the necessary protection of a lunatic or his estate may be recovered against the lunatic or his estate.

Williams v. Wentworth, 5 Beav. 325.

Howard v. Digby, 2 Cl. & F. 634.

Mr. Caldecott, for the executor of the lunatic, submitted that if the money had been borrowed and expended for the benefit of the husband, then no doubt Mrs. Wood would have been entitled to call upon her husband's estate to repay the money. Only a small part of the money borrowed was expended on the lunatic, and there was no evidence that Mrs. Wood was not in receipt of a sufficient maintenance from her separate estate at the time when she thus pledged her husband's credit. And the fact that the income of her separate estate was not received by her was not sufficient to authorize her to borrow money on her husband's credit—*Holt v. Brien* (3). Such an implied authority only arose in special circumstances, and the onus of proof of such circumstances lay on the plaintiff.

WOOD, V.C., without calling for a reply, said that it was new to him that a married woman living apart from her husband was bound to pledge her separate property for her maintenance, without calling upon her husband to contribute towards her support. It could not be argued that because at the time a lady married, property given to her by a former husband was settled to her separate use, therefore her second husband was not bound to contribute towards her maintenance; but it was unnecessary to decide that point, for this case went further. It had been proved that the husband had actually received his wife's separate estate up to the time of the lunacy.

It had been contended that the removal of this lady to London, where her husband was living, was a needless expense; but it was very natural that she should desire to be near her husband, who was suffering

from this terrible affliction; and it appeared to him the lady did quite right in so removing. Her conduct was evidently approved of by the Lords Justices, or they would not have appointed her committee of the person of her husband.

Under the circumstances, the Court could not hold that this lady, who had been accustomed to live at the rate of 400*l.* per annum, was, on the lunacy of her husband, to be content with her separate estate only, and not to call upon her husband's estate to contribute towards her maintenance. Even taking the separate income into account, the amount borrowed for her maintenance for two years had not been excessive. He must therefore allow the proof for the amount claimed. Costs to be added to the proof.

From this decision the executor of the lunatic appealed; and the appeal was heard, before the Lords Justices, on the 4th of June, the same counsel appearing as in the Court below.

Mr. Caldecott, in support of the appeal.—Besides the cases cited below against the claim being allowed, the following authorities were relied upon:

Clifford v. Laton, 1 Moo. & M. 101.

Liddlow v. Wilmot, 2 Stark. 86.

Dixon v. Hurrell, 8 Car. & P. 717.

Johnston v. Sumner, 3 Hurl. & N. 261.

Counsel for the respondent was not called upon.

LORD JUSTICE KNIGHT BRUCE.—Upon the cases cited from the courts of common law, it is unnecessary to give any opinion. The amount of the income of husband and wife, and the particular circumstances of the case, render it wholly superfluous for me to do so. The husband and wife had less than 250*l.* of annual income to live on, and the husband, having been unfortunately afflicted with lunacy, was properly brought up to London and properly maintained there, and these small advances were made to her to enable her to support herself and him. The Vice Chancellor's decision was clearly right, and the appeal from it is frivolous and vexatious, and if my learned Brother should agree with me, it will be dismissed with costs.

LORD JUSTICE TURNER.—I entirely agree.

(2) 6 Exch. Rep. 636; s.c. 20 Law J. Rep. (N.S.) Exch. 309.

(3) 4 B. & Ald. 252.

NEW SERIES, 32.—CHANC.

[IN THE HOUSE OF LORDS.]

1863.
March 13, 17, 20, 24;
April 24. { ELLIOT v. THE
NORTH - EASTERN
RAILWAY COM-
PANY.

Railway Company—Sale of Land to, with exception of Minerals—Right of Landowner to work Minerals—Support to Surface—Form of Injunction.

A conveyance of a strip of land was made to a railway company in 1834 under an act of parliament, which provided by one section, that all coal or other mineral should be deemed to be excepted out of any purchase of lands by the company and might be worked by the owners and lessees thereof, "so that no damage or obstruction be done or thereby occur to or in such railway or other works"; and in case of damage reparation was to be made by the owners or lessees. And by another section, that whenever the workings should approach within twenty yards of any masonry or building belonging to the company notice thereof should be given to them, and they might deliver a declaration requiring the minerals under such masonry or building to be reserved for their protection, and in that case they should purchase the same, and in case they should not deliver such declaration that the owners or lessees might work the minerals under the said masonry or buildings, in the usual and ordinary manner of working mines, doing no avoidable damage. The land was taken for the purpose of building thereon a bridge of great weight, which was subsequently built by the company. At the time of the purchase there was beneath the land, and a large tract of adjoining land belonging to the vendor, an old mine which had been accidentally flooded and had long previously been full of water. In 1859 a lessee, deriving title under the vendor, threatened to drain the mine and renew the workings:—Held, that in addition to the special protection afforded by the act in respect of workings within twenty yards distance of any masonry or building, the railway company was entitled, by way of necessary incident to the grant of the land, to such lateral support from the adjacent land of the vendor not situate within the twenty yards as might be necessary to uphold

the bridge; and that the lessee was properly restrained from working minerals under the adjacent land not the property of the company, and not within the limits of twenty yards, so as to affect the stability of the bridge.

Held, also, that the circumstance that the conveyance of the land was compulsory and not voluntary, could not, in the absence of any special enactment, affect the construction of the conveyance, nor prevent it from passing to the company the necessary right of support as an ordinary legal incident.

Held, however, that although the water might afford additional support to the surface, the company had no right to speculate on the continuance of such an accidental circumstance, and that the lessee ought not to be restrained from withdrawing the water from the spaces left in the old workings, if such effect should be produced by working the colliery in a proper manner.

In cases like the foregoing, it being impracticable to define beforehand the limits within which the workings ought to be restrained, an injunction is properly expressed in general terms against working so as to produce the particular evil apprehended.

This was an appeal from a decree made by Vice Chancellor Wood (1), and an order of the Lord Chancellor affirming the same, with some slight alterations (2); the principal question for decision being whether the respondents were entitled to adjacent as well as subjacent support for a bridge, having regard to the several acts of parliament under which they were carrying on their undertaking.

The respondents are the successors of the Durham Junction Railway Company, which was incorporated by an act of parliament passed in 1834, and the company was thereby empowered to construct the railway and works, and to purchase the lands therein mentioned, amongst which were certain lands belonging to and subsequently purchased of a Mr. Boulcott.

The Durham Junction Railway Company, pursuant to authority given to them by an act of parliament passed in 1844, sold all their property and rights to the Newcastle

(1) 1 Jo. & H. 145; s. c. 29 Law J. Rep. (N.S.) Chanc. 808.

(2) 2 De Gex, F. & J. 423; s. c. 30 Law J. Rep. (N.S.) Chanc. 160.

and Darlington Railway Company, which last-mentioned company underwent several changes of name, and ultimately, by virtue of the North-Eastern Railway Company's Act, 1854, (in which the Railways Clauses Consolidation Act, 1845, was incorporated) received the name of the North-Eastern Railway Company, by which name it is now known.

By the 12th section of the original act the Durham Junction Railway Company were required to build in a proper manner a substantial bridge or viaduct of brick, stone, wood or iron, or of all or any of those materials, over the river Wear, as therein mentioned.

By the 27th and 28th sections of the same act it is enacted as follows:—

Section 27. "Provided always and be it further enacted, that, nothing in this act contained shall extend to give to the said company any coal, stone, slate or other mineral under any lands, tenements or hereditaments purchased by the company under the authority of this act (except only so much of such stone, slate or mineral as shall be necessary to be dug or carried away, or used for the purposes of this act); but all such coal, stone, slate and mineral not necessary to be so dug, carried away or used as aforesaid, shall be deemed to be excepted out of the purchase of such lands, tenements and hereditaments, and may be worked by the respective owners and lessees of such coal, stone, slate or mineral under the said lands, tenements and hereditaments, or under the railway or other works of the said company, as if this act had not been passed, so that no damage or obstruction be done or thereby occur to or in such railway or other works: provided nevertheless, that in case any damage or obstruction shall be so done or occur to or in such railway or other works, the same shall forthwith be repaired or removed (as the case may require) by and at the expense of the respective owners or lessees of such coal, stone, slate or mineral as aforesaid; and if the same shall not forthwith be done, it shall be lawful for the said company to repair such damage or to remove such obstruction, and to recover the expenses attending the same, in case of neglect or refusal to pay the same within twenty days after demand thereof, by distress and sale

of the goods and chattels of such respective owners or lessees, or by action of debt or on the case in any of his Majesty's Courts of record at Westminster."

Section 28. "Provided also and be it further enacted, that whenever in the working or getting of any such coal, stone, slate or mineral, the owners or lessees thereof, or other persons working the same, shall approach within twenty yards of any masonry or building belonging to the said company, the person directing the working of any such coal, stone, slate or mineral shall give notice in writing thereof to the said company, and within fourteen days after the service of such notice, the said company, or the directors of the said company, to be appointed as hereinafter mentioned, may deliver to such person a declaration in writing under the common seal of the said company, that they require the coal, stone, slate or mineral under such masonry or building so lying within twenty yards thereof (or so much thereof as shall be specified in the said declaration) to be reserved for the protection of such masonry or building, and in that case the said company shall purchase and pay the persons entitled to the same for the coal, stone, slate or mineral so reserved; and in case the said company and such person shall not agree as to the price to be paid for the said coal, stone, slate or mineral so reserved, the same shall be settled by a jury, in manner hereinafter mentioned; and in case the said company or the said directors shall not deliver such declaration as hereinbefore mentioned, the said owners, lessees or other persons may work and get the said coal, stone, slate or mineral under the said masonry or buildings, provided the same be worked in the usual and ordinary manner of working mines, and that no avoidable damage be done to the said masonry or buildings."

In the year 1834 Mr. Boulcott was the owner in fee simple of lands on the left bank of the river Wear. Under the surface of his land lay seams of coal and other strata, two of which seams of coal had, at some previous time, been partially worked, but such workings had been abandoned upwards of forty years before the year 1834, the owners of the coal having left pillars of coal sufficient for the support of the super-

incumbent strata. One of such seams was intersected by two bands of a clay which is apt to decompose and rot away if exposed to the air after it has been long in contact with water. About the time of the abandonment of the workings, the colliery in question was drowned by a flood of the river Wear, which filled the workings with water, and the surface of the ground was, in the year 1834, and had then for many years been, supported by the joint pressure and strength of the water and the pillars of coal. The Durham Junction Railway Company having considered the nature of Boulcott's land, and being advised that the surface, with its then amount of support, or even in the event of the water being drawn off, was secure, resolved to rest the abutments of one end of the proposed bridge on a portion of Boulcott's land.

The company accordingly contracted with Boulcott for the purchase of about seven acres of his surface land, for the sum of 650*l.*, being its surface value, and by a deed dated the 20th of May 1837, Boulcott conveyed the land to the company; who in the year 1836 commenced building the bridge, resting the abutments of one end of it on the piece of land purchased by them of Boulcott. The bridge was finished in the year 1838, and has ever since been used for traffic. It is called the Victoria Bridge, and crosses the river Wear at a great height and by a single span, and is well known as a great engineering work. The weight of the bridge renders it necessary that the surface of the ground on which it rests should have more support than would otherwise be required from the subjacent and adjoining ground.

In the year 1856 Boulcott, or his successors in title, demised to the appellant, and to one David Jonassohn, the mines underneath the piece of land comprised in Boulcott's conveyance of May 1837, and underneath adjoining land of which Boulcott was the owner in fee simple, in and previously to the year 1837. Jonassohn died in July 1859, and the appellant had since been the sole lessee of the mines in question.

In the month of February 1859 the appellant and the late David Jonassohn commenced sinking or deepening a shaft called the Haugh Shaft, for the purpose of working portions of the coal comprised in

the said lease, which were yet unexplored, and which were the greatest portion of the mines comprised in the said lease. The distance of the shaft from the strip of land purchased by the company was about 200 yards. Before the works were so commenced, the appellant gave the company notice of the intention of Jonassohn and himself to work the collieries and minerals comprised in the lease. Upon receiving such notice, the company warned the said Jonassohn and the appellant, that they could not take away either the coal or the water from underneath the said strip of land or the immediately adjoining land, without endangering the Victoria Bridge, and Jonassohn and the appellant thereupon discontinued working, but afterwards gave notice of their intention to resume the works; whereupon the respondents filed their bill in June 1859 against the appellant and Jonassohn, and after the death of Jonassohn the said bill was amended, and as amended was against the appellant as the sole defendant, and prayed that the appellant might be restrained by injunction from taking away any of the water or coal from underneath the piece of land purchased from Mr. Boulcott, and from taking away any of the water or coal underneath the land adjoining thereto, which was necessary for the stability or security of the Victoria Bridge.

The appellant put in his answer to the original bill, and stated that he had no immediate intention of working the coal left at the place where there were former workings, but that it was most probable that he should do so at a future time; and he also mentioned the works commenced by him as aforesaid for the purpose of obtaining the coal yet unexplored, and stated that if he should be prevented working the same he would lose the benefit of the aforesaid lease, and would not be able to perform the covenants therein contained on the lessee's part. And he stated that he never proposed or intended to work or obtain more coal from the said mine or any part thereof than ought to be worked and obtained fairly, regularly and orderly, and according to the best and most approved course, method and manner of working collieries on the rivers Tyne and Wear. He also further stated that the works which were commenced by him as aforesaid were not so commenced with the view of pumping

out the water from underneath the piece of land conveyed to the company, but for the purpose of working other portions of the coal mines comprised in the said lease and yet unexplored. The appellant also put in his answer to the amended bill, and thereby stated that he did not desire to work the pillars of coal left at the former workings, and undertook not to work the coal within such a distance as the Court should deem a reasonable distance from the bridge or the piece of land purchased by the company without giving ample notice of his intention to work the same. And he stated that from his knowledge of the locality, he believed in the great value of the mines, and that by virtue of the said lease he had the additional and very valuable privilege of raising minerals from other mines by means of the shafts in the mines so leased as aforesaid, and that he would be a loser to the extent of many thousand pounds if he were deprived of using the said shafts, and from sinking other shafts, if necessary, into the said mines.

The cause came on to be heard, upon motion for decree, before Vice Chancellor Wood, who, by his decree made on the 22nd of June 1860, ordered that a perpetual injunction should be awarded to restrain the appellant, his servants, workmen and agents from taking away any of the coal, stone, slate or mineral from underneath the land purchased by the Durham Junction Railway Company from Joseph Crew Boulcott, *or any land* within twenty yards of any masonry or buildings belonging to the company, or from otherwise working the mines under the said land so purchased, *or within such range of twenty yards, in such a manner as to occasion any damage or obstruction to the railway or other works of the company, unless such notice should have been first given by him, as was required by the 28th section of the act in the respondents' bill mentioned, and the company should have neglected to deliver such declaration as in that section mentioned, and to restrain the appellant, his servants, workmen and agents, from working any of the minerals under or in the land adjoining to the said land so purchased, being the property of the company, and not being within twenty yards of any masonry or buildings belonging to the com-*

pany, in such a manner as to affect the stability of the Victoria Bridge, or the railway or other works in the respondent's bill mentioned; but the order was to be without prejudice to the appellant's right to pump out or otherwise remove the water in the shaft called the Haugh Shaft, the Court being of opinion that the appellant was entitled so to drain the said shaft.

The appellant then presented a petition for a rehearing to the Lord Chancellor. By the order made on the rehearing, in November 1860, the petition of appeal was dismissed, but by consent, the injunction awarded by the decree was varied by omitting the words "or any land" and "or," above distinguished by italic type, and the appellant was ordered to pay the costs of the rehearing.

*Mr. Rolt and Mr. Dickinson (Mr. Han-
nen with them)*, for the appellant, contended that the company having acquired title to the surface by virtue of the compulsory powers of their act of parliament, were not entitled to adjacent support, except such as was necessarily implied from the provisions of their act, which support was not beyond the distance of twenty yards from any masonry or buildings belonging to the company specified in their act—*Fletcher v. the Great Western Railway Company* (3). The marginal note in *The Caledonian Railway Company v. Sprot* (4) was not borne out by that case, and that was a case of voluntary conveyance. The injunction operated as to coal not being under the land purchased, whereas section 28. of the act applied only to coal under the land purchased; this section implied that the landowner had a right in the minerals which might endanger masonry, and the legislature had inserted the provision as to the twenty yards for the protection of the company. The 27th and 28th sections must be read together. The landowner might work within twenty yards, paying for damage; it could not be intended that he should not be at liberty to work beyond the twenty yards in a fair and ordinary manner, and so that no avoidable damage should be done—*The Dudley Canal Navi-*

(3) 4 Hurl. & N. 242; s.c. 28 Law J. Rep. (N.S.) Exch. 147: in error, 5 Hurl. & N. 689; s.c. 29 Law J. Rep. (N.S.) Exch. 253.

(4) 2 Macq. 449.

gation Company v. Grazebrook (5), *The London and North-Western Railway Company v. Ackroyd* (6). The injunction was so vague as to be contrary to the principles of equity; the landowner would be in contempt of Court if he worked at any distance, so as to affect the stability of the bridge; which prevented him from working at all. The injunction was altogether too indefinite—*The Earl of Ripon v. Hobart* (7), *Haines v. Taylor* (8), *Cotter v. the Midland Railway Company* (9). There was no evidence of damage, except as to the withdrawal of the water, and the landowner ought not to be responsible for the withdrawal of the water from the spaces in working the mines properly—*Chasemore v. Richards* (10).

Sir Hugh Cairns and *Mr. Hobhouse* (*Mr. George Williamson* with them), for the respondents, submitted that the contention of the appellant, that the respondents had no right to adjacent support from minerals in adjoining lands, would give the appellant the right to cut the surface of his land and minerals so as to leave only a solid block for the support of the railway, which would be to doom it to destruction, and the company could not purchase beyond the twenty yards. They contended that the twenty yards had no reference to adjacent support, only to subjacent support. The 27th and the 28th sections of the act related only to subjacent support. If the true construction of these sections was, that the landowner was to have the mines, but that he must make good any injury to the railway, then the company need not wait for the injury to interfere, but might do so at once. The 28th section did not interfere with the object of the 27th section. All the cases were to be reconciled. First, as to the cases on the Railways Clauses Consolidation Act, 1845, sections 77, 78, and 79. This act introduced a new consideration, viz., a lateral support of forty yards, if no distance was mentioned in the

special act. The act contemplated that the special act might specify an area, both subjacent and adjacent, which would afford an adequate support; if no area was named, then it defined forty yards as the area. This area was made purchaseable, and the right to support was made correlative with the right to purchase. The implication of law to be derived from these conclusions was, that where a purchaseable area of adjacent and subjacent support was thus provided, there was no room for an implication of law that any further support was intended. In such a case compensation for mineral support did not form part of the price on the original purchase of the land—*Fletcher v. the Great Western Railway Company, The London and North-Western Railway Company v. Ackroyd*, and *Bagnall v. the London and North-Western Railway Company* (11). The cases in which the Railways Clauses Consolidation Act did not apply were *The Dudley Canal Navigation Company v. Grazebrook*, which was clearly distinguishable from the present case, *The Birmingham Canal Navigation v. Earl of Dudley* (12) and *The Stourbridge Navigation v. Earl Ward* (13). The respondents had, however, a common law right to adjacent support—*The Caledonian Railway Company v. Sprat*. This case was conclusive of the present, and had been followed by *The Caledonian Railway Company v. Lord Belhaven* (14), *Humphries v. Brogden* (15), *Roberts v. Haines* (16) and *The North-Eastern Railway Company v. Crosland* (17); and it was immaterial whether the purchase was voluntary or compulsory. The danger to the respondents was threatened by the appellant himself. The injunction was in the proper and the most merciful form, and was the form of injunction granted in parallel cases; as such they referred to *The Imperial Gas-Light Company v. Broadbent* (18), *The Earl of Ripon v. Hobart, Haines*

(11) 10 W. Rep. 232.

(12) 9 Jur. N.S. 24.

(13) 7 Ibid. 329.

(14) 3 Macq. 56.

(15) 12 Q.B. Rep. 739; s.c. 20 Law J. Rep. (N.S.) Q.B. 10.

(16) 6 E. & B. 643; s.c. 25 Law J. Rep. (N.S.) Q.B. 353; on appeal, 7 E. & B. 625; s.c. 27 Law J. Rep. (N.S.) Exch. 49.

(17) 2 Jo. & H. 565, ante, 353.

(18) 7 H.L. Cas. 600; s.c. 29 Law J. Rep. (N.S.) Chanc. 377.

(5) 1 B. & Ad. 59; s.c. 8 Law J. Rep. K.B. 361.

(6) 8 Jur. N.S. 911, 913.

(7) 3 Myl. & K. 169; s.c. 3 Law J. Rep. (N.S.) Chanc. 145.

(8) 2 Ph. 209; s.c. 10 Beav. 75.

(9) Ibid. 469; s.c. 17 Law J. Rep. (N.S.) Chanc. 235.

(10) 7 H.L. Cas. 349; s.c. 29 Law J. Rep. (N.S.) Exch. 81.

v. Taylor, Cothor v. the Midland Railway Company, and The North-Eastern Railway Company v. Crosland. The injury, if any, to the appellant did not arise from the form of the injunction, but by act of law.

Mr. Rolt, in reply.—The legislature has determined that twenty yards is a sufficient area for support; and if the respondents require a greater area, they must apply to the legislature to increase their right to support. It was conceded that where there was a purchaseable area for support there was no room for an implication that any further support was intended. This put an end to the respondents' case. The appellant is at all events entitled to some declaration to the effect that he is not to be responsible for withdrawing the water from the spaces, if such a result is occasioned in the proper working of the mines. The cases referred to as to the form of the injunction are no answer to the objections to it; when there is a doubtful right, the Court will endeavour to define that right to the utmost extent, and will cast upon the plaintiff the obligation of shewing within what limit damage will arise, and will ascertain it.

LORD CHELMSFORD.—My Lords, during the opening of this case, on the part of the appellant, I felt considerable doubt whether the injunction could be maintained to the full extent to which it had been granted; but having carefully considered the able arguments addressed to your Lordships by the counsel on both sides, I am now satisfied that the decree appealed from may, with some modification, be generally affirmed. The appellant is the lessee of the mines in question for the term of forty-two years, under a lease of the 21st of December 1856, granted by Mr. Boulcott, who was the proprietor of the mines in 1834, when the act for making what is now the respondents' railway was passed. Under this act the company was empowered to carry the railway over the river Wear, at or near to a place called Biddick, by means of a bridge or viaduct. For the purpose of constructing this bridge and a portion of the railway, the company required some of the land of Mr. Boulcott under which there were seams of coal, and he agreed to sell them the required quantity of land for the sum of 650*l.* It seems to me to be not

very important to consider whether this transaction is to be regarded in the light of a voluntary or a compulsory sale. As the company could have compelled Mr. Boulcott to part with his land for the purposes of the act the latter would probably be the more correct view. The conveyance to the company was made in the form prescribed by the act, and must be read as if the sections applicable to the subject-matter of the grant and its incidents were inserted in it. These sections, the 27th and the 28th, contain provisions for the case of mines lying under land purchased by the company under the authority of the act. These mines, whether of coal, stone, slate, or other mineral, by the 27th section, are to be deemed to be excepted out of the purchase of such lands, and may be worked by the respective owners under the lands or under the railway or other works of the company, as if the act had not been passed, "so that no damage or obstruction be done, or thereby occur, to or in such railway or other works." The 28th section relates to masonry and building belonging to the company, and enacts that whenever in working any such coal, &c. (which refers to coal previously mentioned as being under the land purchased), the working shall approach within twenty yards of any masonry or building, notice shall be given by the owner or lessee of the mines, and the company may deliver a declaration that they require the coal to be reserved for the protection of such masonry or building, and in that case they shall purchase and pay for the coal so reserved, and in case the company shall not deliver such declaration, the owners, &c. may work or get the coal under the masonry or buildings; provided the same be worked in the usual and ordinary manner of working mines, and that no avoidable damage be done to the said masonry or buildings. The appellant contends that the 27th section must be interpreted by the 28th, and that the meaning of the two sections taken together is, that the company is entitled, by the 28th section, to purchase a limited amount of support, and can claim nothing more, and that beyond this limit the appellant is only bound to work his mines in such a manner as to leave sufficient support for the ordinary purposes of the railway, but not for

any extraordinary works. The two sections, however, appear to me to be independent of each other. By the 27th section, the owners of mines under lands purchased by the company are required to work them "so that no damage be done or thereby occur to the railway or other works." This is not an unreasonable restriction. Throughout the line in general it is probable that no great additional weight will be laid upon the surface, and therefore that in the course of working the coals in the ordinary manner no difficulty will be found in preventing damage to the railway. But if it turn out that the coal cannot be worked in the usual and ordinary manner without occasioning damage, then to permit it to be even so worked would be to defeat the object for which alone the surface land was taken from the owner, and would make the very act which authorized the construction of the railway the sanction for its destruction. The legislature having thus, in the 27th section, provided generally against all damage by working mines under the purchased land, proceeds, in the 28th section, to deal with the special case of masonry and buildings belonging to the company, with a view to the protection both of the company and of the mine owner. As a great additional weight must be laid upon the surface by works of this description necessarily requiring a greater amount of support than would be afforded in the ordinary mode of working mines, it seems but fair that the company should pay for this extraordinary support, which can only be obtained by depriving the owner of a quantity of his coal, which he would otherwise have been able to work. The 28th section therefore enables the company to purchase the requisite protection to their masonry and buildings; and if they decline to do so, permits the mine owner to remove all the coal which he would be able to get in the usual and ordinary manner of working, and if in so working damage is unavoidable the company must bear the consequences.

The act thus provides for the rights of the mine owner and of the company as far as the purchased lands extend. But the injunction which has been granted restrains the appellant from working not only under the purchased lands, but also under or in the land adjoining to the land so purchased

in such a manner as to affect the stability of the Victoria Bridge or the railway or other works. And the appellant contends that the company having secured by their act a certain amount of support to their masonry and buildings, and also within the limits of the purchased lands what may be necessary for the ordinary purposes of the railway, their rights are defined by the act, and the rule of the common law with regard to lateral support from adjacent land is altogether excluded.

But this argument appears to me to be answered by the decision of this House in the case of *The Caledonian Railway Company v. Sprot*. There the act contained a clause making it competent to the proprietor whose lands were authorized to be taken, to reserve from the bargain and sale to the company the whole minerals in the lands for his own proper use and behoof, but restraining him from working the minerals till he had given security for injury which might thence in any way result to the undertaking. The conveyance of Mr. Sprot to the company contained a reservation of the minerals under the land conveyed, and may be considered as equivalent to the exception of the minerals by the act itself. And Lord Cranworth, then Lord Chancellor, in advising the House, said, "Independently of any parliamentary enactment, the effect of the conveyance was to convey the land to be covered by the railway to the company, together with a right to all reasonable subjacent and adjacent support, a right to such support being a right necessarily connected with the subject-matter of the grant."

It was said by the appellant's counsel, that this case has generally been considered to have proceeded upon the ground of the conveyance being voluntary. I have already observed that in these cases of private arrangement, where the owner may be compelled to part with his property, the sale can hardly be regarded as a voluntary one. But whether voluntary or compulsory, every grant must carry with it all that is necessary to the enjoyment of the subject-matter of it, and therefore if a certain amount of lateral support is essential to the safety of the railway, the right to it must pass as a necessary incident to the grant.

But the learned counsel for the appellant insisted that even if he were bound to leave

this lateral support for the ordinary purposes of the railway, he was not called upon to provide support for extraordinary purposes such as bridges, &c. But this objection seems to be met by my noble and learned friend, Lord Cranworth, in the case to which I have just referred. After observing that how far adjacent support must extend is a question which in each particular case will depend upon its own special circumstances, he adds, "It must further be observed that all which a grantor can reasonably be considered to grant or warrant is such a measure of support, subjacent and adjacent, as is necessary for the land in its condition at the time of the grant, or in the state for the purpose of putting it into which the grant was made." Now, Mr. Boulcott must have known where it was proposed to carry the bridge over the river Wear, and that some of his land would be used as a support to the abutments of the bridge. He must be taken therefore to have impliedly granted all the adjacent support necessary to maintain these abutments. It is incorrect to speak of the bridge as an extraordinary work in connexion with the railway. It is a necessary part of the line of the railway, without which it could not have been made, and it comes rather within the meaning of the words "ordinary purposes of the railway," for which it is conceded that support within the limit of the purchased lands must be provided.

These then were the respective rights and obligations of the parties when the appellant's notice of his intention to work the mines was given. This notice, with the plan accompanying it, informed the company that the appellant's mining operations would extend in every direction, not only near to but even under the railway itself. The company therefore filed their bill praying for an injunction; and the defendant's answer shews the extent to which he claimed the right to work the mines. He says, "The company are not entitled to have any further or other support left to the ground or surface of the strip or portion of land so purchased as in the plaintiff's bill mentioned than such as would be left according to the fair, regular and orderly and best and most improved course, method and manner of working collieries on the rivers Tyne and Wear." And what consequences he anticipated might possibly occur from this mode of working

may be collected from another passage in his answer, in which after stating his inability to say whether the water as well as the coal underneath and adjoining the piece of land purchased is or not necessary to the stability of the Victoria Bridge, or whether great damage will or will not ensue to the plaintiffs if he is allowed to resume his works, he submits "that such damage would not be irreparable, as it would simply consist of pecuniary loss or expense, as the railway might be carried across the river Wear by a bridge not requiring so much support as the Victoria Bridge." So that he contemplates nothing less than the possibility of the entire destruction of the bridge as the consequence of his operations. The appellant complains that the injunction was granted without any proof being offered that damage would result from the removal of the coal, the evidence being almost wholly directed to shew that the support of the water was necessary to the stability of the bridge. To this I think a satisfactory answer was given by the counsel for the respondents. The only question really in dispute between the parties was the right to the support afforded by the water. There was never any doubt as to the necessity of the support from the coal; and if the company would have abandoned their claim to the water support (which was afterwards decided against them), they might perhaps have asked for an injunction upon the admissions in the defendant's answer.

But it is said that, even assuming it to be right to restrain the appellant from working his mines so as to damage the railway, the injunction which has been granted is so general and indefinite that the appellant is deterred from commencing any operations in his mines, however distant from the railway and works, lest he should be guilty of a breach of the injunction and render himself liable to an attachment. The appellant seemed to think that the form of the injunction adopted on this occasion was entirely new. We have however been referred to the case of the *North-Eastern Railway Company v. Crosland*, in which an injunction in the same extensive and indefinite terms was granted. It is difficult indeed to see how adequate protection can be given in any other way. It was suggested that the injunction ought to have defined by metes and bounds the limits within which workings

were to be prohibited. But this is altogether impracticable, because it is not possible to determine beforehand to what extent the workings may deprive the railway and works of the adjacent support which of right they ought to have. Nor need the appellant entertain much apprehension of the consequences of this injunction upon his future operations. He must know that it amounts merely to a declaration of the Court upon the question of right which he himself, as he says in his answer, desired "to afford an opportunity of having properly tried."

One part of the injunction, however, will require some qualification or explanation to prevent the appellant receiving a detriment to which he ought not to be exposed. When the bill was filed, the main contention between the parties was, whether the company were entitled to have the water left in the Haugh Shaft, as by its pressure on the water in the spaces of the old workings of the mine it afforded an additional support to the surface land. The Court decided that the appellant is entitled to drain this shaft though the consequences will necessarily be that the support of the bridge will be thereby diminished. This decision apparently proceeded on the ground that the filling of the Haugh Shaft was the result of an accident, and that it being reasonable to expect that at some future time the owner would resume the working of the seams of coal to which it led, and would use the shaft for the purpose, the company had no right to speculate on the water being always left in the shaft. But why had they any more right to speculate on the continuance of a circumstance equally accidental—the water constantly remaining in the spaces? And if the operation of working coal, not in the pillars, but in other and deeper seams will have, as it appears it may have, the effect of drawing off the water in the spaces, why had the company any more right to count upon the continuance of the accidental state of circumstances in the spaces than in the shaft? Therefore, I submit to your Lordships that the decree ought to be varied by adding these words, "and this injunction is not to restrain the defendant from withdrawing the water from the spaces left in the old workings, if such effect should be produced by working the colliery in a proper manner,

and in the usual manner of working mines in the district where the same is situated," and that, with this addition, the decree ought to be affirmed.

With respect to costs, I submit that there should be no costs of this appeal on either side; and as the question of the right to support from the water in the spaces does not appear to have been made the ground of the defendant's appeal to the Lord Chancellor, that his decree as to costs ought not to be varied.

LORD KINGSDOWN.—My Lords, in the year 1834 the respondents, or a company which they represent, were authorized and required for the purposes of their railway to build a bridge over the Wear. They proposed to build this bridge at a part of the river where, on one side of the stream, there were at a considerable depth below the surface the workings of a colliery, which had for some years past been abandoned. The workings had been conducted in the usual manner, by getting up portions of the coal, leaving other portions of the mineral standing as pillars to support the roof. It seems that at a distance of about 200 yards from the line of railway there was an old shaft, communicating with the abandoned colliery, by which the coal had been drawn up. An overflow of the river or some occurrence had taken place in which the water of the river had poured down the shaft, and filled not only the shaft itself, but the interstices between the pillars left for the support of the roof. And it is obvious that by the pressure of the water in the shaft upon the water in the beds considerable support would be afforded to the roof, in addition to that supplied by the pillars.

In this state of things, in the year 1835, the company, having taken advice as to the sufficiency of the ground (though to a certain extent undermined) to support their supposed bridge, purchased in the year 1837 from Mr. Boulcott, the owner, a portion of land for the site of the bridge, together with a strip of land of some length leading up to it, and proceeded to make their railway and to erect their bridge on the land so purchased. This bridge is said to be of unusual solidity, to be of more than the ordinary weight of such structures, and to require therefore more than the

ordinary support. The bridge, however, was built in conformity with the provisions of the act of parliament, and for more than twenty years no attempt was made by Mr. Boulcott, or those claiming under him, to disturb the supports of the bridge as they existed at the time when it was built.

The question then is, what are the rights the company would have acquired against Mr. Boulcott by the conveyance from him if the purchase had been made by private bargain and the conveyance had reserved to the vendor the right to the minerals under the land sold? I apprehend that upon the authorities there can be no doubt that Mr. Boulcott having sold the land for the bridge and the railway, could not so use the property which he had reserved, either the minerals under the land sold, or the surface of or minerals under the adjoining land, as to prejudice the use of that which he had granted for the purpose for which it was known to have been granted. He could not have taken away either from under the land sold or from the adjoining land, minerals, the abstraction of which would have the effect of interrupting the railway or endangering the bridge. That this would be so at common law in the case of a private contract was not disputed, but it is said that the law is different when a compulsory sale is made under an act of parliament; in which case it was argued that the purchaser takes nothing but what the act of parliament gives in terms. It is extremely difficult to understand what difference there can be for this purpose between the effect of a conveyance when the contract is entered into under the authority of an act of parliament, and when it is made by private bargain. In either case the conveyance must pass the property described in the deed, with its legal incidents. There may indeed be either in the conveyance or in the act of parliament provisions which exclude from the conveyance of the land its ordinary legal incidents, but unless something to this effect be shewn, the ordinary legal incidents will attach to the land.

The real question therefore is, does the conveyance in this case, or does the act under which it was made, contain anything which excludes the operation of the ordinary rule of law? The appellant

represents Mr. Boulcott, and can assert no rights which Mr. Boulcott could not have maintained. It is not suggested that there is anything special in the terms of the conveyance, but the provisions of the act of parliament are relied on. Let the matter be considered first under the 27th section. That section applies only to minerals reserved, that is, to minerals under the sold land, and so far from containing anything contrary to the common law right, it expressly recognizes and enforces it, for it provides that the minerals may be got by the owner, so that no damage or obstruction be thereby caused to the railway or works; and that if any damage be done and the owner do not repair it, the company may do it, and charge the expense on the owner. Does this recognition of the common law right to subjacent support afford any inference of an intention to exclude the common law right to lateral support? I can see no foundation for any such inference. But this question seems to me to be settled by the decision of your Lordships in *Sprot's case*. There can be no doubt that the operation of this clause will extend to the bridge as well as to the other works of the railway, unless by the effect of the 28th section the bridge is excluded from the protection which is afforded to other portions of the railway, not consisting of masonry or building.

The 28th section, like the 27th, is confined to minerals worked under the sold lands, and it has nothing to do with lateral support; I mean with support to be afforded to the land sold, by the adjoining land. Section 28. seems to me intended to give an additional protection in certain cases to the railway company. The personal remedy against the miner given by the former clause would often be very insufficient where buildings possibly of great value, like the bridge in this case, might be destroyed by working. The person guilty of the destruction might, very probably, be quite unable to answer any damages for the injury which he had caused, and the injury might, in many cases, be of a character for which pecuniary damages would afford no adequate compensation; therefore, when the workings approached within such a distance of buildings as in the opinion of the legislature was likely to endanger them, it gave

the railway company the right of purchasing the minerals either immediately under the buildings or within twenty yards of them. Which is the true construction is for the present purpose immaterial. The owner being compelled to sell at a price, nothing could be more reasonable than that if the railway company refuse to purchase the owner should be at liberty to get the minerals in a workmanlike manner; and that, if he did no damage to the railway beyond that which was unavoidable, he should be relieved from all responsibility. When the absolute right to the minerals was reserved to the owner he was to work at his own peril. When his right was qualified by the option given to the company to purchase, then, if the company preferred the risk of damage to the expense of purchase, they were to be subjected to the risk which they refused to buy off. There is nothing, as it seems to me, but what is just and reasonable in these provisions, which are in no degree inconsistent with each other.

The result is, that in this act of parliament there is nothing, in my opinion, to exclude the ordinary right of a purchaser to such support of the land which he has bought, both subjacent and adjacent, as the common law of the land gives him. The other objections made to the decree remain to be considered.

When the facts of the case are understood, it is impossible to say that there was no danger threatened which warranted the interposition of the Court. It appears by the plan annexed to the notice that the appellant intended to work, and insisted on the right to work, the coal left in the old workings; and he now contends that he has a right to do so whatever may be the effect upon the bridge or the other works of the railway, provided he works in a proper manner and does no damage which can be avoided. He has challenged the company to a contest upon this point, and the injunction awarded is the necessary consequence of the decision; it is in fact, as was justly stated by the respondents' counsel, the decision of the Court, and equivalent only in substance to a declaration of right.

With regard to the form of the injunction, I confess that I agree with my noble and learned friend in thinking that it is too

extensive. The Court has decided that the defendant is entitled to withdraw the water from the shaft, and to this decision the respondents have submitted. Upon this principle I do not understand why he is to be held obliged to retain the water in the spaces. I agree in the propriety of the qualification of the decree proposed by my noble and learned friend.

Decree and order affirmed, with the following addition: "That this injunction is not to restrain the defendant from withdrawing the water from the spaces left in the old workings if such effect should be produced by working the colliery in a proper manner, and in the usual manner of working mines in the district where the same is situated."

LORDS JUSTICES. } M'INTOSH v. THE GREAT
May 22, } WESTERN RAILWAY COM-
25, 26. } PANY.

Practice—Form of Chief Clerk's Certificate.

In a suit between a contractor and a railway company, praying a settlement of accounts between them, a decree was made directing an inquiry whether anything, and what, was due to the contractor in respect of the works executed and materials supplied under the contracts. That decree was not appealed from. The chief clerk, by his certificate, found that a lump sum was due, and that in a schedule he had set forth the particulars of such sum, and that the evidence adduced on the inquiry was that set forth in another schedule. On an objection to the form of the certificate, the Lords Justices (overruling a decision of one of the Vice Chancellors),—Held, that the certificate must be discharged; for that the chief clerk ought, in finding the lump sum to be due, to have stated how that amount was arrived at, so as to enable the Court to judge whether he had come to a right conclusion.

This was an appeal from a decision of Vice Chancellor Stuart, refusing a motion to discharge or vary the chief clerk's certificate. The suit was instituted by the late Mr. David M'Intosh, in the year 1847, against the company, praying a settlement

of accounts, and the payment of a very large balance alleged by the plaintiff to be due to him. After the death of the plaintiff the suit was revived. The bill stated several contracts, described as 3 L, 3 B, 3 B Extension, 6 B, Fox's Wood Filling, 3 B and 3 B Extension, Ballasting, and 2 B Completion, under which the plaintiff has executed large works for the defendants, the Great Western Railway Company. Under these contracts many payments had been made to him on certificates during the progress of the works. The whole having been completed, and possession taken by the company, the bill was filed to compel a settlement of accounts and recover payment of the balance (about 248,000*l.*) alleged to be due to the plaintiff. It was admitted that no final settlement has been made under the contracts, and that the balance could not be ascertained without a minute examination of the accounts.

The company claimed 340,000*l.* from the plaintiff for penalties on the contracts.

At the hearing of the cause (reported 3 *Sm. & Giff.* 146, and 24 *Law J. Rep.* (N.S.) Chanc. 469), Vice Chancellor Stuart, on the 30th of May 1855, made a decree, directing an inquiry to be made in the following terms, viz., "whether anything and what remains due to the plaintiff in respect of the works executed and materials supplied, or otherwise, under the several contracts in the pleadings mentioned, having regard to the terms of the contracts, and to the circumstances under which the plaintiff carried on the works."

From this decree there was no appeal.

The chief clerk by his certificate, dated the 19th of February 1863, certified as follows: "There is due to the plaintiff in respect of the works executed and the materials supplied, or otherwise under the several contracts in the pleadings in this cause mentioned, having regard to the terms of the said contracts respectively, and the circumstances under which the plaintiff carried on and executed the said works, the sum of 147,598*l.* 10*s.* 1*d.* The particulars of the said sum are set forth in the first schedule hereto. The evidence adduced upon the said inquiry consisted of the evidence mentioned in the said decree, and also of the evidence mentioned and set forth in the second schedule hereto."

The first schedule contained the several lump sums due on each contract, viz. Contract 3 L, . . . 9,958*l.* 0*s.* 8*d.*, and so on, and the interest due on each sum, making in all 147,598*l.* 10*s.* 1*d.* The second schedule was in two columns headed thus, and contained eighty-one items:

Date of Filing.	Description of Evidence and Names of Witnesses.
4 Feb. 1857 . . .	William Radford—Affidavit.
9 Feb. 1857 . . .	Edward Pratt—Affidavit.
2 April 1857 . . .	Cross-examination of William Radford upon his Affidavit, filed 11 July 1854.
7 April 1857 . . .	Depositions of Joseph Bennett.
28 April 1860 . . .	William Henry Scriven and Henry Amor—Affidavit (rejected by the Vice Chancellor).
* * * * *	* * * * *
28 Jan. 1862 . . .	James Abernethy and Charles Nixon—Depositions on cross-examination.

And the several exhibits mentioned or referred to in the aforesaid affidavits and depositions respectively, and also several of the documents mentioned or referred to in the schedules to the answers of the said defendants, and in the schedules to the several affidavits of the plaintiff, David M'Intosh, filed on the 7th of April 1853, and of William Wood, filed on the 10th of April 1861.

On the 5th of March 1863 a notice of motion was served, on behalf of the company, that the certificate might be discharged, for, amongst other objections, thirty-six in number—1. For that it does not by the said certificate appear, as and in the manner in which the same ought to appear, upon what the result in the said certificate stated, viz. that the sum of 147,598*l.* 10*s.* 1*d.* is due to the plaintiff, is founded.

2. For that it does not, by the said certificate, or by any documents filed therewith or referred to therein, appear what accounts or claims were brought in or made before the said chief clerk upon the inquiry directed by the decree, either on the part of the plaintiff or of the company, upon what accounts or claims, either on the part or behalf of the plaintiff or of the defendants, the chief clerk has proceeded in making the said inquiry, or has certified that the

sum of 147,598*l.* 10*s.* 1*d.* is due to the plaintiff.

3. For that the said chief clerk has not by his said certificate, or by any account or document filed therewith or referred to therein, stated what items or sums in any and what accounts or claims brought in or made before him upon the said inquiry in relation to the contract, known as contract No. 3 L, have been allowed or disallowed, either wholly or partially, or what sums have been allowed in respect of items only partially allowed, or of what particulars the sum of 9,958*l.* 0*s.* 8*d.* in the said certificate, and the first schedule thereto, stated to be due to the plaintiff under Contract No. 3 L, or any part of such sum of 9,958*l.* 0*s.* 8*d.* consists, or is composed.

4. For that the said certificate does not distinguish or refer, in the manner in which the same ought, to the evidence, or the particular paragraphs or portions thereof, upon which the said chief clerk has certified that the said sum of 9,958*l.* 0*s.* 8*d.* is due to the said plaintiff under the said last-mentioned contract." There were objections similar to the third and fourth applicable to the other contracts; and also objections as respects each contract to the effect that the chief clerk ought to have found that nothing was due thereunder; and that a less amount than he had found due, was due thereunder; and the notice of motion concluded thus:

"36. Or that the said certificate of the said chief clerk may be varied in such respects and in such manner as may be just and proper, and that it may be distinctly expressed and made to appear in and by the certificate in this cause upon what the result stated in such certificate is founded."

The plaintiff was equally dissatisfied with the certificate, and appealed to the Vice Chancellor, who, on the 16th of April, made this order: That "this Court does not think fit to make any order on the said motions; but the refusal of the said motions is to be without prejudice to any question as to the allowance of interest, or the rate at which the same should be allowed. The costs of both applications to be costs in the cause." In giving his judgment, the Vice Chancellor said that the decree had been carefully framed by him, after a lengthy hearing of the cause for sixteen days, and he was of

opinion that the form of the certificate was in accordance with the decree, and that it was right. The form of the certificate had been adopted with his (the Vice Chancellor's) sanction, and with a view to bringing the proceedings in this lengthy litigation to a close. If the items had been specified, a door would thereby have been opened to a discussion upon each item, and his object had been to prevent such a discussion. He was not sure that his view would be concurred in by the Court of Appeal, but still he felt it was the right one.

From this order the company appealed, and renewed their motion to discharge or vary the certificate. The plaintiff did not appeal; but, by leave of the Court, the case was argued as if he had done so.

Mr. Bacon, Mr. Malins and Mr. T. Stevens insisted that the certificate was wholly irregular in point of form, and argued for the company, submitting that in order to see what sums had been allowed and what had been disallowed, the account brought in by the plaintiff should be investigated, and the parts allowed and disallowed should be shewn by distinctive marks, and the reasons given for the same, which would be the most convenient mode of settling the matter, and enabling the Court to judge whether the chief clerk had come to a just conclusion. They cited—

Kilbee v. Sneyd, 2 Moll. 186.

Ranger v. the Great Western Railway Company, 5 H.L. Cas. 72.

Dick v. Milligan, 2 Ves. jun. 22.

The Solicitor General, Mr. Bazalgette and Mr. F. C. J. Millar, for the plaintiff, insisted that the company having permitted the decree to be framed in the way in which this was made, and though made as long ago as 1855 had not appealed, it was now too late to object. The case was not within the 46th and 47th Rules of the 35th General Consolidated Order of the Court, nor with the 15th Rule of the 23rd of those Orders. They cited—

The Duke of Marlborough v. Strong, 1 Bro. P.C. 175.

Falle v. Le Sueur, 12 Moore P.C. 501.

Paynter v. Houston, 3 Mer. 297.

The Masters in Chancery Abolition Act, (15 & 16 Vict. c. 80. s. 32.)

Mr. Bacon was heard in reply.

LORD JUSTICE KNIGHT BRUCE (May 26).—In this case it appears to me that the appellants, without any negligence or fault on their part, have been left without knowledge or information what some at least of the particular points among the numerous questions involved in the inquiry directed by the decree of the 30th of May 1855 (an inquiry including, if not wholly consisting of, matters of account)—upon which the opinions of the Vice Chancellor's chief clerk and that of the Vice Chancellor himself must have been against them—are, and also without knowledge or information what were the grounds of his Honour's opinion as to not a few of the points decided against the appellants.

It seems to me, therefore, that we ought not to consider as satisfactory the certificate made under the decree, that being the subject of the order of the 16th of April last now under appeal, which order and certificate should, in my judgment, both be discharged, without prejudice to any question. The costs in the Vice Chancellor's court and here should, I think, be costs in the cause.

If on either side there should be vexatious or litigious conduct in the Vice Chancellor's chambers, the Court, especially having regard to what has already taken place there, will know how to deal with it. The time already occupied in this cause, instituted in the year 1847, the decree in which was made in the year 1855, to whatsoever circumstance attributable, and whatsoever the volume or complexity of the controversy, seems not less than shocking.

LORD JUSTICE TURNER.—I am of the same opinion. I am by no means sure that the unfortunate position in which we find this case at present is not due to an attempt, well intended beyond all question, to arrive at the justice of the case between the parties by a short cut. So far as my experience, now unfortunately of some considerable duration, has extended, I am perfectly satisfied that parties do better to observe the regular course and practice of the Court than to endeavour, by any short cut, to arrive at substantial justice, as it is called, between them.

We have not, however, at present to deal with that question. We have not to

consider whether the decree was or was not right, or whether it might have been framed in a different mode, so as more clearly to have pointed out what was necessary to be done in order to work out justice between these parties. The decree is in this form: "That the following inquiry be made, that is to say, an inquiry whether anything and what remains due to the plaintiff in respect of the works executed and materials supplied, or otherwise, under the several contracts in the pleadings mentioned, having regard to the terms of the said contracts respectively, and to the circumstances under which the plaintiff carried on and executed the said works."

Now it is quite obvious that the first question which arises under that decree in working it out is, what were the works executed, what were the materials supplied, what money accrued due before the works were executed and the materials supplied, what payments have been made in respect of the monies which so accrued due and of the materials which were so supplied, and what were the circumstances under which the plaintiff carried on and executed the works. It is said that this decree was made with the intention, and that the proper effect of the decree is, that a lump sum must be given, and the chief clerk only found there was a lump sum payable to the plaintiff; no doubt that, in a sense, is true, because the inquiry is, "whether anything and what remains due," and that must necessarily result in a lump sum of some description or other; but the true question in this case is, not whether the chief clerk was justified in finding a lump sum to be due, but in what mode it was to be ascertained how the lump sum which was due became due, and whether that sum was the right sum which was to be paid, in order that the Court might be put in a position of judging whether the chief clerk had or had not arrived at a correct conclusion upon the materials, as to the amount of the sum which he found to be the result of the inquiry which was made before him. That, in my opinion, is the true view of this question, whether the decree was to ascertain a lump sum or not. The question before us is, in what mode it was to be taken for the purpose of ascertaining what that lump sum should be,

admitting, as I do, upon the face of the decree a lump sum was to be found.

Now, it is said that there has been a course of practice in those cases and similar cases which ought to govern the present. For instance, that in finding what is due to a tradesman under a decree for administration of a testator's estate, the Court does not take an account on the same principle as it takes the account in the case of a decree against an executor or trustee, but it ascertains what upon the result is the sum which is due to the tradesman. I desire to be understood as not intending in any way to alter any practice which exists in the Court upon that subject; but, on the other hand, I have no hesitation in stating my very clear opinion to be, that if a case of that description were brought before the Court upon a motion to vary the certificate, and the Court found itself in a position that it could not ascertain what sum had been allowed to the tradesman, and which of the items in the tradesman's account had been allowed, and which of the items in that account had been disallowed, the Court, before it would proceed in the dark to adjudicate upon the rights of the tradesman, would send the matter back for further inquiry, in order to ascertain what were the items in the account which formed the question between the parties, and on which the Court was called upon to adjudicate.

Undoubtedly the old practice of the Court was, in all cases of accounts against executors and trustees, to require that the accounts should be contained in the schedule to the report. It is singular that there is a very old authority which I met with upon that subject, which is to be found in *Dickens' Reports* (1), where the Master, in taking an account against an executor and trustee, set out upon the report balances which he found due from the executor, but he omitted the schedule to the report by which that balance was ascertained and in which the balance appeared; he did not append that schedule to the report, but he entered it in a book in his office in the same mode in which receivers' accounts were entered in the office; and the clerk of the reports, whose duty it would be to file

the report, refused to file the report upon the ground that schedules were not appended to the report; and that matter coming before the Court, the Court, without any hesitation, as to the account of the capital of the personal estate, said, "I have no doubt that it ought to be annexed by way of schedule and filed, and that is what he ought to have done, and I shall expect the Master to do it." Part of the objection which the clerk of reports took to filing the report in its then state, without the schedule, was the very objection urged at the bar in the present case, that the exception to the report would be chiefly as to the sums in the schedule. It seems to me, therefore, that that case shews very clearly what course the Court is to adopt where there is to be an account ascertained between the parties.

Then, it is said, that this case is not within the Orders; that the Orders apply only to cases of accounts against executors and trustees; but supposing it to be so, if the case be not within those particular Orders, it is within no Orders at all: it must be governed by the general practice of the Court which existed before the passing of the act of parliament, and if governed by the general practice of the Court which existed before the act passed, undoubtedly, according to the general practice of the Court before that time, the report must be in such a shape as will enable the parties to take the judgment of the Court upon it, whether the conclusion which the Court arrives at is the correct one or not. I think, therefore, it is quite immaterial to consider the question which is suggested at the bar, whether the case is or is not within the 46th and 47th Rules of the 35th of the General Orders, or within the 15th Rule of the 23rd Order, to which Mr. Millar has referred.

Now, we have been asked to say what course ought to be pursued in this case. All that I can say in the present state of the case is this, that the chief clerk must, by his certificate, tell us what sums he has allowed and what sums he has disallowed, because I think it is essential to the justice of this case, essential to enable the Court to determine anything whatever between these parties, that it should be known what sums have been allowed and what sums have been disallowed. What will be the most convenient mode of arriving at

(1) *Smith v. Smith*, 2 *Dickens*, 789.

that conclusion, whether it will be (as was suggested by Mr. Bacon) to take the account brought in by the plaintiff, and to mark in that account the several items—whether that is the most convenient mode or not—or whether the more convenient mode may be to classify the items and say, “I have allowed certain items upon such and such grounds, and I have disallowed certain other items upon certain other grounds, and I state the reasons why I have allowed and disallowed those items, referring to the evidence upon which these conclusions are grounded,” it is impossible for us to say, without knowing the whole details of this account, which I cannot pretend to do. I have great confidence in the judgment of the chief clerk, that he will adopt that course which, after what has passed here on the present occasion, he knows is necessary to be adopted to enable the Court to arrive at a just conclusion between these parties.

I very much regret the length of time which has been occupied in this case. I am quite sure that the Vice Chancellor intended to do perfect justice between these parties; but, as I said at the commencement, my experience fully convinces me, both judicially and from my professional career, that any attempt to deviate from the ordinary forms of the Court always results in confusion and protracted litigation. I think, therefore, that the order must be made which my learned Brother has suggested.

Wood, V.C. }

April 22; }

May 1. }

DAVIES v. HUGUENIN.

Settlement—Release of Power—Portions—Younger Child—Vesting.

By voluntary settlement J. D. conveyed freehold estates to trustees, to the use of J. D. and his wife, successively for their respective lives, with remainder to the use of their children, as J. D. should by will, or in default of appointment by him as his wife should by will, appoint, and in default of appointment to the use of trustees for 500 years, with remainder to the use of the first and other sons of J. D. and his wife successively in tail male; and the trusts of 500 years' term were declared to be as soon as conve-

NEW SERIES, 32.—CHANC.

niently might be after the death of the survivor of J. D. and his wife, in case J. D. should have issue by his wife one son and also two or more children then in trust to raise the sum of 6,000*l.* for the portion or portions of any child or children of J. D. and his wife, other than their eldest or only son, equally to be divided between them if more than one. No period was fixed for vesting the portions. J. D., by a settlement made on the marriage of his daughter H. D., covenanted that he would not execute any appointment or do any other act to diminish the share to which H. D. might become entitled under the first-mentioned settlement: Subsequently J. D., by will, appointed the estates to his second son J. S. D., charged with 1,000*l.* in favour of H. D., and 3,000*l.* in favour of another daughter:—Held, that by the covenant J. D. had released his testamentary power to the extent of disabling himself from affecting the share of H. D. by any subsequent exercise thereof (but not to any greater extent), and that H. D. was entitled to the same share in the 6,000*l.* that she would have taken in default of appointment.

For the purpose of ascertaining the share H. D. would have taken if there had been no appointment, and in construing the settlement upon that hypothesis, Held, (1), That the representatives of an eldest son who attained twenty-one, but died in the lifetime of J. D. without issue, were entitled to share in the 6,000*l.* (2) That the second son, who but for the appointment would have taken the estate as tenant in tail, was excluded from any share; (3) That the representatives of the eldest son and of a daughter who attained twenty-one, but died unmarried in the lifetime of the tenant for life, were entitled to share in the 6,000*l.*; and (4) That the representatives of a son who died an infant in the lifetime of the tenant for life, were excluded.

By a voluntary settlement, dated the 9th of November 1819, John Davies and Mary his wife settled certain freehold estates on trustees to the use of John Davies for life, with remainder to the use of Mary Davies for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of such of the children of John Davies and Mary his wife and in

3 H

such shares and proportions as the said John Davies should by will or codicil appoint, and in default thereof to the use of such of them as Mary Davies should, by will or codicil, appoint; and for want of such appointment, to the use of trustees for the term of 500 years, upon trusts thereafter mentioned, and subject thereto to the use of the first and other sons of the said John and Mary Davies successively in tail male, with remainders over.

The trusts of the said term of 500 years were declared to be as soon as conveniently might be after the decease of the said John Davies and Mary his wife and the survivor of them, in case of no such appointment as aforesaid; and in case the said John Davies should depart this life leaving issue, by the said Mary his wife, one son and also two or more children, either born in his lifetime or after his decease, then in trust to raise the sum of 6,000*l.* for the portion or portions of any child or children of the said John and Mary Davies other than their eldest or only son, equally to be divided betwixt and amongst them if more than one.

There were eight children of the marriage; two of them died infants before the 9th of November 1819. Of the remainder, Harriet was born in 1810, and was twice married, in 1829 to William Meadowcroft, and in 1840 to Louis Huguenin; Lucy Margaret was born in 1812, and died in 1845; William Hamblett was born in 1815, and died without issue in 1847; Elizabeth Ann was born in 1818; John Stanley was born in 1822, and died in April 1857; and Thomas was born on the 24th of August 1825, and died on the 10th of September in the same year.

By articles of agreement, dated the 12th of September 1829, and made upon the contract of marriage between Harriet Davies and William Meadowcroft, the said John Davies, for himself, his heirs, executors and administrators, covenanted with the said W. Meadowcroft, his heirs and assigns that he, the said John Davies or the said Mary his wife, should not nor would execute any appointment or do any other act to defeat, lessen or diminish the share and interest to which the said Harriet Davies, as the daughter of the said John Davies and Mary his wife, was or might become entitled on the

decease of the said John Davies and Mary his wife in the pecuniary division or portion made and secured for the only daughter or for the younger son and sons and daughter or daughters as the case might be of the said John Davies by the said Mary his wife, under and by virtue of the aforesaid indenture of settlement, bearing date the 9th of November 1819; but, on the contrary, that he, the said John Davies, would when thereunto requested, make, do and execute all such acts and deeds as might be requisite for confirming and establishing such share, right and interest of the said Harriet Davies in the said pecuniary provisions or portions, so as the said Harriet Davies should receive for her share and proportion of the settled property the sum of 1,500*l.* at the least.

By his will, dated the 26th of April 1852, John Davies appointed the property comprised in the settlement of the 9th of November 1809 to his son John Stanley Davies and his heirs, charged with the sum of 3,000*l.* to be secured thereon for the benefit of the testator's daughter Elizabeth Ann Davies and with the sum of 1,000*l.* for the benefit of Harriet, then the wife of Louis Huguenin.

John Davies died on the 30th of August 1853, leaving his widow Mary Davies, John Stanley Davies, Elizabeth Ann Davies and Harriet Huguenin him surviving.

John Stanley Davies died in April 1857, leaving a widow and two infant children.

Mary Davies died on the 10th of April 1861.

A bill was filed, by the widow and infant children of John Stanley Davies, against Louis Huguenin and Harriet his wife, the trustees of a settlement made on the marriage of Louis Huguenin and Harriet his wife and Elizabeth Ann Davies, seeking that the trusts of the settlement of the 9th of November 1819 might be carried into effect under the direction of the Court, and that the rights and interests of all parties to and in respect of the property then remaining subject to the last-mentioned settlement might be ascertained and declared.

Mr. Giffard and *Mr. Kay*, for the plaintiffs, contended that the power given by the settlement of the 9th of November 1819 was limited, and could only be exercised by a will. A settlement was no exe-

cution of such a power, and did not at law release the power, but could only operate as a contract; the power was afterwards properly exercised by will; the remedy on the contract was against the contracting party. But if J. Davies had effectually released his power it was clear that children who died after the date of the settlement, but in the lifetime of their father, were entitled to share with the survivors. On this point they cited—

Powis v. Burdett, 9 Ves. 428.

King v. Hake, Ibid. 438.

A condition that the children to entitle them to any share must survive their parent, if not expressed, could not be inferred—

Hovegrave v. Cartier, 3 Ves. & B. 79.

Perfect v. Lord Curzon, 5 Madd. 442.

Torres v. Franco, 1 Russ. & M. 649.

In the case of settlements by parents the time for ascertaining who was the eldest son was the period of distribution and not the period of vesting—

Sandeman v. Mackenzie, 1 Jo. & H. 613; s. c. 30 Law J. Rep. (N.S.) Chanc. 838.

Adams v. Beck, 25 Beav. 648.

Mr. W. M. James and *Mr. North*, for Elizabeth Ann Davies, submitted that even assuming the covenant in the settlement of 1819 operated as a release of the power, it was only a release *pro tanto*—

Cunynghame v. Thurlow, 1 Russ. & M. 436, n.

Green v. Green, 2 Jo. & Lat. 529.

No period of vesting was fixed by the settlement; and the use of the word "portions" was not sufficient to restrict the vesting of the share of a daughter until she should attain twenty-one or marry.

Mr. C. T. Simpson (*Mr. Rolt* with him), for Mr. and Mrs. Huguenin, contended that it was competent to the donee of a power to appoint by will to release his power. On this point he cited—

Hurst v. Hurst, 16 Beav. 372; s. c. 22 Law J. Rep. (N.S.) Chanc. 538.

Re Chambers, 11 Ir. Eq. Rep. 518.

Horner v. Swann, Turn. & R. 430.

But even assuming that the covenant operated only as a release of the power *pro tanto*, the portions of 6,000*l.* were charged on land; and as no time of vesting was mentioned the portions were not to be raised until

required for persons *in esse*, and did not vest until the time appointed for payment. On this point the following cases were cited:

Bruen v. Bruen, 2 Vern. 439; s. c. *nom. Brewin v. Brewin*, Prec. Ch. 195.

Jennings v. Looks, 2 P. Wms. 276.

Warr v. Warr, Prec. Ch. 213.

Lord Teynham v. Webb, 2 Ves. sen. 197.

Lord Hinchinbroke v. Seymour, 1 Bro. C.C. 395.

Edgeworth v. Edgeworth, Beatty, 328.

There was an exception to this rule; but the exception only applied when the child had lived to such an age as to have required a portion. Thomas Davies, therefore, could take no share—

Remnant v. Hood, 2 De Gex, F. & J. 396; s. c. 30 Law J. Rep. (N.S.) Chanc. 71.

John S. Davies, having become the eldest son, could claim no share—

Chadwick v. Doleman, 2 Vern. 527.

Richards v. Richards, Johns. 754; s. c. 29 Law J. Rep. (N.S.) Chanc. 836.

Elizabeth A. Davies and Mrs. Huguenin were each entitled to 3,000*l.*, as no other child had become entitled to a portion.

Mr. Giffard, in reply, submitted that the cases only decided, that when the children did not require a portion it could not be raised against the inheritance; but they did not go the length of giving the portions of children who died under twenty-one to increase the portions of the others, where the payment was postponed only for the convenience of the inheritance. The settlement gave a vested interest to each child, without respect to age—*Evans v. Scott* (1). The cases that had been cited were cases introducing a rule for the benefit of children and the convenience of the inheritance only. On the authority of *Ellison v. Thomas* (2) it was clear that the representatives of J. H. Davies were entitled to a share.

WOOD, V.C. (May 1.)—In this case the point which has been argued relates to the share to which the defendant, Mrs. Huguenin, is entitled under the provisions of a voluntary settlement made by her father and mother. The state of circumstances

(1) 1 H.L. Cas. 43.

(2) *Ante*, Chanc. 32.

of the family were these: There had been two children who died before the settlement, and who, of course, may be put out of the question altogether. Then, after the date of the settlement, there were six children living: one of those died when not a year old. Another, the eldest son, lived to attain twenty-one, but died before the father; and another, Lucy Margaret Davies, attained twenty-one, but also died in the lifetime of her father. The result was, that at the death of the settlor there were living the second son, John Stanley Davies, Mrs. Huguenin and Elizabeth Ann Davies. Now, it is almost too clear for argument, though it was in some degree discussed, that the covenant of the father, on the marriage of Mrs. Huguenin, operated as a release of his power of appointment, so far as she was concerned. So that no appointment afterwards made by him could affect her interest in any part of the 6,000*l.* portion.

Now, the father John Davies, by his will, makes an appointment by which he appoints to his surviving son, subject to certain charges which are created by his will. He appoints a sum of 3,000*l.* to Elizabeth Ann Davies and 1,000*l.* to Mrs. Huguenin. The question is, can Mrs. Huguenin claim any further sum? A settlement was made of that 1,000*l.*, but no dealing with that would affect her right to a larger sum if that should be coming to her under the provisions of the first settlement. The only important questions on the settlement are these: did any share vest in that child who died an infant? what was the interest of the eldest son who died during the lifetime of the father and never came into the property at all? and what was the interest of the second son (who would have become entitled to the freehold property in the event of no appointment) in this 6,000*l.*?

As to the second son, that part of the case is completely covered by the decisions in *Chadwick v. Doleman*, and that class of cases. If there had been no appointment he would have taken under the first limitation in tail, and he taking the estate must be treated as a son not entitled as a younger child to come into any share of the portion, and must be put out of the case altogether.

As regards the eldest son the case, curi-

ously enough, seems to be governed by the recent case before the Lord Chancellor. I can see no distinction between the two cases, and therefore I must follow the decision in *Ellison v. Thomas*, in which it was held that the eldest son not becoming entitled to the estate takes a share of the provision which is made for younger children. It is not by any means an inconsistent decision, but is new, I apprehend, as applied to this particular question. Although there are many authorities to be found in which when the younger son has taken the estate the elder son has come in and been treated as a younger son, I do not remember any case where, having died before the fund was divisible, he was so brought in. I cannot distinguish the case from *Ellison v. Thomas*, and therefore I must hold that the eldest son would have taken one share.

Then as regards the daughter, who was of age but died during her father's lifetime, I apprehend it is quite clear that under this settlement she also was to take a share, because there is no limitation as to the age at which the children are to take, which will be material when I come to consider the case of the child who died an infant; but the period of the sons attaining twenty-one and the daughters attaining twenty-one or marriage, must at the least be taken as the period of vesting. This lady attained twenty-one; she took therefore, as it seems to me, a clear vested interest, and would take the second share.

Then the question is as to the child who died in infancy, and on this point I have not been able to find any express decision, although there is a strong intimation of Lord Justice Turner's opinion in the case of *Remnant v. Hood*, a case like this, in which there was no express period named for the vesting of the interest in the children. His Lordship observed that the Court in all cases of settlements had always taken upon itself the right to construe them with reference to the intent of the instruments, and frequently in a manner which was scarcely consistent at all with the words contained in the instrument; but which words the Court had held to be overridden by the plain and manifest intent of the settlement; and the case of *Chadwick v. Doleman* is perhaps the strongest instance of the application of that doctrine, where

the appointment was made to one who had a clear vested interest, but from the circumstance of his becoming an elder son afterwards he was held not to be entitled. And with reference to portions the Court has gone still further: from a very early period the Court has taken upon itself to construe the limitation of portions in such a way (unless there is something in the instrument strictly prohibiting it) as to provide that the portions shall be raised *quâ* portions at the time and in the manner in which they are required. One of the leading authorities as to portions not being raised when not required was the case of *Poulet v. Poulet* (3). As regards the inheritance charged with portions, in most of the cases it has been decided that when the portions are not required to be raised in consequence of the pre-decease of the person entitled, there, though the portion is vested in a sense, yet being charged on real estate, the Court will not allow it to be raised, the purpose for which it was to be raised no longer existing. The length to which that doctrine has been carried in some cases is remarkable. Lord Justice Turner referred to the case of *King v. Withers* (4), in which Lord Talbot approved of the decision in *Bruen v. Bruen*. I think that *Bruen v. Bruen* is better reported in *Precedents in Chancery* than in *Vernon*; it is evidently the same case, because, although the spelling of the name is different, the circumstances of the case are the same, and the decision is a very remarkable instance of the discretion which the Court has taken on itself. In *Remnant v. Hood* neither side wished to argue this question, and the point was not raised: there had been a vesting in children situated exactly as the children are in the case before me, there being a gross sum to be divided amongst children; Lord Justice Knight Bruce said that he was not satisfied on the point, and as it was not necessary to determine it he would not express a decided opinion one way or the other; but I think his opinion seemed to lean to the interest being vested. Lord Justice Turner expressed a more decided opinion on the point, and I confess that, looking to what was done

in those earlier cases, and looking to the observations of Lord Justice Turner in *Remnant v. Hood*, in which, if I may venture to say so, I entirely concur, it appears to me that I cannot hold that a child who never attained twenty-one, or if a daughter never became married, took an interest in this sum of 6,000*l.*; and although it is quite true that most of the cases have been cases in which this doctrine has been applied with reference to the interest of the heir, it is not fair to say that the decisions proceeded wholly on that ground. The case of *Bruen v. Bruen* shews that the whole intent and purport of the settlement must be looked to; and in this case the sum is a gross sum to be raised and to be divided amongst a certain number of children. The question is, which of those children are to partake and share in the sum to be provided? It is not one of those cases where there is a separate sum appropriated for each younger child, but it is a sum of 6,000*l.* which I have now to appropriate and divide; and it appears to me upon the authorities that I should not be justified in giving to a child who died in infancy a share which in those circumstances would be simply transmitted to its parent. The consequence is, that I think the 6,000*l.* would have become divisible in four shares, and that Lucy M. Davies, who attained twenty-one, W. H. Davies, the eldest son (according to the authority of *Ellison v. Thomas*), Elizabeth Ann Davies and Mrs. Huguenin in default of appointment were each entitled to one share.

LORDS JUSTICES.

April 24;

May 1, 8.

{ *Ex parte* CURRIE AND
OTHERS, *in re* THE GREAT
NORTHERN AND MID-
LAND COAL COMPANY
(LIMITED.) (Second case.)

*Joint-Stock Company—Winding up—
Contributory Directors—Qualification.*

On the 10th of August 1860, at a meeting of five persons, held before the formation of and for the purpose of forming a joint-stock company, this resolution was passed: "Each of the gentlemen present agrees to hold 100 shares in the company, and also to execute the articles and memorandum of association

(3) 1 Vern. 204.

(4) Cas. & Talb. 117; s. c. Forrest, 122.

when ready, and act as directors of the company." At a meeting held on the 14th of August the draft articles of association were submitted to the five gentlemen and approved, and ordered to be engrossed for execution at the next meeting. On the 25th they all signed the memorandum of association for twenty-one shares each, and executed the articles of association. By one of the articles the qualification of directors was fixed at 100 shares, and by another, it was provided, that until directors were appointed, the subscribers thereto should be deemed to be directors. The company was afterwards wound up in bankruptcy:—Held, (affirming a decision of one of the Commissioners,) per Turner, L.J., that by the resolution of the 10th of August and the articles of association taken together, and per Knight Bruce, L.J. that by the effect of the resolution and articles and of the proceedings in January 1861, reported *ante*, pp. 57, 58, the five gentlemen were contributories in respect of 100 shares each, in which number the twenty-one shares for which they had subscribed the memorandum of association should be included.

This appeal of Capt. Currie and Messrs. Fitzpatrick, Harker, Longcluse and Parker against an order of Mr. Commissioner Goulburn, whereby a call of 3*l.* per share was made upon these gentlemen in respect of 100 shares each, as directors of the company, came on again upon the further judgment of the Commissioner.

In the original case in this matter, reported *ante*, p. 57, the Lords Justices made an order, at the close of which was the following :

"It is referred back to the Commissioner acting in the prosecution of this matter, without prejudice to any question, to inquire and determine whether or not the said appellants, being subscribers for twenty-one shares each to the memorandum, and being also subscribers to the articles of association of the said company, shall be placed on the list of contributories of the said company, and be ordered to pay upon 100 shares each subscribed for by them respectively for their qualification as directors of the said company."

By a reference to the former report, at p. 59, it will be seen that Lord Justice Turner, in looking through the papers, dis-

covered that, at a meeting held on the 10th of August 1860, at which these five gentlemen were present, various resolutions were passed, and among them the following: "Each of the gentlemen present agrees to hold 100 shares in the company, and also to execute the articles and memorandum of association when ready, and act as directors of the company." His Lordship considered it might admit of argument whether this resolution ought not to affect their Lordships' decision as to the 100 shares, either upon the ground that those shares, though nominally taken as paid-up shares, ought to be held to have been taken by way of qualification, and therefore to be held to be unpaid shares, or that the above resolution distinguished the present case from that of *Lord Abercorn* (1), and that the appellants, notwithstanding that case, were liable in respect of those shares.

Upon a subsequent day their Lordships, after some discussion, referred the matter back to the Commissioner as to the 100 shares, without prejudice to any question.

Under these circumstances the matter came before the Commissioner upon the point referred, when it appeared from the minute-book of the company that at the meeting, held on the 10th of August 1860, at which all the five gentlemen were present, it was resolved that a company be incorporated to carry into effect the undertaking as detailed in the prospectus; and after appointing a manager, solicitor and secretary *pro tem.*, subject to the directors making such alterations as they might deem advisable, and after providing also for the registration, &c. of the company, the resolution stated above was passed. It also appeared, that on the 14th of August the draft articles of association were submitted to the five gentlemen and approved, and were ordered to be engrossed ready for execution by the next meeting; and that shortly afterwards the memorandum of association and articles were executed by all five.

On the hearing, before the Commissioner, it was argued on behalf of the official liquidator, that the resolution of the 10th of August 1860, taken together with the articles of association, in the opinion of

(1) 31 Law J. Rep. (N.S.) Chanc. 828.

Lord Justice Turner, distinguished this case from that of *Lord Abercorn*; but that upon the 62nd article alone (see *infra*), without reference to the resolution, *Lord Abercorn's* case was distinguishable. He therefore submitted that these gentlemen ought to be placed upon the list of contributories in respect of the shares they had agreed under the resolution to subscribe for.

For the contributories it was contended that the decision of the Court of Appeal in the former case was a complete answer to the present application. The meeting at which the resolution in question was passed was a private meeting of these parties before the formation of the company, and therefore they ought not to be bound by the proceedings thereat. There was some misapprehension as to the time and the circumstances under which the meeting was held. It was not a meeting of the directors at all, but of the promoters, for the purpose of forming a company, and before the memorandum of association or the articles of the company were prepared. No subject-matter was in existence; everything was then under discussion for ultimate arrangement. There were no contracting parties, consequently no contract.

The Commissioner decided that the five gentlemen were liable to calls upon the 100 shares each as their qualification as directors, in which number of shares the twenty-one shares each had subscribed for under the articles were to be included (2).

(2) The Commissioner, on the 9th of March, gave a judgment, of the principal part of which the following is the substance.

"This case was originally before me upon a question as to settling the list of contributories of this company, and ordering a call, and certain gentlemen were placed upon the list. There were five of them. They appealed to the Lords Justices, who, having heard the case, varied my order, retaining in some cases the names of those gentlemen, and in others striking them out. But after the argument, Lord Justice Turner stated that, in looking through the papers, there were one or two papers, which had not been mentioned to me, which struck him forcibly, and he wished the case to be argued on those points; and, after some discussion, it was resolved by both the Lords Justices that the case should come back to me to re-hear and finally determine whether those names were to be placed on the list or not. The order is worded thus: 'It is hereby referred back to the Commissioner of Her Majesty's Court of Bankruptcy, acting in the prosecution of this matter, without prejudice to any question, to inquire and determine whe-

The five gentlemen now appealed.

Mr. Daniel and *Mr. Hardy*, for the appellants, contended that, according to the true construction of the articles of association, it was not incumbent upon the appellants, who were the first directors of the company, to take the 100 shares mentioned in the articles as the qualification, which applied only to future directors. It was said on behalf of the official manager that, by a resolution passed at a meeting of these gentlemen on the 10th of August 1860, they had agreed to be directors and hold 100 shares. But this was before the company was registered, and was not binding on them or the company, as they could not have insisted upon having the 100 shares if the company declined to give them.

Mr. Bacon and *Mr. Roxburgh* insisted that the qualification clause applied as well to the appellants as to any directors of the company. They had been the only directors during the existence of the company, and now it was being wound up they contended that they were not under liability as shareholders. This was a proposition that could not be maintained. The public took shares on the faith of the articles which prescribed the qualification, and of course would conclude that their directors were duly qualified. To hold these gentlemen free from any liability would be to say that it would be competent for any person to act as director to a company without qualification, to deal with and spend other people's money,

ther or not the said appellants, being subscribers for twenty-one shares each to the memorandum, and being also subscribers to the articles of association of the said company, should be placed on the list of contributories of the said company, and be ordered to pay upon 100 shares, inclusive of the twenty-one shares subscribed for by them respectively for their qualification as directors of the said company.' That is the point which I am to determine. ** The Lords Justices, when this case went before them, struck these gentlemen off the list for the 100 shares, subject to the opinion of Lord Justice Turner, which I am about to state. They also struck them off in respect of the shares for their attendance fees, saying that though it was a corrupt thing to vote themselves fees, and a wrong way of paying themselves, they thought the transaction was either void or not, and could not be, as Lord Justice Turner expresses it, 'void in part and held good in part.' Therefore they were struck off as if it were a totally void transaction, as they seem to think it was, and they could not be held liable to a call in respect of those shares. When this case came on to be argued

and when it was all lost to retire from his position without any liability or loss. There was a clear agreement by the appellants to take the 100 shares, and, although this was before the company was formed, it formed the basis of the clause in the articles as to the directors' qualification; and this case differed in this essential particular from the case of *The Marquis of Abercorn*, decided by their Lordships, and it was therefore submitted that the order of the learned Commissioner ought to be affirmed.

Mr. Daniel was heard in reply.

The arguments founded on the several clauses of the articles of association will be found set out in the judgment.

LORD JUSTICE TURNER (May 8).—This is an appeal from an order of Mr. Commissioner Goulburn, by which order the appellants respectively have been put upon the list of contributories of the company for seventy-nine shares, in addition to twenty-one shares for which they were previously upon the list. The appellants were originally upon the list for twenty-one shares, for which they had subscribed the memorandum of association of the company. They were also originally upon the list for certain paid-up shares which they had accepted for fees payable to them as directors of the company. They were also originally upon the list for 100 paid-up shares, which had been transferred to them by a gentleman of the name of Butcher, the originator of the

company, and which had been given to Mr. Butcher in part payment of the purchase-money for property which the company had purchased from him; and they were further on the list for 100 other shares for their qualification as directors of the company.

The learned Commissioner afterwards struck the appellants off the list as to the 100 qualification-shares on the authority of *Lord Abercorn's case*, and the case having subsequently come before us as to the other shares, we made an order by which, in effect, we retained the appellants on the list as to the twenty-one shares, struck them off from the list as to the paid-up shares accepted by them for fees, and referred it back to the learned Commissioner, without prejudice to any question, to "inquire and determine whether or not the said appellants, as being subscribers for twenty-one shares each to the memorandum, and being also subscribers of the articles of association of the said company, or any or each of them, should be placed on the list of contributories of the said company, and be ordered to pay on 100 shares each (inclusive of the said twenty-one shares subscribed for by them respectively), for their qualification as directors of the said company;" and we also reserved the consideration of the costs of the original application, and gave the parties liberty to apply. It is under this order that the learned Commissioner has put the appellants upon the list for the

before the Lords Justices, Lord Justice Turner, in a most excellent and lucid judgment, says: "On looking through the papers, I have found that at a meeting held on the 10th of August 1860, at which those parties, or some of them, were present, the following resolution was passed (I believe all the appellants were present): 'Each of the gentlemen present agrees to hold 100 shares in the company, and also to execute the articles and memorandum of association when ready, and act as directors to the company.' I have already said that by the articles of association nobody could be a director, or ought to be, according to these articles, without holding 100 shares. Lord Justice Turner then goes on to say: 'Nothing was, I think, said in the course of the argument as to the effect of this resolution (it never was mentioned before me at all), and it may admit of argument whether this resolution ought not to affect the decision as to the 100 shares, upon the ground that those shares, though nominally taken as paid-up shares, ought to be held to have been taken by way of qualification, and therefore ought to be held as unpaid shares; and upon the ground that the above resolu-

tion distinguishes this case from that of *Lord Abercorn*, and that the appellants, notwithstanding that case, are liable in respect of those shares. Upon these points I think that, if it is desired on the part of the official liquidator, further argument ought to be admitted.' And the matter ended in both the Lords Justices agreeing that the point ought to be considered, and wished the case to come back to me for my opinion upon the point whether, looking at this fresh evidence, which Lord Justice Turner alluded to, the case has not so differed from *Lord Abercorn's case*, that these gentlemen ought to be determined to be constructively liable for these 100 shares, regard being had to this minute and to the memorandum and articles of association signed by them. * * Now comes the resolution which Lord Justice Turner suggests, and I quite concur with him, fixes those gentlemen conclusively: 'Each of the gentlemen present agrees to hold 100 shares in the company, and also to execute the articles and memorandum of association when ready, and act as directors to the company.' That is the resolution to which these gentlemen agreed. * * Upon the 25th they

seventy-nine shares which are now in question, making with the 21 shares the 100 shares for their qualification as directors, and it is the learned Commissioner's decision upon this point which is brought under review by the present appeal.

The circumstances under which the learned Commissioner arrived at this decision are these: At a meeting of the promoters of this company, held on the 8th of August 1860, it was resolved that the company should be formed. At another meeting, held on the 10th of August 1860, at which all the appellants were present, the following resolution was passed, after referring to the preliminary matters: "Resolved, that a company be incorporated to carry out the undertaking as detailed in the prospectus, and that Mr. Butcher be the manager of the company;" and then the solicitor and the secretary are appointed, and they come under certain resolutions, and then this further resolution was passed: "Each of the gentlemen present agrees to hold 100 shares in the company, and also to execute the articles and memorandum of association when ready, and act as directors to the company." That resolution was passed on the 10th of August 1860. On the 25th of the same month the memorandum of association of the company was signed by the appellants respectively, and by this memorandum of association they signed for twenty-one shares, stating the objects for which the company was formed,

sign the memorandum, by which they say, 'We the several persons whose names and addresses are subscribed are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company which are set opposite to our respective names.' Then come the names and twenty-one shares, so that as to these twenty-one shares there can be no question whatever but they are liable; there being two ways clearly by which men may become shareholders, either by signing this memorandum of association, or by accepting shares and being upon the register. Here they clearly signed the memorandum, and it was not contended that they were not liable for twenty-one shares expressly. Now comes the question about the 100 shares, whether they are liable as to these; and that is the question submitted to me by the order of the Lords Justices. I think they are, first, because I think this case is clearly distinguishable from *Lord Abercorn's case*. In reading that case I dwell upon what Lord Justice Knight Bruce said so forcibly, that Lord Abercorn never accepted or took, and

NEW SERIES, 32.—CHARG.

with a nominal capital of 50,000*l.*; and "we, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names." Then there are twenty-one shares set opposite to the names of each of these gentlemen. On the same 25th of August 1860, the company's articles of association were also signed by the appellants respectively; and by these articles of association it was agreed, amongst other things, that "no person shall be deemed to have accepted any share in the company unless he has testified his acceptance thereof by writing, under his hand in such form as the company from time to time shall direct." Then article 60. is in these terms: "The number of directors and the names of the first directors shall be determined by the subscribers of the memorandum of association, but so that there shall not be less than three, nor more than nine." The 61st article is thus: "Until the directors are appointed the subscribers of the memorandum of association shall, for all purposes of this act, be deemed to be directors." The 62nd is, "That no shareholder shall be entitled to be a director unless he holds at least 100 shares in the company." Then the 72nd clause of the deed says, that "the directors appointed by the subscribers to the memorandum of

never intended to agree and never did agree to accept or take, any share of what is called the capital stock of the association. Here we may say that these gentlemen always did accept, and did intend to accept. Every one of the negatives is answered in the opposite. How, then, is it possible to say that *Lord Abercorn's* is any authority at all for the present case? They are as widely dissimilar as any two cases can be. It comes to this, whether a party is bound in justice and good faith and conscience to do an act when he intends or agrees to do that act? Whether, when he agrees to do that which he is bound to do upon every principle of right, he is not in law to be held to have done it? An agreement to do a thing which a man is bound and ought to do, has always been held to be done.—*Id factum est quod fieri debet*. That principle is correct, and ought to prevail. Here the parties have agreed to take 100 shares, which number it is necessary for them to take as directors, without which they could not act, and were not worthy to be continued in the position in which they have placed themselves. Having done that, or agreed to do it, why are they

association and these articles, remain as directors of this company for the term of three years."

These are the circumstances under which the learned Commissioner has put these gentlemen upon the list; and the question is whether, under these circumstances, they ought to be put upon the list of contributories, and be ordered to pay on 100 shares each (including the twenty-one shares for which they signed the memorandum of association), for their qualification as directors.

It is not contended, on the part of the appellants, that if they were under an obligation to take 100 shares as directors, the obligation could be satisfied by their having taken these unpaid shares, nor could it have been so contended with any prospect of success; for it would be a mere delusion to hold that the obligation could be satisfied without any liability being incurred. Nor was it contended, on the part of the appellants, that this case could be governed by *Lord Abercorn's case*, and it is plain that it could not be so governed, the two cases being in every respect distinguishable. But it was insisted, on the part of the appellants, that they were under no liability to take 100 shares in the company; that the agreement contained in the resolution of the 10th of August 1860 was a mere agreement between the parties, and not an agreement by them with the company, which in truth, had at that time no existence; that that agreement was superseded, so far as it could

not to be held, or ought they not to be held, in a Court of law or equity, to have done it, and as being constructively the holders of these shares! Looking at the other point of view only, it is said, where are those shares! How can a man constructively hold them! The answer is, that the memorandum of association says that the parties who signed it shall be deemed to take shares to that amount. The clause itself says: 'They shall be deemed to hold them.' These parties have agreed to do it; they were bound to do it in conscience, good faith and probity, and therefore in law they are held as though they did it. They are held and determined, in answer to this inquiry, to hold 100 shares in this company, including the twenty-one shares. In answer, therefore, to this last point, upon which Lord Justice Turner bases his judgment, namely, whether this case is not distinguishable from *Lord Abercorn's case*, I say that it is. But we are not driven here to constructively holding. These parties did actually hold 100 shares; but they say, 'These shares which we hold we received as a bribe, to qualify

have any effect, by the memorandum of association, by which the appellants took twenty-one shares only, and that under the articles of association the appellants were under no liability to take the 100 shares. It was insisted that under the 61st clause of these articles the appellants, as subscribers to the memorandum of association, were appointed directors until directors should be appointed by the shareholders, the 61st clause being this: "Until the directors are appointed, the subscribers of the memorandum of association shall, for all the purposes of this act, be deemed to be directors"; then that no appointment having been made by the shareholders, the appellants continued directors on the footing of the memorandum of association, and that they were in no way affected by the 62nd clause of the articles, which provides "That no shareholder shall be entitled to be a director unless he holds at least 100 shares in the company;" that that did not reach the appellants at all, because that applied only to shareholders, and the appellants held their office of directors under the 61st clause, as being subscribers to the memorandum of association.

Now, I am not of opinion that that argument can be at all maintained—that these gentlemen are not affected by the 62nd clause of the articles of association. I think that by the 60th clause of those articles it became the duty of these appellants themselves to appoint directors, the 60th clause being "The number of directors and the names of

us as directors; but they are paid-up shares under this agreement which we have.' They cut out at one time the lithographed printed forms, and say they are to be taken as paid-up shares, and therefore they are not to pay. Lord Justice Turner uses some strong language as to that; he says, 'I almost call it, for anybody in the position of these gentlemen, a fraud.' So it is one, in truth. They say, 'We have 100 shares to qualify us as directors, and we took them, though unpaid shares, as paid-up shares in return for our zeal and energy in acting as directors.' It would be allowing people to take advantage of their own wrong; it would be keeping the word of promise to the ear and breaking it to the hope, it would be contrary to all justice to strike them off the list, and in the highest degree subversive of every principle of right, if we did not hold these gentlemen liable to pay calls upon these 100 shares. Under these circumstances, I have no doubt that these gentlemen are liable in respect of 100 shares each, including the twenty-one shares, and that they ought to be placed upon the list accordingly."

the first directors shall be determined by the subscribers of the memorandum of association, but so that there shall not be less than three, nor more than nine." So that, as I read these articles, the duty of these appellants was to nominate directors; it was their duty to appoint the directors of the company; and I think that the 62nd clause of these articles was meant to extend, and would extend to directors so appointed; and it having been the duty of these appellants so to appoint, and default having been made by them in so appointing, I am of opinion that they were chargeable in equity as if they had so appointed, and in fact that they must be considered in equity as having appointed themselves, and must be held chargeable accordingly.

The 72nd clause was relied upon on the part of the appellants, that clause being, "That the directors appointed by the subscribers to the memorandum of association and these articles, remain as directors of the company for the term of three years." But I think, so far from assisting the appellants' case, that clause favours the view which I have taken of the articles, for it refers to the directors appointed "by the subscribers and these articles," and shews, therefore, that it was the duty of the appellants to make the appointment. Upon these grounds, therefore, I concur with the opinion of the learned Commissioner. As to the costs which were reserved, and the costs of the present appellants, I am of opinion that the appellants should pay all the costs from the date of the order of reference, but that no costs should be given up to that time, the appellants, in truth, having in part succeeded in the previous contest.

LORD JUSTICE KNIGHT BRUCE.—I think it unnecessary to give any opinion in this case, independently of the proceedings of the 10th of August 1860, and the 15th of January 1861(3). Taking these proceedings and the articles of association together, I agree with the learned Commissioner; and I also concur with my learned Brother's conclusion as to the costs.

Mr. Bacon asked that the official liquidator might take his costs out of the estate, and

Their LORDSHIPS made an order to that effect.

(3) See former report, pp. 57, 58.

Mr. Roxburgh (May 22) applied that the deposit might be paid as part of the costs of the official liquidator; and it was so ordered.

WESTBURY, L.C. }
Dec. 16, 17; } COOKNEY v. ANDERSON.
Jan. 24; }
April 25. }

Jurisdiction — Demurrer — Service out of Jurisdiction — Consolidated Order X., Rule 7.

The jurisdiction of the Court to direct process to be served on a defendant out of the jurisdiction, and to proceed upon such service as if it had been made within the jurisdiction, is confined entirely to such suits as answer the description contained in the 2 Will. 4. c. 33. and the 4 & 5 Will. 4. c. 82; and the 7th Rule of the 10th Consolidated Order, giving power to the Court where a defendant "in any suit" is out of the jurisdiction, to order service upon him, extends only to such suits as are within the above-mentioned statutes.

Consequently, where a suit was instituted in this country against defendants domiciled in Scotland, to administer the trusts of a deed, in the Scotch form, entered into in that country, and relating to land situate there,—Held, that an order to serve a copy of the bill on the defendants in Scotland was beyond the power of the Court, and not warranted by the above-mentioned Rule.

Where it appears on the face of a bill that the suit is one in which the Court is not warranted in exercising jurisdiction against persons resident abroad, it is not necessary that defendants who have been served out of the jurisdiction should move to discharge the order of service. If they demur to the jurisdiction, and for this purpose a general demurrer for want of equity is sufficient, the same reasons that would be effective for discharging the order of service are equally available for the allowance of the demurrer.

This case came on upon appeal from the decision of the Master of the Rolls, reported ante, p. 305.

Mr. Hobhouse and *Mr. W. W. Mackeson* appeared for the plaintiff, the appellant.

Mr. Selwyn and *Mr. Druce*, for the defendants, the respondents.

In addition to the cases and statutes cited in the Court below, the following were referred to :

French v. Davidson, 3 Madd. 396.

Lord Cranston v. Johnston, 3 Ves. 170.

Buchanan v. Rucker, 9 East, 192.

Tulloch v. Hartley, 1 You. & C. C.C. 114.

Beattie v. Johnstone, 8 Hare, 169.

Angus v. Angus, West, t. Hardwicke, 23.

The King of Spain v. Machado, 4 Russ. 225; s. c. 6 Law J. Rep. Chanc. 61.

Russell v. Smyth, 9 Mee. & W. 810; s. c. 1 Dowl. P.C. 929; 11 Law J. Rep. (N.S.) Exch. 308.

Henley v. Soper, 8 B. & C. 16; s. c. 2 Man. & Ry. 153; 6 Law J. Rep. K.B. 210.

Mostyn v. Fabrigas, Cowp. 161; s. c. 1 Smith's Lead. Cas. 607, 5th edit.

Kildare v. Eustace, 1 Vern. 405.

Sheeley v. the Professional Life Assurance Company, 3 Com. B. Rep. N.S. 787; s. c. 27 Law J. Rep. (N.S.) C.P. 233.

Cammell v. Sewell, 29 Law J. Rep. (N.S.) Exch. 350.

The Duke of Brunswick v. the King of Hanover, 2 H.L. Cas. 1.

The Marquis of Breadalbane v. the Marquis of Chandos, 2 Myl. & Cr. 711; s. c. 7 Law J. Rep. (N.S.) Chanc. 28.

Meiklan v. Campbell, 24 Beav. 100.

Mortimer v. Watts, 14 Ibid. 616; s. c. 21 Law J. Rep. (N.S.) Chanc. 169.

Kekewich v. Marker, 3 Mac. & G. 311; s. c. 21 Law J. Rep. (N.S.) Chanc. 182.

Pennell v. Roy, 3 De Gex, M. & G. 126; s. c. 22 Law J. Rep. (N.S.) Chanc. 409.

Hope v. Hope, 4 Ibid. 328; s. c. 23 Law J. Rep. (N.S.) Chanc. 682.
3 & 4 Vict. c. 94.

The LORD CHANCELLOR (April 25) delivered the following written judgment.—

In explanation of my decision in this case, it is necessary to begin by referring to some well-established general principles. The Courts of civil judicature in every country sit to administer the municipal law of that country, and their jurisdiction therefore is limited and territorial. It is true that the duty of yielding obedience to the law of his native country may follow the native subject of that country wherever he resides; for every nation has a right to bind its own natural-born subjects by its own laws in every place. Municipal law, therefore, may provide that judgments and decrees may be lawfully pronounced against natural-born subjects when absent abroad, and may also enact that they may be required to appear in the Courts of their native country even whilst resident in the dominions of a foreign sovereign. If a statutory jurisdiction be thus conferred, Courts of justice in the exercise of it may lawfully cite, and on non-appearance give judgment in civil cases against natural-born subjects whilst they are absent beyond seas in a foreign land. This jurisdiction depends on the statute or written law of the country. Where it is not expressly given it cannot be lawfully assumed. If such a law does not exist the general maxim applies, *extra territorium jus dicenti impune non paretur*. But as international law in private rights is, so far as it has been clearly established, a part of municipal law, it follows that the law of a country, which gives to its municipal tribunals authority to exercise jurisdiction as to persons and things which are beyond the confines of their own territories, may also consistently with international law be extended in certain cases to persons who are not natural-born subjects. For, where it is well settled by the comity of nations that any question of private right falls to be decided by the law of a particular country, it would seem reasonable that the Courts of that country should receive jurisdiction and the power of citing absent parties, though residing in a foreign land. Thus, by way of example, it is generally agreed by European nations that all questions relating to the ownership of land must be decided by the *lex loci rei sitæ*; that all questions relating to the succession or administration of the property of a deceased person, whether testate or intestate, belong

to the Judge of the domicile of the deceased; and that contracts ought to be applied and interpreted by the law of the place where they are made, and where it is intended they should be performed. If, therefore, an action or suit be commenced in the Courts of a particular country relating to a subject, which, by this consent of nations, is appropriated to the law of that country, it may be right, in order to prevent a failure of justice, to give to such Courts the power of exercising complete jurisdiction, and therefore of citing absent parties under the penalty, if they do not appear, of having judgment pronounced against them in their absence. But it is a jurisdiction that should be given and exercised with great caution, and only where it is clear, on the principles of public law, that the judgment against the absent party ought to be treated as binding by the Courts of foreign countries. The right of administering justice is the attribute of sovereignty, and all persons within the dominions of a sovereign are within his allegiance and under his protection. If, therefore, one sovereign causes process to be served on the territory of another, and summons a foreign subject to his court of justice, it is in fact an invasion of sovereignty, and would be unjustifiable unless done with consent, which is assumed to be the fact if it be done in a case where a foreign judgment would by international law be accepted as binding. For, besides the general maxim which I have already cited, and which limits the jurisdiction of every tribunal to its own territory, there is another general rule, *actor sequitur forum rei*; and both are violated when the territorial Judge cites, and pronounces judgment against a person who does not appear, and is absent in another territory. There are, therefore, two grounds on which the legislature of any country is warranted in conferring on its civil tribunals an extra-territorial jurisdiction; one, the right which it possesses of binding universally by its laws the persons who owe to it a natural allegiance, the other, the right which it receives by international law, that is, from the consent of nations, of summoning all persons interested, wherever resident, when the subject of suit arises or is situate within its own territory, and falls to be determined by its own law and the judgment of its own

Courts of civil judicature. In conformity with these principles, the act of 2 Will. 4. c. 33. was framed and passed, by which it was enacted that it should be lawful for the Court of Chancery in England, in any suit relating to land in England, to order its process to be served on a defendant residing within any part of the United Kingdom; and a similar power is given to the Court of Chancery in Ireland relating to land in Ireland. The effect of the subsequent act of 4 & 5 Will. 4. c. 82. is to give to the Courts of Chancery in England and Ireland respectively a limited and guarded power in "suits concerning land in England and Ireland respectively, or concerning any charge, lien, judgment or incumbrance thereon, or concerning any money vested in any government or other public stock, or public shares in public companies or concerns, or the dividends or produce thereof," of directing that process may be served on any defendant in such suit, although resident in any place out of the United Kingdom, and of proceeding upon such service as if it had been made within the jurisdiction.

Previously to these statutes, the Courts of Chancery in England and Ireland had not, nor without these statutes would they now have, any jurisdiction or authority to serve process upon any defendant, whether a natural-born subject or not, who was resident out of the territorial limits of their respective jurisdictions, unless, indeed, the defendant were shewn to have absconded to avoid such service; and it is a jurisdiction which depends on the nature of the suit, and is confined entirely to such suits as answer the description contained in the last-mentioned statutes.

The jurisdiction of the Courts of Common Law was equally limited and territorial as the jurisdiction of the Court of Chancery. Before the Common Law Procedure Act of 1852 the Courts of Common Law at Westminster had no jurisdiction to order or to proceed upon the service of a writ on a defendant residing in a foreign country. By the Common Law Procedure Act of 1852, section 18, it is enacted to the effect that in case any defendant, being a British subject, is residing out of the jurisdiction of the superior Courts in any place, *except Scotland and Ireland*, it shall be lawful for the Court, upon being satisfied by affidavit

that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and that the writ was personally served, and so forth, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to the Court shall seem fit.

The jurisdiction of the Courts of Common Law, therefore, in the case of defendants residing out of the jurisdiction, is much more limited than the jurisdiction of the Court of Chancery. It is confined to British subjects, and to suits founded on a cause of action which arose within the jurisdiction, including breaches, wherever committed, of contracts made within the jurisdiction; that is to say, if the cause of action be a tort or breach of duty, that must have arisen within the jurisdiction; but if it be breach of contract, it is enough if the contract can be shewn to be within the jurisdiction. It is plain, therefore, that the legislature, in conferring this extent of extra-territorial jurisdiction on the superior Courts of Chancery and Common Law, was careful to keep much within the limits allowed by international law, as they are recognized by all civilized nations, and that any attempt by a Court, either of equity or common law, to exercise jurisdiction beyond these statutory limits is simply unauthorized and void. Any rules which a Court of justice may make touching its procedure must, of course, be taken as intended to apply only to such jurisdiction and authority as it has the right to exercise. We are bound to suppose that a Court of justice, in its rules and orders, does not mean to usurp a jurisdiction that does not belong to it, or to transgress the limits which have been set to its authority by the legislature. It cannot be supposed to have intended that which could be illegal and void. By various statutes powers have been given to the Court of Chancery to make rules and orders for regulating its procedure and improving the mode of exercising its jurisdiction. The power given by the Improvement of Jurisdiction of Equity Act (15 & 16 Vict. c. 86.) is perhaps, having regard to the purposes of the act, the most comprehensive power. By it the Lord Chancellor, with the advice and assistance of three of the

other Judges of the Court, is empowered and required "from time to time to make general rules and orders for carrying the purposes of the act into effect, and for regulating the times and form and mode of procedure, and generally the practice of the said Court in respect of the measures to which this act relates," &c., and the powers given by the other statutes are similarly, but not so extensively worded; but it was not the purpose of any one of these statutes, nor is it one of the measures to which they relate, to extend or amplify the jurisdiction of the Court against persons residing in foreign countries. That jurisdiction still remains in the limited form in which it was conferred by the statutes of William the Fourth, which have been stated. A new procedure under an existing jurisdiction may be created by orders, but a new jurisdiction cannot. By the 10th of the Consolidated Orders of the Court, which are now in operation, and by the 7th rule, it is ordered, that "where a defendant in any suit is out of the jurisdiction of the Court, the Court, upon application, supported by such evidence as shall satisfy the Court in what place or country such defendant is, or may probably be found, may order that a copy of the bill under the statute, 15 & 16 Vict. c. 86. s. 3, and, if an answer is required, a copy of the interrogatories, may be served on such defendant in such place or country, or within such limits as the Court shall think fit to direct." This order must be bounded by the limits of the authority from which it emanates, and as the authority exists only with respect to such suits as are defined in the 4 & 5 Will. 4, the word "suit" in the order must be restricted to mean a suit in which the Court has authority and jurisdiction to bind by its decrees and orders persons named as defendants who are resident abroad and have not appeared in the suit. But the persons who may be so bound are the defendants in such suits only as are described in the statutes of 2 Will. 4. c. 33. and 4 & 5 Will. 4. c. 82. It would be absurd to suppose that the authority to make orders for the improvement of procedure involved authority to usurp a new jurisdiction, either in respect of persons or of things, and it is the duty of the Court in all cases to adopt

a construction that does not involve a manifest absurdity. The authority was given for the improvement of the manner of administering the existing jurisdiction. If it could be used to enlarge the territorial extent of the Court's authority, it might be equally used to enlarge the subject-matter of its jurisdiction, and orders might be made enabling the Court to try actions of assault or grant divorces *à vinculo matrimonii*. It is unnecessary to pursue this further; it is in my opinion clear that the word "suit" in the 7th rule of the 10th order must be taken to denote such suits only as are described in the two acts of William the Fourth. It follows that in the present case the order to serve a copy of the bill upon the defendants in Scotland was beyond the power of the Court, and not warranted by the order, according to the interpretation which I have put upon it, inasmuch as this suit, as will be hereafter shewn, cannot possibly be brought within the description contained in either of the statutes of William the Fourth which have been already referred to.

But it is urged in argument that these considerations are immaterial, inasmuch as the defendants have actually appeared under the process, and must therefore be considered as duly convened. But although it is true that the defendants have appeared, and have never moved to discharge the order of service, yet they have demurred to the jurisdiction of the Court; and if it appears upon the face of the bill that the defendants at the time of the institution of the suit were resident in a foreign country, and that the suit does not relate to any of the circumstances on which this Court is warranted in exercising jurisdiction against persons so resident, it follows that the demurrer ought to be allowed for the same reasons on which I hold that the order for service of process ought not to have been made. The only effect of appearance is to throw upon the demurring defendants the obligation of proving, from the statements in the bill itself, that the case is one in which the Court cannot claim a right to exercise jurisdiction. It may be generally true that, whatever may be the nature of the subject-matter, this Court, which acts *in personam*, will, if there be matter of equity, exercise jurisdiction

against a defendant who appears in court and does not challenge the jurisdiction for sufficient grounds apparent upon the record. But if those grounds are apparent, and the defendant appears for the purpose of demurring to the jurisdiction, the same reasons that would be effective for discharging the order of service are equally available for the allowance of the demurrer. And, first, I think it plainly appears upon the face of the bill itself that all the demurring defendants were at the time of filing the bill resident in Scotland, out of the jurisdiction of this Court, and where it must be taken they still reside. And, secondly, the origin of the right to sue is a trust-deed or contract made in Scotland, in the Scotch form, the trusts of which the bill seeks to have administered, and the construction of which, as well as the extent and nature of the rights and liabilities it creates, must be ascertained and determined wholly by the law of Scotland. The principal part of the property to which this deed relates is real estate situate in Scotland, the right to which this suit seeks to determine, and further, to have a *forum concursus* set up in this Court, to which all the creditors of the Scotch company shall resort, obliging them to quit the Courts of the country where they reside, and by the laws of which their rights must be determined, and to bring their rights and claims to the bar of a foreign tribunal. The law by which every question in the cause would have to be determined is Scotch law, of which this Court knows nothing, save as it may be informed of it by the testimony of witnesses; and acting on the principles of the recent act of 24 Vict. c. 11, it may have to make frequent reference to the Courts of Scotland, to whom the whole subject naturally belongs, and by whom it may be conveniently determined. It is scarcely possible to imagine any combination of circumstances in which, more than in this case, the Court would be forbidden to exercise jurisdiction by every principle of law, as well as every consideration of expediency.

By the Common Law Procedure Act authority is not given to serve parties who are resident in Scotland or Ireland, and for the plain reason that in such cases the plaintiff may resort to the Courts of those countries; but this bill is framed on the

very opposite of the established rule, *actor sequitur forum rei*. Every decree or order which the Court might make must be carried to Scotland to be enforced and have practical operation given to it; but the Courts of that country could not be required to be auxiliary to any such purpose, or in any manner to recognize the judgment of this tribunal. I am therefore bound by every consideration to give no aid to the plaintiff in this suit. I concur in the decision of the Master of the Rolls, and dismiss this appeal with costs.

KINDERSLEY, V. C.
Jan. 30.

In re THE LONDON AND
NORTH-WESTERN RAIL-
WAY COMPANY'S ACT,
1846, AND THE RUGBY
AND STAMFORD RAIL-
WAY ACT, 1846, *in*
re THE SETTLED ES-
TATES OF BARONESS
BRAYE.

Lands Clauses Consolidation Act—Costs of Payment out of Court—Separate Appearance of Tenants in common in tail and Parties having Charges.

A railway company took lands which stood limited to a tenant for life, with remainder, subject to a charge of 20,000*l.*, to four sisters as tenants in common in tail, and paid the purchase-money into court under the Lands Clauses Act. A petition was presented for payment out of court to the owner of the charge, in part satisfaction thereof; and upon the petition, the tenants in common in tail, and other parties having charges, appeared separately:—Held, that the company were liable to pay the costs of all parties.

This was a petition, asking for the sale and payment out of court of the proceeds of 3,708*l.* 14*s.* 3*d.*, 3*l.* per cent. Consolidated Annuities arising from the investment of monies which had been paid into court under the provisions of the Lands Clauses Consolidation Act, in respect of lands taken by the London and North-Western Railway Company, under the London and North-Western, and Rugby and Stamford Railway Acts, such lands being parts of large estates in Northamptonshire and Leicestershire. Under previous indentures of settlement,

and an indenture of re-settlement, dated the 11th of October 1832, and the will of Robert Otway Cave, sen., deceased, the estates in question, at the time when the lands were taken, stood limited to the use of the late Baroness Braye for life, with remainder, subject (amongst other charges) to a charge of 20,000*l.* in favour of General Sir De Lacy Evans, to her four daughters, Anne Richardson, Catherine Countess Beauchamp, Maria Otway Cave and Henrietta Wyatt Edgell, as tenants in common in tail. The Baroness Braye, to whom the income of the fund in court had previously been ordered to be paid during her life, having died in February 1862, the present petition was presented, by the Rev. Edgell Wyatt Edgell and his wife the Hon. Henrietta Maria (one of the devisees in common), for the purpose of dealing with the *corpus* of the fund. The petition prayed that the 3,708*l.* 14*s.* 3*d.* might be sold and the proceeds applied in payment of Sir De Lacy Evans's charge; and that the company might pay the costs of all parties. Upon this petition, the representatives of Baroness Braye, the other three tenants in common, Sir De Lacy Evans and other parties having charges, appeared by counsel.

Mr. Jessell appeared in support of the petition.

Mr. Karslake, for Sir De Lacy Evans.

Mr. Bedwell, for the representatives of the Baroness Braye, who were entitled to an apportioned part of the dividends to the date of her decease.

Mr. F. O. Haynes, for the Rev. Cook Otway, a trustee for raising portions for younger children under an indenture of 1793.

Mr. Alfred Baily, Mr. Amyot, Mr. Rowcliffe and Mr. Vaughan Hawkins, for the other tenants in common and the other parties having charges.

Mr. Speed, for the London and North-Western Railway Company, contended that the principle enunciated in the case of *Melling v. Bird* (1), which was recognized subsequently in *Haynes v. Barton* (2), governed the present case. That principle was, that where parties were entitled to aliquot shares, some arrange-

(1) 22 Law J. Rep. (N.S.) Chanc. 599.

(2) 1 Dr. & Sm. 493; s.c. 30 Law J. Rep. (N.S.) Chanc. 804.

ment should be made that those who were in the same interest should appear together, to save the necessity of separate service and separate appearance, which so greatly and so unfairly augmented the costs; and if that was not done, the company were not liable to pay such extra costs, because such a course of proceeding must be considered as oppressive.

Re Picton's Estate, 3 W. Rep. 327.

Wilson v. Foster, 26 Beav. 398; s. c. 28 Law J. Rep. (N.S.) Chanc. 410.

Mr. Jessell, in reply, referred to the 78th section of the Lands Clauses Act, and argued that in such a case as this, there was a right to appear separately. Wherever any party could come alone, as he undoubtedly could here, to have his share, he was entitled to appear separately, and the principle contended for did not apply.

KINDERSLEY, V.C.—With regard to the question whether these four ladies should have appeared together or not, my opinion is that there is nothing oppressive, as regards the company, in their appearing as they have done, separately. This is a case to which the principle of *Haynes v. Barton* applies, and the case of *Melling v. Bird* does not. *Prima facie*, a railway company must pay the costs of all parties properly served for the purpose of getting the order asked for; but there is the exception, quite consistently with this, that if the parties who might and ought to have appeared together, oppressively and vexatiously appear separately and thereby increase the costs, the Court will not give them those costs as against the company, and the only question is whether this case comes within the exception: it appears to me that it does not, and therefore the order must be made as prayed.

ROMILLY, M.R. }
Nov. 22, 24. } FRYER v. WARD.

Will—Trade—Right to purchase Goodwill—Specific Bequest.

A testator authorized the trustees of his will, in case his nephew F. and his clerk C. should elect to carry on his business, to permit them so to do, without any payment

for goodwill, upon their giving bond for payment of the value of the stock-in-trade, &c. by half-yearly instalments extending over not more than ten years:—Held, upon F. and C. electing to carry on the business, that there was a specific bequest to them of the goodwill, and that upon making provision for payment of the testator's debts and the value of the stock-in-trade, &c., they were entitled to the business from the time they made their election.

The business was carried on upon premises partly freehold of the testator and partly leasehold, and before any lease of the former was granted to F. and C. notice was given to take the premises under the powers of an act of parliament:—Held, that F. and C. were not to be regarded as having become entitled to a lease of the freehold portion of the premises, and that the whole compensation in respect of the value thereof (irrespective of value of goodwill) belonged to the testator's estate.

Semble—A bequest of the goodwill of a business carried on by the testator on his own freehold, entitles the legatee to such limited occupation only of the premises as may be necessary to enable him to obtain the benefit of his bequest, but not necessarily to have a lease of the premises.

William Fryer, for many years previous to his decease, carried on the business of a tobacco-manufacturer at Smithfield Bars, in which for some years he had been assisted by his nephew, Christopher Fryer, and John Henry Coultman, his clerk.

By his will, dated the 17th of November 1861, William Fryer gave his widow Mary Fryer 400*l.* a year for life, and he charged it upon his real and personal estate, and subject thereto he gave such real and personal estate to Richard Danvers Ward and Thomas Mitchell Fryer and his wife, their executors, administrators and assigns, upon trust to sell all his real and personal estate, and thereout to pay 100*l.* a year to his mother, and to invest the clear proceeds in securities authorized by law, and out of the income, and, if necessary, the principal, to pay the annuities, and then to pay to his nephew Christopher 200*l.*, and to accumulate the excess of income; and on the death of his wife to divide the whole of the residue and accumulations amongst his

(the testator's) nephews and nieces living at his wife's decease.

By a codicil, dated the 19th of November 1861, the testator, after reciting that he had made no provision for the carrying on and disposal of his business, empowered his trustees to postpone the sale and disposition of all or any part of his real and personal estate for so long a time as they should think fit, with full power to let the same or any part thereof for any term or terms of years, upon such conditions as they should think proper, and for that purpose to dispose of all the stock-in-trade of his business as they might think best without being in any way responsible for any liability or loss occasioned thereby; and he expressly authorized them, in case his nephew and clerk, Messrs. Fryer and Coultman, should elect to carry on the business, to permit them so to do without any payment for goodwill, upon their giving his trustees their joint and several bond for the amount and value of his stock-in-trade or such part thereof, and of other his personal estate, as they might require for the carrying on the business on their own account, such amount to be ascertained by arbitration in the usual way, and such bond to be for payment of the money by equal half-yearly instalments, extending over a period not exceeding ten years, bearing interest at the rate of 5 $\frac{1}{2}$ per cent. per annum, the first half-yearly instalment not to become due until the expiration of eighteen months after his death.

The testator died on the 20th of November 1861.

On the 15th of January 1862, Messrs. Fryer and Coultman made their election to carry on the business on their own account, and gave the trustees notice to that effect, and they thenceforward carried on the business on that footing, remaining in possession of the business premises.

On the 12th of May 1862 the corporation of the city of London gave the executors notice that they required the business premises for the Metropolitan Meat Market, established by the 23 & 24 Vict. c. xciii.

This suit was instituted, on the 5th of June 1862, by two nieces and a nephew of the testator, against the executors and

the widow, for an administration of his estate; and, on the 7th of June 1862, a decree was made directing the usual inquiries, and also an inquiry what real or leasehold estates the testator was seised of or entitled to at the time of his death, and what incumbrances affected the same, and it was ordered that the estates should be sold. It also directed an inquiry what was fit and proper to be done with respect to the business carried on by the testator, and the executors were to be at liberty, with the approbation of the Judge, to make any arrangement for the carrying on or winding up of such business, having regard to the provisions of the codicil.

An inquiry was also directed as to what was proper to be done with reference to the notice which the executors had received from the city of London, requiring possession of the business premises and the claim for compensation therein referred to; and it was ordered that the executors should be at liberty to settle such claim for compensation, with the approbation of the Judge.

On the 26th of June 1862, the plaintiffs and the trustees took out a summons, asking that Messrs. Fryer and Coultman might elect to take the business upon the terms and conditions of their paying 7,800*l.* on account of the book-debts due to the testator at his death, and the value of the plant and machinery, &c., and the stock-in-trade, and also such further sums, not exceeding the amount of the debts and the value of the plant and machinery and stock-in-trade, as might be required for the discharge of the debts and liabilities of the testator and the costs of suit, and that they might, within fourteen days after the valuation of the plant, machinery, &c., and stock-in-trade, give their joint and several bond for the residue of the money to arise from the same sources, payable by instalments of 500*l.* a year, with 5 $\frac{1}{2}$ per cent. interest; and in default of their accepting the terms offered, or failing to comply with them, it asked for the appointment of a receiver and manager, and for a sale of the business and the goodwill, the plant and machinery, &c., and the stock-in-trade. It then asked for the appointment of a valuer, and for leave to send in to the corporation of the city of London a claim for compensation for the business premises on the basis of

the valuation which should be made of them.

This summons was served on Messrs. Fryer and Coultman, and on the 27th of January 1863 they took out a cross-summons; and, on the ground of their having elected to take and carry on the business, they asked the Court to determine what estate or interest they were entitled to in the freehold and leasehold premises on which the business was carried on, as incident to the right to the business without payment for the goodwill, and also in what manner the claim for compensation for the premises and goodwill should be made against the corporation of the city of London pursuant to their notice requiring possession.

Mr. Selwyn and Mr. C. C. Barber, for the plaintiffs.—The executors had offered the business and the stock-in-trade to Messrs. Fryer and Coultman on terms they considered reasonable; as these had been refused, the business, together with the goodwill, ought to be sold to discharge the debts and liabilities of the testator.

Mr. Osborne, for the trustees and executors.

Mr. Baggallay and Mr. Hardy.—Messrs. Fryer and Coultman having elected to carry on the business; they were, therefore, legatees of the goodwill and owners of the business, and no act of the executors could deprive them of the benefit. The Court, therefore, would interpose and settle the differences which had arisen, not only with respect to the business, but also as to the valuations directed to be made by the codicil; and in doing this, it would secure to them the value of the goodwill, either by giving them a lease of the premises or by fixing a principle upon which the compensation should be paid.

Churton v. Douglas, Johns. 174; s. c.

28 Law J. Rep. (N.S.) Chanc. 841.

Blake v. Shaw, Johns. 732.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS.—If the codicil gives Messrs. Fryer and Coultman a power to elect to take the business of the testator if they think fit to carry it on, and they make the election and accept the gift, then it is not in the power of the executors to withhold their consent to sell the property to them; and if the executors have entered

into any agreement to sell the property to strangers, that cannot in any respect vary the rights of the parties to whom the power of election is given. If the personal estate of the testator is amply sufficient to pay all the debts of the testator, and there is no question respecting it with any of the creditors, and Messrs. Fryer and Coultman have power to take the business at a sum to be agreed upon between them and the executors, the latter cannot prevent them from obtaining the benefit given to them; they cannot refuse to assent to a sale; they cannot refuse to name an arbitrator: if they do the Court will fix the price to be paid, even though the will directed that the sum to be paid should be fixed by an arbitrator. Messrs. Fryer and Coultman had a right to the business as soon as they made the election; from that time the business became theirs, and after that time the executors had no other function or duty to perform, except that of ascertaining the sum to be paid for what Messrs. Fryer and Coultman desire to take of the plant, stock-in-trade, &c.; and if they and the executors cannot agree upon appointing the arbitrator then the amount must be fixed by the Court.

Is that affected by there being a great number of unsecured debts, for the payment of which it may be necessary to apply all the property belonging to the testator? Debts, no doubt, must take priority over a specific legacy; there is no doubt also that the executors are the parties to determine whether the debts are such that they will require the sale of the specific legacy; still there is another right belonging to the specific legatee: he may claim a right to take the specific legacy and secure the payment of all the debts, and the Court will allow him to take his specific legacy with all the benefits arising from it from the date of the death of the testator. All he will have to do when he provides for the debts which remain unpaid will be to make such a provision as the Court shall approve of, if the parties themselves cannot agree. If upon the election of the legatees to take the legacy, the amount of the property to be taken is not ascertained until a subsequent period, the only difference is that the profits belong to them from that period, and they must pay interest on the purchase-money from the time they elected to take

it; and if the testator has fixed the interest at 5*l.* per cent., as he has done in this case, then that is the amount.

The executors have full power to let the property or any part thereof upon such terms as they may think best, without being in any way responsible for any liability or loss occasioned thereby, but this must be controlled by circumstances. The words of the codicil confer a benefit upon Messrs. Fryer and Coultman, and give them a right of pre-emption to the business, which, if they think fit to exercise, the executors are not at liberty to refuse; the value must then be fixed; they will then be entitled to the profits from the time they elected to take it, and they must pay interest upon the amount fixed as the value from that period, not of course upon giving them the ten years mentioned in the codicil, because the rights of the creditors intervene and prevent it, so far, from being carried out; and also impose an essential condition on the specific legatees that they must, to the extent of the value of the property taken, provide for the rights of the creditors, who have nothing to do with the questions between the executors and the specific legatees.

As soon, therefore, as Messrs. Fryer and Coultman elected to take the business it was theirs, and upon their paying the purchase-money, with interest at 5*l.* per cent., and providing satisfactorily and amply for the payment of all the debts of the testator and of the costs of all the persons to the suit, they will become absolutely entitled not only to the profits, but also to all the benefits of the business from the 15th of January 1862, the time they declared their intention to carry it on for their own benefit.

Mr. Selwyn.—One point remains which is not quite concluded by the judgment. Messrs. Fryer and Coultman are in possession of the freehold estate; on what terms are they to retain it? The business is carried on partly on the freehold and partly on the leasehold estate, and the corporation have given notice of their intention to take the freehold and leasehold estate compulsorily, and Messrs. Fryer and Coultman claim to be entitled to so much of both when sold as represents the goodwill.

The MASTER OF THE ROLLS.—They cannot have a lease of the freehold. But whatever compensation is to be paid for the goodwill they will be entitled to it, as the business is theirs and the goodwill belonging to it. The freehold, however, is the testator's, and as it is unlet and the corporation required it before any lease was granted, the testator's estate will be entitled to the whole purchase-money to arise from the freehold, the same as any other proprietor whose freehold is occupied for the purposes of trade without any lease or agreement for a lease. This question, however, as also the question of value to be fixed for the plant, stock-in-trade, &c., must be settled in chambers (1).

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LORDS JUSTICES.

1862.

Dec. 19.

1863.

June 5.

} *In re BLACKMORE, late a person of unsound mind.*

Lunatic—Recovery—Suspension of Commission—Supersedeas.

A lunatic petitioned for the supersedeas of a commission, under which he had been found lunatic, his petition being supported by medical evidence that he had recovered. The committee opposed the petition, and filed his own affidavit and those of medical witnesses. The Lords Justices had several interviews with the lunatic. Ultimately they ordered all proceedings under the commission to be suspended for a stated period, giving the lunatic his personal liberty and the full possession and control over his property in the mean time; with liberty to apply. At the expiration of the period the commission was superseded.

This was the petition of Mr. Walter Blackmore, a lunatic, praying that the commission under which he was found lunatic might be superseded, and that he might be discharged from custody. It was supported by the affidavits of several medical witnesses, and was opposed by the committee of the person, who filed his

(1) In the result separate claims for compensation were made by the executors in respect of the value of the freehold, and by F. and C. in respect of goodwill, &c.

own affidavit and the affidavits of medical witnesses. From time to time the lunatic had lengthy interviews with, and was examined by, the Lords Justices.

Mr. W. M. James and Mr. Sheffield supported the petition.

Mr. Fischer, for the committee in opposition, cited the following cases:

Ex parte Holyland, 11 Ves. 10.

In re Dyce Sombre, 1 Mac. & G. 116.

LORD JUSTICE TURNER.—The present application is one of those to which Lord Eldon's remarks in *Ex parte Holyland* (1) apply, namely, that "there is no part of the duty which occurs in the exercise of the jurisdiction in lunacy more unpleasant and requiring greater caution than that of determining when a commission should be superseded; for although you may upon evidence arrive at a safe conclusion establishing lunacy, it is very difficult to determine when the mind is restored, depending upon the circumstance whether the party is led to those topics upon which it was affected." It may be that the recovery is apparently perfect so long as the restraint is continued; but the moment the restraint is removed the disorder again appears. It must therefore be a subject of anxious consideration whether the recovery will be likely to continue after the restraint has been removed. Notwithstanding the implicit confidence which the Court places in the medical reports produced, and the favourable impression conveyed by the personal interviews which the Court have had with the petitioner, I feel that we ought not to go so far at present as to supersede the commission, but that it is our duty to see what will be the effect of removing the restraint, and whether the removal of it will be attended with a recurrence of the disease. This course is one which is borne out both by reason and authority. The authorities in favour of it are the judgments of Lord King in *Ex parte Ferrars* (2); of Lord Hardwicke, in *Sir William Brooke's case*, in 1737; of Lord Loughborough, in *Errington's case*, in 1798; of Lord Eldon, in *Stock's case*, in 1813; and of Lord Lyndhurst and Lord Cottenham, in *Dyce Sombre's*

case, in 1844 and 1847 (3). After much reflection upon the subject, I have come to the conclusion, in accordance with those authorities which have been furnished to the Court by the courtesy of Mr. Wilde (4), that the Court ought not at once to supersede the commission, but that it ought to make an order to suspend all proceedings under it until further order, and that Mr. Walter Blackmore be at liberty to apply for further relief upon his petition to the Lord Chancellor or to the Lords Justices, in Trinity Term next, and that in the mean time he should have the management and control of his business and estate, without the control or interference of the committee of his person, with liberty to apply in the meanwhile. The costs of the petitioner and of the committee will be paid out of the fund in court.

LORD JUSTICE KNIGHT BRUCE.—I also have given this case my most earnest consideration, and have come to the same conclusion.

June 5.—This day the commission was superseded in the ordinary form.

KINDERSLEY, V.C. }
Feb. 21. }

Re SUTTON.
SUTTON v. REES.

Lien—Landlord of Leaseholds—Receiver—Sale of Furniture.

A receiver in a legatee's suit, advertised furniture, in a leasehold house, for sale. The superior landlord claimed rent, but took no other step, and the furniture was sold:—Held, that the landlord had no lien on the proceeds of the sale, but must come in with the other creditors.

This was an adjourned summons from chambers. The suit was instituted for administration by legatees under a will, part of the property of the testator being a leasehold house in which was certain furniture. A decree had been made and a receiver appointed, who advertised the furniture for sale, upon which the superior landlord applied to the receiver, through

(1) *Ubi supra.*

(2) *Moseley's Reports*, 78.

(3) *Ubi supra.*

(4) *The Registrar in Lunacy.*

his solicitor, for the 47*l*. rent due to him; but the next day after such application the furniture was sold, the landlord having taken no other step. After the sale, the landlord took out a summons, that notwithstanding the presence of the receiver, he might be allowed to distrain for the rent, and the summons having been adjourned into Court upon a statement of facts (which it was agreed should be taken as if the landlord had been examined *pro interesse suo*), it now came on for hearing.

Mr. Speed, for the landlord, argued that he had an equity, by reason of his right to distrain, which was interrupted by the receiver. That he also had a right of action against the executrix either *de bonis testatoris* or *de bonis propriis*, and could compel her to repay; and she would have a right over out of the assets, and the landlord had therefore a lien out of the proceeds of the furniture in the hands of the receiver—

Doe v. Porter, 3 Term Rep. 13.

1 *Williams on Executors*, p. 600.

Mr. Kay, for the plaintiff.—The landlord has no lien on the funds in the hands of the receiver in priority to any other creditor. He waited until the sale had taken place, and then did what he ought to have done in the first instance: and thus having lain by, he could only come in with the other creditors.

Mr. Speed was heard in reply.

KINDERSLEY, V.C.—In this case the landlord, except by virtue of his power of distress, stands in no better position than any other creditor, but he may be in a better position by reason of that right; and the question is, whether what has taken place puts him in the same position as if he had actually distrained and seized the furniture and effects; if not, he is an ordinary creditor of the testator entitled to be paid in the due course of administration. Suppose there had been no receiver, the executrix *quæ* executrix might have been tenant, and the landlord would have had the option of suing her in her individual capacity or as executrix, and might have recovered against her in either capacity. But that would have given him no lien on any particular portion of the testator's estate. But if instead of suing her he had distrained, and the goods had been seized, then he would have

had a right to be paid the rent due to him; but unless he did so he would have no lien on any particular portion of the goods, but would only be an ordinary creditor, except that he has the right of distress, by reason of which he may place himself in a better position. The appointment of the receiver does not in the least affect the rights of the landlord; but the Court would not allow him to exercise them without leave first obtained; and if he desired to distrain he should have issued the distress warrant, with directions not to execute it without further instructions. He should then have come to the Court, and asked for authority to distrain, notwithstanding the presence of the receiver; and beyond all doubt the Court would have given him that authority, there being no doubt as to the fact of his being the landlord. There is nothing in this state of facts to indicate an intention to issue a distress, and the application to the receiver is the same as if (there being no receiver) he had applied to the executrix. It amounts to nothing like a distraint or an act by which a lien is created on the property. At this time the advertisement had been issued; whether it was known to the landlord or not does not appear, and the receiver in selling only did his duty. After the property was sold it was no longer capable of being the subject of a distress; and as it could no longer be seized, the landlord now applies and asks, in substance, that the proceeds of the sale may be *first* applied in paying the amount of rent due to him; and that depends upon whether he has a lien on the property of which it is the proceeds. It appears to me that he has none. He might have had a lien if he had put himself in a proper position, by getting leave of the Court, and thus acquiring a lien. Perhaps by applying to the receiver he might have got paid, and therefore he has rather been guilty of want of vigilance than any omission. If, there being no receiver, he had given notice to the executrix, and she had sold without paying him, that would have left the landlord in the same position as he is in now; and my opinion, therefore, is that he has no right to be paid in priority to other creditors, but must come in in the ordinary course.

LORDS JUSTICES. }
May 25. } *In re BIRTLE'S ESTATES.*

The Settled Estates Act (19 & 20 Vict. c. 120.)—Time at which Property must stand limited by Way of Succession, in order that the Act may apply.

Property in the County Palatine of Lancaster was, by will, limited to trustees during the life of the longest liver of the testator's wife and five children; and from the death of such longest liver to the respective issue then living of his children, in undivided fifth shares, as tenants in common in fee, with cross limitations. The longest liver of testator's wife and five children died in 1861, when the property vested absolutely in fee in undivided shares in numerous persons. All these persons, several of whom were still infants, concurred in an application for an order under the Settled Estates Act to sell the property; but the Vice Chancellor of the County Palatine thought the property had ceased to be "settled" within the meaning of the act, and that he had no power to make an order. The Lords Justices agreed, considering that, as when the application was made the particular limitations were spent and the property had vested in fee, the case was not within the act.

The time for ascertaining whether hereditaments stand limited by way of succession so as to bring them within the operation of the Settled Estates Act, is when application is made to the Court.

Nathaniel Birtle, by his will, dated in 1826, devised his real estate to trustees and their heirs; as to part thereof, upon trust for sale, and as to the rest of his real estate, to the use of the trustees and their heirs during the lives of testator's wife and children, James, Joseph, Nathaniel, John, and Mary, and the life of the longest liver of his wife and said children, upon trusts which were co-extensive in duration with the life estate so limited to the trustees; and after the decease of the longest liver of testator's wife and said children, to uses limiting (in substance) an undivided fifth share of the residuary real estate to such children of testator's said son James as should be living at the death of the longest liver of testator's wife and said children, and such issue as should then be living of James's then deceased

children, as tenants in common in fee, another one-fifth in like manner to Joseph's issue, another one-fifth in like manner to Nathaniel's issue, another one-fifth in like manner to John's issue, and another one-fifth in like manner to Mary's issue—with a limitation by way of cross-remainders as to the share or shares intended for the issue of any of testator's said children whose issue should have failed at the death of the longest liver of testator's wife and said children.

Testator died in 1831. His son Nathaniel was the first of testator's children who died; and he died without having been married. Testator's son James was the longest liver of testator's wife and children, and died in 1861; and as at his death there were living issue of each of testator's four children, James, Joseph, John, and Mary, the result was that testator's residuary real estate then vested absolutely, in undivided shares, in numerous persons; of whom ten then were, and, at the time of the application in this matter, still remained, under age.

The residuary real estate being within the County Palatine of Lancaster, an application, concurred in by all the persons interested, was made to W. M. James, Esq., the Vice Chancellor of the County Palatine, to authorize a sale under the Leases and Sales of Settled Estates Act, 19 & 20 Vict. c. 120, which came into operation in 1856. His Honour was of opinion that the case was not within the act, and on that ground declined to make any order; but, having regard to the apparent conflict between the reported judgments (referred to below) he authorized the matter being mentioned to the Lords Justices for obtaining their opinion on the point.

Mr. Lake now mentioned the matter, and argued thus in support of the application.—

In section 1. of the act (1) the expressions "*stand limited to or in trust*"

(1) Section 1. of the act is as follows: "The word 'settlement,' as used in this act, shall signify any act of parliament, deed, agreement, copy of court-roll, will or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure, or any estates or interests in any such hereditaments stand limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively;

for any persons by way of succession" and "are the subject of a settlement" would primarily import present time, and refer to the passing of the act—though, the act being a remedial one, they would no doubt be held equivalent to "do or shall stand limited," &c., and "are or shall be the subject," &c. In this case, when the act passed, it could certainly be affirmed of the property in question it does "stand limited" by way of succession, and it is the subject of a settlement, and is within the operation of the act. Vice Chancellors Wood and Stuart appear to have put conflicting interpretations upon the act, as to the time when, for the purposes of the act, property must "stand limited"; the former referring it to the date of the application under the act, and the latter referring it to the date of the instrument of settlement. In *Re Thompson's Settled Estates* (2) Wood, V.C. says in his judgment (p. 422): "At the time when the petition was presented one of these four-fifths was not settled in any shape, having become vested in three persons in fee simple. This fifth, therefore, was not within the provisions of the act at all." But, in the subsequent case of *Re Goodwin's Settled Estates* (3), in which *Re Thompson's Settled Estates* was cited, Stuart, V.C. said, that the question whether property is "settled" within the meaning of the act must be determined with reference to the state of things which existed at the date of the instrument. The language of Vice Chancellor Stuart's judgment seems equivalent to holding that property once in settlement is always in settlement, for the purposes of the act; but it is not necessary to go to that extent; and it is submitted that Vice Chancellor Stuart's construction, if taken with a qualification to be mentioned, is the proper one. The 27th section of the act (4) affords a clue;

and the term 'settled estates,' as used in this act, shall signify all hereditaments of any tenure, and all estates or interests in any such hereditaments which are the subject of a settlement; and for the purposes of this act a tenant in tail, after possibility of issue extinct, shall be deemed to be a tenant for life."

(2) Johns. 418.

(3) 3 Giff. 620.

(4) Section 27. is as follows: "Nothing in this act shall be construed to empower the Court to authorize any lease, sale or other act beyond the extent to which, in the opinion of the Court, the

and the proper construction, having regard to that and other sections—as section 15. (5) — is that, where once the property does "stand limited" by way of succession, the Court has power to authorize a sale at any time within such period as a sale might have been made under a power for the purpose given by the settlor in the instrument of settlement. In the present case, as the property did at the passing of the act "stand limited" by way of succession, it is clear that the testator might have given a valid power of sale to be exercised over the entirety of the property, during the minority of any of the now infants interested in the property; and therefore the Court has jurisdiction now to authorize a sale under the act.

LORD JUSTICE KNIGHT BRUCE—I am of opinion that as, when this application was made, the particular limitations were spent, and the property had absolutely become vested in fee simple, the case does not come within the act. To hold otherwise would be to hand over the parties to a furnace of litigation.

LORD JUSTICE TURNER—I am of the same opinion, as indeed I intimated by the question I put when the case was opened. I consider that the time for ascertaining whether the act applies—whether the hereditaments "stand limited" by way of succession within the meaning of the act—is when the application is made to the Court.

LORD JUSTICE KNIGHT BRUCE.—Were we to decide according to the ingenious argument which has been addressed to us, we should probably involve the parties in endless litigation.

same might have been authorized in and by the settlement by the settlor or settlors."

(5) The 15th section is as follows: "On every sale or dedication to be effected as hereinbefore mentioned the Court may direct what person or persons shall execute the deed of conveyance, and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise as the Court shall direct."

ROMILLY, M.R.
Dec. 12, 15;
Jan. 13.
LORDS JUSTICES.
Feb. 26, 27, 28;
May 21.

PRICE v. SALUSBURY.

Agreement — Parol Evidence — Specific Performance.

The owner of an estate, consisting of freeholds, leaseholds for years, and leaseholds for lives, agreed to demise the same in consideration of receiving a year's rent in advance. He signed notices requesting the tenants to attorn to the lessee; but he did not, in the first instance, clearly understand the boundaries, limits and rental of the several estates. The agreement was subsequently added to by a further agreement and by verbal communications, and a sum for the year's rent was paid in advance. These arrangements still left the subject and the terms and conditions indefinite, and difficulties arose in carrying the agreement into effect. Upon a bill by the lessee for specific performance, — Held, by the Master of the Rolls, that there had been no part performance which had reference to the agreement alleged; that it was too vague and uncertain to be enforced; and that the bill must be dismissed; but, under the circumstances, without costs.

An appeal to the Lords Justices was dismissed, dissentiente Lord Justice Turner; Lord Justice Knight Bruce being of opinion that the defendant was not sufficiently advised respecting the terms of the agreement to justify a decree for specific performance against him.

If a bill is filed to enforce a parol agreement, on the ground of part performance, there must be no uncertainty; the terms of the agreement must be plainly and distinctly shown, and it must also be shown that the part performance referred to them — per Master of the Rolls.

Where there has been part performance of a written agreement as varied by parol, and the non-performance of the agreement as so varied would, in the eye of the Court, amount to a fraud, evidence must be received to shew what the agreement as varied really was; and the authorities establish that in cases of agreements part performed, parol evidence is admissible to add to or alter a written agreement, and that a specific

performance of the agreement as varied may well be founded on such evidence — per Lord Justice Turner.

This was a bill for specific performance by William Price against Sir Charles John Salusbury, Bart. The property which formed the subject-matter of the litigation was thus described in the first paragraph of the bill:

"The defendant is the owner of a manor, farm and lands in the parishes of Bishton, Llanbeddoe, Llandevaud, Llandewi, and Llanmartin, in the county of Monmouth, comprising in the whole 700 acres, or thereabouts, of which lands all, except a very few acres, are situate in the parish of Bishton, and the defendant is and was, on the 23rd day of June 1859, entitled to such lands for the terms and estates following, (that is to say), as to 498 a. 2 r. 11 p., for the residue of a term of twenty-one years from the 30th day of April 1846, created by an indenture of lease, dated the 13th day of February 1847, and made between the Bishop of Llandaff of the one part and the defendant of the other part, at a small rent; and as to the manor of Bishton, and the lands thereto belonging, all situate in the parish of Bishton, the exact acreage of which the plaintiff is not aware of, for the residue of a term of twenty-one years from the 30th day of April 1846, created by an indenture of lease, also dated the 13th day of February 1847, and made between the said Bishop of Llandaff of the one part and the defendant of the other part; as to 112 acres or thereabouts, of which the greater part are in the parish of Bishton, and the residue in the parish of Llanmartin, for an estate during the natural lives of the Rev. Edward Bankes, Miss Caroline Alston and Mary Phillips, and the life of the longest liver of them, which estate was created by a lease, dated the 6th day of July 1838, and made between the Bishop of Llandaff of the one part and the defendant of the other part; and as to certain pieces of land, containing 28 a. 1 r. 20 p., or thereabouts, situate in some or one of the said parishes, but which the plaintiff is not able to state; as to part for the residue of the said term of twenty-one years, and as to the remainder for the said three lives, the said lands having been allotted under an Inclosure Act in re-

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spect of the said leaseholds for lives and years respectively, held under the said Bishop; and as to the residue of the said lands in the said parishes, but which were of small extent, and were intermixed with the said leasehold lands, for an estate of fee simple; and such fee-simple lands are hereinafter referred to as the 'freehold lands,' and such leasehold land for lives and years as the 'leasehold lands'; and the whole of the said leasehold and freehold lands were, on the 23rd day of June 1859, in the occupation of the plaintiff and the other tenants named in the list mentioned in the third paragraph of the bill, with the exception of cottages and chief rents and poor allotments, the names of the tenants of which are not mentioned."

On the 23rd of June 1859 an agreement, stated fully in the judgment of the Master of the Rolls, was entered into between the plaintiff and the defendant, by which, proceeding upon the mistaken assumption that all the property referred to in the list set out in the third paragraph of the bill, was leasehold for years, held under the Bishop of Llandaff, the defendant agreed to let to the plaintiff all and every the leasehold premises held by the defendant under the bishop "for and during all the rest, residue and remainders then to come and unexpired of and in the several term and terms of years in the same several and respective premises" at the yearly rent of 739*l.* 19*s.* 9*d.*, one year's rent being made payable in advance.

The 739*l.* 19*s.* 9*d.* was arrived at by adding 100*l.* to the supposed aggregate rental of the premises intended to be let to the plaintiff, which, as shewn by the list, was 639*l.* 19*s.* 9*d.* Subsequently it was ascertained that mistakes had been made in computing the rental, and a new list of holdings, shewing an aggregate rental of 710*l.* 19*s.* 9*d.*, was prepared; and on the 9th of December 1859 the plaintiff paid to the defendant 810*l.* 19*s.* 9*d.*, and the defendant gave him a receipt as follows: "Received of Mr. Price his rent in advance for the year 1860 of the leasehold property in different parishes. Charles Salusbury. Dec. 9, 1859. 810*l.* 19*s.* 9*d.*"

On the 26th of December 1859 (the nature of the holdings having been discovered by the plaintiff), the defendant, at

the request of the plaintiff, signed the following memorandum:

"26th December, 1859.

"This is to certify that the lifehold property in different parishes, and the freehold property in the parish of Bishton, belonging to me, is to be held by William Price at the same rent per acre per year in proportion of the present rental of the whole, after the term of years lease is expired until the longest liver that is in the life-lease is expired."

And on the same 26th of December 1859 the defendant signed an authority to take possession, which was as follows:

"To Mr. William Price, yeoman, Bishton. I hereby appoint and authorize you to demand and receive possession from my several and respective tenants now under notice to quit their farms, lands, cottages, gardens and premises, situate, lying and being respectively in the parishes of Bishton, Llanmartin, Llandeud, Llanbeddow and Llandewi, in the county of Monmouth. Dated this 26th day of December 1859."

Possession was obtained by the plaintiff of all the lands, except two or three small holdings, the tenants whereof refused to attorn.

In January 1860, the plaintiff's solicitor applied to Messrs. Prothero & Fox, the solicitors for the defendant, for a draft of the lease, and after considerable correspondence, the latter, in July 1860, forwarded the draft of a lease accompanied by a letter stating that "neither the draft nor any correspondence with reference thereto was to be treated as evidence of a contract on either side."

After long negotiations which resulted in the parties being unable to come to terms, the defendant, in June 1861, gave the plaintiff notice to quit on the 25th of December following.

In August 1861 the bill was filed, praying that the defendant might specifically perform the said agreement, and might be decreed to execute a proper assignment to the plaintiff of the lands and hereditaments which he held of the Bishop of Llandaff, for the lives and respective residues of the terms of years for which the same were holden; and that he might also execute a lease for the lives in the leases mentioned, and the survivor and survivors of them of

such of the defendant's fee-simple lands and hereditaments as he had agreed to demise to the plaintiff, at the rent and subject to the covenants agreed on between them in manner in the bill appearing. And praying also that the defendant might be restrained from ejecting the plaintiff from the lands in his possession.

Mr. Selwyn and *Mr. Jessel*, for the plaintiff.—The agreement was good; it had partly been performed. The defendant had accepted the rent, and he could not now decline to complete the contract.

Mr. Baggallay and *Mr. Whitbread*, for the defendant, denied that there was any concluded agreement.—

The Marquis Townshend v. Stangroom, 6 Ves. 328.

Woollam v. Hearn, 7 Ves. 211.

Clowes v. Higginson, 1 Ves. & B. 524.

Sutherland v. Briggs, 1 Hare, 26; s. c.

11 Law J. Rep. (N.S.) Chanc. 36.

Mundy v. Jolliffe, 5 Myl. & Cr. 167;

s. c. 9 Law J. Rep. (N.S.) Chanc. 95.

Ridgway v. Wharton, 6 H.L. Cas.

238; s. c. 27 Law J. Rep. (N.S.)

Chanc. 46.

29 Car. 2. c. 3.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS.—The agreement is by parol, and the plaintiff seeks a specific performance of it, on the ground of part performance. The first duty of the plaintiff is to establish what the terms of the agreement were. They do not appear in any one or more written documents; but it is alleged to be a parol agreement, evidenced partly by two documents in writing, and partly by parol evidence, and which agreement has been part performed by letting the plaintiff into possession of the property demised, and by accepting rent from him on the terms and according to the condition of the agreement. This parol agreement depending upon two documents, the deficiencies in which are to be supplied by parol testimony, has been found so embarrassing to the pleader that he has thought it desirable to set forth, in the nature of a summing-up of the previous allegations in the bill, what that agreement is which the plaintiff seeks to enforce. He has done this in the penultimate paragraph of the bill, and it is to this effect: "The final

agreement made between the plaintiff and the defendant, as hereinbefore appears, is to the effect that the defendant should assign to the plaintiff all the defendant's estate and interest in the said lands and hereditaments now holden by the defendant of the Bishop of Llandaff for lives and for years, and also to grant to the plaintiff a lease of the said freehold lands in Bishton, belonging to the defendant in fee for the lives of the said Edward Banks, Caroline Alston and Mary Phillips, and the longest liver of them. The rent for the whole property taken by the plaintiff to be 810*l.* 19*s.* 9*d.* per annum, and an added sum of 17*l.* or thereabouts, for the said freehold land in Bishton, which were to be taken at an average rent as aforesaid, free from all deductions except in respect of property-tax, during the said residue of the term of twenty-one years, and an apportioned part of such rent to be paid for the said lifehold and freehold lands after the expiration of the said term of twenty-one years, such apportioned rent being calculated at the same average rent per acre as the plaintiff is to pay for the whole of the said lands during the residue of the term of twenty-one years as aforesaid." Then he says, "The defendant, or rather Messrs. Prothero & Fox, appears to dispute the facts of some parts of the defendant's freehold lands being included in the said lease, and if it shall appear that the defendant has any freehold lands not so included therein, the plaintiff, of course, does not claim them." That is how he states the agreement. This paragraph, as originally framed, did not state the agreement in the form in which it at present appears, either in the original bill or in the bill after it had been amended once. It was not till after the bill had been a second time amended that it adopted its present shape. The second amendment took place under peculiar circumstances. It had been by me permitted after replication filed while the evidence on which each side intended to rely was known to that side, but was unknown to the other side. It was permitted, notwithstanding the earnest opposition of the defendant, who contended before me that the proposed amendments would introduce a new case. I find it so difficult, without hearing a cause, duly to appreciate the result and effect of such and similar applications, whether they

be to amend or to add fresh evidence, that I frequently grant such applications reserving to myself at the hearing the consideration of the circumstances under which the application was made, and how it may bear upon the opposite party at the hearing, and then to consider whether, if I had been at the time when the application was made in possession of all the circumstances which the hearing of the cause disclosed, I should have thought it right to grant such an application, not in any case for the purpose of treating the plaintiff's bill as if such an amendment had not been made, but for the purpose of considering, when the whole case is before me, whether the amendment is introduced, not in order to correct some accidental slip, but rather for the purpose of fitting and adjusting the plaintiff's case to evidence subsequently obtained, and which, if the plaintiff's case be correct, must have been within his own knowledge at the time when he filed his bill. This appears to me to be a somewhat striking instance of the necessity of making this reservation, for the amendment made in consequence of the order so obtained adds a fresh term to the agreement which had not been previously stated in the bill, but which was required for the purpose of making the evidence and the peculiar situation of the property, of which possession had been delivered to the plaintiff, consistent with the terms of the alleged agreement. And this is more worthy of observation, because it must be admitted to be a circumstance extremely unusual, that a plaintiff who comes to enforce the specific performance of an agreement should not be able accurately to state in his instructions for the original bill first filed exactly what that agreement is in all its details, the specific performance of which he seeks to enforce. It is obvious, looking at this bill and the various amendments added to it, that the pleader who prepared it must have felt himself extremely embarrassed as to the mode in which he should state the agreement, so as to make it consistent with all the various ramifications of evidence, depending partly on written documents and partly on oral testimony, and complicated with the peculiar nature of the property, consisting of leasehold, lifehold and fee simple, all intermingled with each other, of which possession had been delivered. This uncertainty

is unfavourable to the plaintiff's case, which requires that there should be no doubt or uncertainty about the terms of the agreement which he seeks to enforce, which ought to be distinct in his mind when he gives his instructions, and which he is not at liberty afterwards to modify and qualify to suit the arising difficulties of the case. I felt this very strongly at the close of the opening, and after hearing the written evidence in support of the plaintiff's case. At the same time I am bound to state, on the other side, that the *vidæ voce* testimony of the plaintiff, who was cross-examined in court by the defendant, went a great way to remove the difficulties in this case, and to supply the deficiencies in it, which were, as I thought previously existing, all but insuperable. He convinced me (there being no evidence to the contrary) that a definite agreement was originally entered into between the plaintiff and defendant, and that this agreement was afterwards modified and added to by a further agreement come to between the same parties.

To explain my present decision I must refer to an outline of the facts as established before me. It appears that the defendant was, in the year 1859, possessed of considerable property, consisting of between twenty and thirty different holdings, besides many cottages and some chief-rents in the parishes of Bishton, Llanmartin, Llandeuvaud and Llandewi, in the county of Monmouth. Much of this was held under the diocese of Llandaff, partly on leases for years, which would expire in 1866, and partly on leases for lives, and the rest was freehold land held by the defendant in fee simple. In 1859, and in the early part of that year, there had been much negotiation and talk between the defendant and the plaintiff respecting these lands, and a proposal was made to the plaintiff by the defendant more than once to take them all at a fixed rent, to be paid in advance. Ultimately, in June 1859, an agreement was come to which was to this effect: "Be it remembered that the defendant hereby agrees to let, and the plaintiff to take, all and every the leasehold farms, farm-houses, lands, hereditaments and premises held by him, the said defendant, under the Lord Bishop of the diocese of Llandaff, situate in the said parishes of Bishton,

Llanmartin, Llandevaud and Llandewi, in the said county of Monmouth, and the rights, easements and appurtenances therewith held, used or enjoyed for and during all the rest, residue and remainders now to come and unexpired of and in the several term and terms of years in the same several and respective premises from the 25th day of December now next ensuing, at the yearly rent of 739*l.* 19*s.* 9*d.*, clear of all existing and future taxes, rates and outgoings (except property-tax), and to be payable, by yearly payments, on the 28th of December in every year, the said plaintiff to pay to the said defendant one whole year's rent in advance on the 25th of December next, for which the said defendant agrees to allow him interest thereon at the rate of 5*l.* per cent. per annum. And the said plaintiff to be entitled to the full benefit and advantage of him, the said defendant, of and in all and every the leases of the said premises so granted to the said defendant by the said Lord Bishop of the diocese of Llandaff as aforesaid. And the said defendant hereby further agrees to execute proper assignments of such leases to him, the said plaintiff, when required so to do. Provided that if the said plaintiff shall fail to pay to the said defendant the said whole year's rent in advance as aforesaid, the assignment of the premises shall be forfeited." That is dated the 23rd of June 1859. The amount of 739*l.* 19*s.* 9*d.* was arrived at by referring to a list of tenants' names, with the sums they paid set opposite to their names, amounting in the whole to 639*l.* 19*s.* 9*d.*, with an addition of 100*l.* per annum. Immediately after the agreement was executed the defendant signed printed notices to the tenants to quit on the 25th of December 1859, and then he gave these to the plaintiff to deliver to the tenants, which he accordingly did. In this way notices to quit were signed by the defendant, and were delivered to all the tenants holding under him except the plaintiff himself. On serving these notices the plaintiff discovered, from the inquiries which he made from the tenants, that the list above referred to was very imperfect. In one case the sum set against the name was 1*l.* instead of 53*l.*, as it ought to have been, and in three other instances no

figures at all were inserted, but blanks were left opposite the names of the tenants, which ought to have been filled up with 5*l.*, 25*l.* and 4*l.* These added to the 37*l.* deficiency already mentioned amounted together to 71*l.*, which added to the 639*l.* 19*s.* 9*d.* would make the total rental 710*l.* 19*s.* 9*d.* The plaintiff says this error being discovered early in December 1859, he went through a list with the defendant, and made up the amount of the rent previously paid to be 710*l.* 19*s.* 9*d.*, the sum already mentioned, and that with the 100*l.* agreed upon as the addition to be paid by the plaintiff, made up the 810*l.* 19*s.* 9*d.*, which sum was paid by the plaintiff to the defendant, who gave him a receipt for that amount on the 9th of December 1859. If the plaintiff had come for a specific performance of the agreement of the 23rd of June simply, or even with the variation produced by the altered list on the consideration of which the receipt of the 9th of December was given, it would have been very difficult for the defendant to have resisted his demand; but much more took place before the terms of the agreement were settled. The imperfection of the statement of the amount of rent paid by the defendant's tenants was not the only thing that was discovered between June and December by the plaintiff. By his inquiries from the tenants he discovered that a portion of their holdings were held by them for lives under the see of Llandaff, and also that of a portion of the lands the defendant was seised in fee simple. He also discovered that the boundaries were confused and difficult to be distinguished. Having ascertained all these facts, on the 26th of December the plaintiff called on the defendant and obtained from him a consent to sign a memorandum modifying the first agreement. Accordingly the plaintiff went away, caused such a memorandum to be prepared, and brought it back to the defendant and signed it. This second document is in these terms; it is dated 26th December 1859: "This is to certify that the lifehold property in different parishes and the freehold property in the parish of Bish-ton belonging to me, is to be held by William Price at the same rent per acre per year, in proportion of the present rental of the whole after the term of years lease

is expired until the longest liver that is in the life lease is expired." Now, if these two papers, together with the revised list of the tenants and the amounts opposite to their names, had constituted the agreement sought to be enforced, or had contained all the terms of the agreement, stating all and omitting none, although the difficulty in the way of the plaintiff would have been considerable, increasing, as it does, every step, still even then the defendant might have found it difficult to resist a decree for specific performance; but these documents, so modified, neither constitute the whole of the agreement nor do they contain all the terms and conditions of it which the plaintiff seeks to enforce a specific performance of. The second list, containing the tenants' names and the rents paid, was also inaccurate. The plaintiff says that, by mistake, it did not include two rents of 11*l.* and 10*l.* 16*s.* for two pieces of land held by the plaintiff himself at separate rents from his farm, of which the defendant was seised in fee, and which was situate in Bishton.

The plaintiff alleges that on the 25th of December 1859, the defendant agreed that the plaintiff should have a lease of these two pieces of freehold at the same rent per acre as the average rent per acre agreed to be paid for the lands, for which 810*l.* 19*s.* 9*d.* had been agreed to be paid. This is not specified in the memorandum of the 26th of December 1859. The plaintiff, however, states and gives evidence to shew that it was intended so to be included by the words of the second memorandum. However, this allegation was not made in the original bill, and even after the correction by the first amendment the allegation respecting it was, as it is now averred, incomplete; and it was only made perfect by a second amendment. This is not, as in some cases it might be reasonably considered to be, a mere technicality arising from a slip of the pleader; it is obviously substance; and the whole case and evidence satisfy me that the averment of the agreement has been necessarily and unavoidably altered to meet the exigencies of the case as they arose from time to time.

But the difficulty does not cease here even. If the memorandum of December 1859 in its loose and general way could be

construed to have the effect attributed to it by the plaintiff in his evidence, then the meaning of this memorandum must include the whole of the lifehold property in the different parishes, and also the whole of the freehold property in the parish of Bishton belonging to the defendant. But this is not the agreement the specific performance of which is sought by this suit; for the plaintiff also says that, besides the two pieces of land above mentioned, which are ascertained to have been included in the agreement, he also held a piece of wood from the defendant at a rent of 2*l.* a year in the parish of Llanwern, which is not included in the agreement, and which, as the plaintiff insists, was not intended to be included. And, besides this, it further appears that there are also some small portions of freehold land in Bishton belonging to the defendant not included in the agreement, as that agreement is alleged and sought to be enforced.

It is obvious from this statement that the whole thing is infinitely too vague and uncertain for the Court to be able to satisfy itself that it can ascertain what the real terms of the agreement were which, if ever, were finally settled between the plaintiff and the defendant, whether it be that which the plaintiff originally alleged or that which the parol evidence of the plaintiff alone now supports. The pleader, no doubt, has, as I have said, ultimately, after a second amendment, with great difficulty, stated a parol agreement which, though not that originally stated by the plaintiff, and which, though not that proved by the written documents which are given in evidence, is attempted to be supported by the evidence of the plaintiff, which is unconfirmed by anything else, and which is now adduced in order to make it consistent with the delivery of possession to the plaintiff of the various pieces of land held by the tenants whose names were written in the list referred to, and which possession was effected by the notices to quit given to the plaintiff and delivered by him, and also at the same time to make it consistent with the amount of rent paid by the plaintiff and received by the defendant. It is complicated and difficult; and leaving out of consideration altogether the denial of the defendant, I have endeavoured by means of the parol

evidence, and by taking the parol statements as they appear in the rest of the evidence, to trace out a complete agreement as the plaintiff now alleges it; but even then I have been unable to do so, unless by paring off from one list and adding on to another list; and all this without any security for its accuracy beyond the mere unsupported oath of the plaintiff; and all this in the teeth of a denial by the defendant of any concluded agreement at all. In fact, I am convinced that the task is an impracticable one; and that if the Court were to support the plaintiff's case as he now states it, it would be violating several of the most important rules which regulate equity in the exercise of the peculiar jurisdiction of specific performance, one of which is, that if this be considered as a written agreement it cannot be varied by parol; and another of which is, that if this be a parol agreement sought to be enforced in this Court on the ground of part performance, it must be shewn plainly and distinctly what the terms of the agreement are which has been part performed, and that the acts of part performance done are referable to that agreement alone. My impression on this subject was so strong at the hearing of this case that I was at first in doubt whether I ought to have called on the defendant to be heard in answer to it; but as the defendant proposed to examine the plaintiff I thought it desirable to hear the account he gave of the matter, and his evidence given in court went so far to support his case that it made it necessary for me to go into the other matters more fully and accurately. It appears that he is unable to write beyond signing his name and setting down figures, and that he reads imperfectly, only sufficiently well to distinguish whose handwriting it is if it be familiar to him; and also to read figures. He is, however, a very acute man, and gave his evidence in a way which went as far as it was possible to support the case he had made by his bill; but the most careful attention to that evidence satisfies me that the agreement of the 23rd of June 1859 was entered into without any knowledge of the real circumstances connected with the property proposed to be demised, and that it was then found impracticable to act on this agreement; and that afterwards, although

some patching of the original agreement was resorted to, no definite and concluded agreement was come to suited to the peculiar nature of the tenures of the land demised, and to the possession given in respect of the notices signed and served in June 1859. Even if such an agreement could be spelt out of the proceedings, and evidence of the parties, I am still of opinion that there was no part-performance of it. The acts constituting the part-performance must have reference to the agreement sought to be enforced; but the possession given in this case was in respect of the agreement of June 1859, and under notices then signed and served, not in respect of a subsequent and newly-altered agreement; and the evidence of the plaintiff shews that the agreement on which he now relies could not have been entered into before the 26th of December 1859. The first payment of rent is before the agreement of June 1859 was finally moulded into the form the plaintiff now contends for, which was not till the 26th of December; and after that period the rent paid is ambiguous, and may be referable as much to one as the other.

The evidence of the plaintiff seems to me to amount to this: the agreement, as he now alleges it, is what, if the plaintiff and defendant had each, in June 1859, fully understood every circumstance connected with the holding and position of the property intended to be demised, would have been agreed upon between them; and the additions and alterations made by the plaintiff are in the spirit of that agreement, and for the purpose of giving due effect to it and to the possession which was delivered to the plaintiff and the payment made by him. The plaintiff was, certainly, and I believe the defendant also was, in June 1859, ignorant of what the tenures were of all the property, and how they were intermingled. At this time notices are signed and served in order that possession may be given of the whole property, leasehold, lifehold and freehold, except that held by the plaintiff. This is wholly inconsistent with the agreement then in force. After this, in order to make the agreement fit with the possession delivered, first one term is added and then another change is made, or at-

tempted by the plaintiff to be made; then a piece is omitted or attempted to be omitted by the plaintiff, as the light respecting the property gradually dawned upon his mind, and was, by him, communicated to the defendant.

The evidence, however, of the plaintiff shews that the defendant, throughout the whole matter, knew what he was about; and I cannot, on account of the peculiarly qualified, self-stultifying plea of the defendant, concede anything to him or his case which would not properly belong to a person actively and intelligently managing his own property (1).

I think that the bill must be dismissed; but, having regard to the circumstances of the case, and more especially to the evidence given by the plaintiff *videlicet* to the effect that the first and repeated solicitation to the plaintiff to take a lease of the property, proceeded from the defendant in the first instance, although the whole matter was never finally completed, I do not think fit to give any costs.

From this decision the plaintiff appealed. The appeal was heard, before the Lords Justices, on the 26th, 27th and 28th of February, when the same counsel appeared as at the Rolls. The evidence is very fully examined in the judgment of Lord Justice Knight Bruce.

LORD JUSTICE KNIGHT BRUCE (March 21).—This suit was instituted, in August 1861, for the specific performance by the defendant of a contract which was made in the year 1859, composed of two or three agreements. The earliest of them was in writing, and dated the 23rd of June 1859; of the others (if two) one was in writing, dated the 26th of December 1859, and one other, it was partly in writing, dated the same 26th of December. The contract

related to the demise, or the sale and demise, to the plaintiff by the defendant of leasehold and freehold lands in Monmouthshire, which then belonged to the defendant, an elderly clergyman resident in that county. The plaintiff, a neighbouring farmer, and seemingly a substantial yeoman, who, though very defectively educated, seems not slow of intellect, was at the time his (the defendant's) tenant of a portion of the lands. The bill was answered; various affidavits were made on each side, and there were, at the hearing of the cause at the Rolls, cross-examinations orally of the plaintiff (who had been a deponent by affidavit) and of another witness. The Master of the Rolls dismissed the bill, which brought the plaintiff hither, and the case was fully argued before us. The earliest agreement, dated the 23rd of June 1859, is stated in the fifth paragraph of the bill, and was certainly signed by the defendant; but I am satisfied that it was without advice and without assistance that he made the bargain, entered into the agreement and signed the document of the 23rd of June 1859: an agreement to such an extent founded in ignorance or error, or both, on the defendant's part, that if between June and December the plaintiff had filed a bill for the specific performance of it, the suit would, in my opinion, have failed. But did the alleged written agreement of the 26th of December 1859 give the plaintiff a title to sue in equity? I think not; signed probably, it was, in fact, by the defendant; but it appears likewise to have been so, and the bargain leading to it likewise made, without advice and without assistance. Loosely, vaguely and obscurely worded, it is wholly silent as to the "reens" mentioned in the 12th and 13th paragraphs of the bill, a silence observed also, I may notice, by the 34th (2) paragraph, notwithstanding the phrase, "as aforesaid."

(1) The defendant in his answer, respecting the making out the lists of the tenants, said, "In answering this and the other interrogatory, I beg to state that my memory is so defective that I am unable to recollect for any period any circumstances relating to the nature or extent of my property or otherwise; and that the plaintiff has been, to the best of my belief, always well aware of my defective memory, and such my inability as aforesaid."

(2) The three paragraphs in the plaintiff's bill referred to by Lord Justice Knight Bruce were as follows:—

Par. 12. "Great part of the said lands of the defendant consists of a reclaimed moor, which is intersected by several reens or large ditches, and in order that the lands may be kept in good order and condition, these reens require to be occasionally cleansed and otherwise attended to, and it had been originally arranged between the plaintiff

Nor is the plaintiff's title in this case improved, as I conceive, by any document that appears to have existed previously to the year 1860: and if in January 1860 a suit had been instituted by the plaintiff against the defendant for a specific performance of the written agreement of the 26th of December 1859, whether in conjunction with the written agreement of the 23rd of June 1859, or separately, it would, notwithstanding the other documents of December 1859, have been, in my judgment, instituted without any title to relief. But did there exist in force at the time when the present suit was commenced a parol agreement or parol agreements of which, in combination with both or either of the two written contracts already mentioned or otherwise, the plaintiff was then entitled to ask from this Court a decree for specific performance? That is a question which the plaintiff insists ought to be answered in the affirmative. He says that partly by means of one or both of the two written contracts of which I have been speaking and partly by parol, an agreement or agreements then existed between them to the effect stated in the 13th and 34th paragraphs of the bill, or one of them, for the fulfilment of which the plaintiff ought to have the assistance of the Court.

For this purpose I assume, in his favour, the Statute of Frauds is inapplicable to the contention, and therefore does not affect the case on either side; and that the possession of a considerable portion of the lands, at least, in controversy was, under the defendant's authority and with his per-

mission, taken by the plaintiff on the 26th of December 1860, or later in that month, and was so taken in part performance of the agreement or agreements which had, before that 26th of December been made between them. This, however, in my opinion, does not materially assist the plaintiff's case. It is certainly not impossible that a plaintiff in this Court should be entitled to obtain specific performance of an agreement relating to land, partly in writing and partly by parol; but for such a purpose the case, I apprehend, must be clear; and the evidence here does not satisfy me that there was any parol agreement between the present parties as to which, whether taken or not taken in combination with both or either of the written contracts, the plaintiff acquired a better title in equity against the defendant than as to the two written contracts alone. For some time, however, I doubted whether, by the course of conduct which the defendant and his solicitor pursued after the year 1859, and especially by the copious correspondence that occupied so great a portion of the time from the beginning of the year 1860 to the commencement of the present suit, and by the much altered draft of the deed proposed to be executed by one or both of the parties, and the receipt of the 19th of December 1860, a title to some decree for specific performance had not been gained by the plaintiff. But, upon consideration, I have become convinced that it would be contrary to the principles and rules which guide this jurisdiction upon questions of specific performance, to afford that relief in the present

and the defendant that the reens should be kept in good order and condition at the expense of the defendant, though no reference was made to them in the said written agreement."

Par. 13. "On the 26th of December 1859, the plaintiff called on the defendant, and after referring to the former meeting, when the rent had been increased as aforesaid, asked the defendant to arrange about the freeholds and lifeholds which were included in the plaintiff's holding, and called the defendant's attention to the omission as to the reens, and the defendant then agreed, in consideration of the plaintiff's keeping the reens in order, that the plaintiff should have a lease of the pieces of freehold land in Bishton, which he held at separate rents as aforesaid and which were not included in the said list, at the same rent per acre as the average rent per acre agreed to be paid for the lands, for which the rent of 810*l.* 19*s.* 9*d.* had been agreed to be paid, and also that the said

leaseholds for lives should be assigned to the plaintiff, and the freeholds should be demised to him for the same three lives and the life of the longest liver, and that after the said term of twenty-one years had expired the rent should be apportioned so that the annual rent thenceforth to be paid for the lifeholds and freeholds should be the same rent per acre as the average rent per acre agreed to be paid for the said land, for which the rent of 810*l.* 19*s.* 9*d.* was agreed to be paid by the plaintiff as aforesaid, so that the same average rent per acre should be paid until the last life dropped. The plaintiff desired to have a memorandum in writing to shew that he was to have the lifeholds and freeholds upon the same terms, and to this the defendant assented, and thereupon signed a memorandum in the words and figures following (that is to say):—"26th December 1859.—This is to certify that the lifehold property in different parishes, and the freehold property in the parish of Bishton,

instance. I think that the agreements which are sought to be enforced are, together, a complicated convention, not without some difficulty to be understood, nor protecting the interests of the landlord and vendor, as in point of prudence they ought to have been protected. I am satisfied that Sir Charles Salusbury (who is sued, not suing) understood the subject clearly or sufficiently, either in June 1859 or in the following December; but I am satisfied that he was on each occasion without proper, or any, advice concerning it; and that notwithstanding the differences between his station and education and those of the plaintiff (or possibly, to some extent, by reason of those differences) they were not on equal terms in the affair. I think the plaintiff had the advantage; that he was the readier man and the better informed for the purpose in hand. Cross-examined at some length in open court, at the Rolls, he seems to have shewn himself there a man of intelligence and acuteness. The defendant, an elderly clergyman, as I have said, expresses himself in the concluding part of the 1st paragraph of his answer in the cause thus: "I was in June 1859 unable, and I am now unable to state, as to my information, belief or otherwise, what were the names of all my several tenants and their respective holdings; and by reason of such my inability the plaintiff himself made out, or caused to be made out, the last-mentioned list, and such list was in fact made and prepared as in the said bill is alleged. In answering this and the other interro-

gatories in the plaintiff's bill, I beg to say that my memory is so defective that I am unable to recollect for any period any circumstances relating to the nature and extent of my property or otherwise, and that the plaintiff has been to the best of my belief always well aware of my defective memory and such my inability as aforesaid." The 31st paragraph of the answer is thus: "So far as I am able to state as to my knowledge, remembrance, information and belief, the only agreement between me and the plaintiff with respect to the lands in the said bill mentioned, or any of them, is the said agreement dated the 23rd of June 1859, and I submit the same to the judgment of this honourable Court as to the purport or effect thereof, and save as aforesaid I am unable as to my belief or otherwise to state what agreement ever existed or was made between the plaintiff and me; and I submit that the plaintiff is bound to prove if he can, that any such agreement as is in the 34th paragraph of the said bill set forth and called the final agreement was ever made between us, and to the best of my belief no such agreement was ever made between us." With regard however to the strength and condition of the defendant's memory, there is a considerable conflict of evidence, various witnesses deposing on the subject, but among them is one on whom particularly (without intending the least degree of disrespect or disparagement towards any other person) I place reliance,—to borrow an expression from Lord Stowell, "I adhere to him as a witness,"—I mean Sir Thomas Phillips, whose

belonging to me, is to be held by William Price at the same rent per acre per year, in proportion of the present rental of the whole, after the term of years' lease is expired, until the longest liver that is in the life lease is expired," as by the same memorandum when produced will appear. The rent at which the said two pieces of freehold land in Bishton would be held by the plaintiff under the said agreement calculated as aforesaid is 17*l.* or thereabouts."

Par. 34. "The final agreement made between the plaintiff and the defendant, as hereinbefore appears, is to the effect that the defendant should assign to the plaintiff all the defendant's estate and interest in the said lands and hereditaments now holden by the defendant of the Bishop of Llandaff for lives and for years, and also to grant to the plaintiff a lease of the said freehold lands in Bishton, belonging to the defendant in fee for the lives of the said Edward Banks, Caroline Alston and Mary Phillips, and the longest liver of them. The

rent for the whole property taken by the plaintiff to be 810*l.* 19*s.* 9*d.* per annum, and an added sum of 17*l.* or thereabouts, for the said freehold land in Bishton, which were to be taken at an average rent as aforesaid, free from all deductions except in respect of property-tax, during the said residue of the term of twenty-one years, and an apportioned part of such rent to be paid for the said lifehold and freehold lands after the expiration of the said term of twenty-one years, such apportioned rent being calculated at the same average rent per acre as the plaintiff is to pay for the whole of the said lands during the residue of the term of twenty-one years as aforesaid. The defendant, or rather Messrs. Prothero & Fox, appears to dispute the facts of some parts of the defendant's freehold lands being included in the said lease, and if it shall appear that the defendant has any freehold lands not so included therein, the plaintiff, of course, does not claim them."

affidavit is thus: "I Sir Thomas Phillips, of the Inner Temple, London, Knight, Barrister-at-law, make oath and say, as follows, I have been for many years past on terms of friendly intimacy with the defendant, and on the 4th of January 1860, I went on a pressing invitation from the defendant's sister, Mrs. Elizabeth Salusbury, who has since died, to defendant's residence at Llanwerne, and remained there till the afternoon of the following day, and I was then informed by the defendant's said sister that her brother the defendant had made an arrangement with the plaintiff for letting to him lands held by the defendant from the Bishop of Llandaff, and either Sir Charles or his sister, and as I believe the latter, handed to me the paper writing produced and shewn to me at the time of swearing this my affidavit marked with the letter 'H,' (3) and that document I on the 5th of January 1860, delivered to the defendant's solicitors Messrs. Prothero & Fox, at Newport. That although I do not remember to have received from the defendant or his sister, the papers or writings mentioned in the affidavit of Charles Burton Fox, sworn in this cause on the 1st of November 1862, except the said paper writing marked 'H,' I did receive from one or other of them on the occasion of the said meeting at Llanwerne, all documents which were delivered by me to Messrs. Prothero & Fox on the said 5th of January. The defendant's said sister was very much dissatisfied that such an arrangement should have been made with her brother, and expressed her desire that I should see the plaintiff on the subject, and accordingly on the morning of the 5th of January 1860, the plaintiff, at the request of the defendant's said sister, who I understood had made an appointment for the plaintiff's attendance, came to Llanwerne, when a meeting took place between the plaintiff, the defendant, his said sister and myself on the subject of the arrangement entered into by the said defendant with the plaintiff for the letting to him the said lands. The plaintiff then produced a paper, which purported to be an original agreement between the defendant and himself, which I then perused, and which I believe to have been to the same effect or purport as the agree-

(3) This paper was a copy of the agreement of the 23rd of June 1859.

ment set out in the 5th paragraph of the bill (4). The defendant's said sister expressed to the plaintiff her surprise that he should have induced the defendant to enter into such an agreement, knowing, as he did, how unfitted her brother was for any business of importance by reason of his loss of memory, and her hope and expectation that the plaintiff would at once agree to cancel the agreement and receive back the money he had paid her brother, a proposal which was not assented to by the plaintiff. Having from my perusal of the agreement formed an opinion that the lands included in it were limited to those held by the defendant for a term or terms of years, I intimated to the plaintiff my belief that the agreement would not prove so much in his favour as he supposed, and that as he declined to relinquish it, the matter would be placed in the hands of the defendant's solicitors, and I did not think he, the plaintiff, would succeed in his object. At the interview referred to in the preceding paragraph of this my affidavit, which was not of a hurried character, no mention was made of any other agreement or memorandum between the plaintiff and the defendant explaining, or extending, or qualifying, or in any way affecting the agreement of the 23rd of June 1859. The plaintiff never referred to any such memorandum as that of the 26th of December 1859, mentioned and set out in the 13th paragraph of his bill of complaint; but he produced the agreement of the 23rd of June 1859 alone as the document under which he, the plaintiff, claimed a lease of the lands held by the defendant under the See of Llandaff. I did not know, and had no reason to believe that any such document existed; and if the existence of such a document had been known to or remembered by the defendant or his sister, I believe it would have been mentioned to me. At the said interview nothing was said of any arrangement between the plaintiff and the defendant that the reens or large ditches should be kept in good order or condition at the expense of the defendant, or that subsequently to the said agreement of the 23rd of June 1859 it was agreed by the defendant to grant to the plaintiff a lease of any free-

(4) This paragraph sets out the agreement of the 23rd of June 1859.

hold lands of him the defendant, or that the leaseholds for lives held by the defendant under the Bishop of Llandaff should be assigned to the plaintiff. The memory of the defendant had been so much impaired by age and infirmity at the period of our meeting that no certain reliance could, in my judgment, be placed on it, especially on matters of recent occurrence, and the explanations and information I received were for the most part given to me by the defendant's said sister." My opinion is that the plaintiff's case in equity, as it stood at the end of January 1860, was too weak to to be effectually aided even by all that took place subsequently. The bill, having been dismissed, should, in my judgment, so remain; but the correspondence appears to me of itself enough to preclude any claim for costs.

LORD JUSTICE TURNER.—My learned Brother's opinion agreeing with that of the Master of the Rolls, it would be a mere waste of time for me to travel through the complicated details of this case. I regret to say, however, that I have found myself unable to agree in the conclusion at which my learned Brother and the Master of the Rolls have arrived. I think that the competency of the defendant is not put in issue by the answer, and I think that the plaintiff has alleged and proved an agreement part performed and of which this Court ought to decree the specific performance. I am not satisfied that, looking at the whole case, there is not alleged and proved a perfect agreement by parol, independently of the written agreement; but supposing it to be otherwise, the fact of the agreement being partly by parol and partly in writing does not, I think, constitute any sufficient ground against specific performance being decreed, for I do not think that the prevailing rule against decreeing specific performance of a written agreement with a parol variation, applies to cases in which there has been part performance of the written agreement as varied by parol. The principle which governs the cases where there has been no part performance is, as I apprehend, this, that where an agreement has been reduced into writing the law presumes, in the absence of any proof of fraud, that the written instrument contains the whole agreement, and will not therefore permit it

to be added to or altered by parol evidence; but where there has been part performance of the written agreement as varied and the non-performance of the agreement as so varied, would, in the eye of this Court, amount to a fraud, evidence must be received to shew what the agreement as varied really was; and this must depend both upon what was agreed upon in writing and what was verbally agreed upon. Whether, however, this be or not the true ground on which parol evidence to add to or alter a written agreement is rejected where there has not been, and received and acted upon where there has been, part performance, I think the authorities shew that in cases of agreements part performed parol evidence is admissible to add to or alter a written agreement; and that a decree for the specific performance of the agreement as varied may well be founded on such evidence. Such being my view of this case, I should, but for the concurring opinions of my learned Brother and the Master of the Rolls, have thought that this decree could not be maintained, and that there ought to have been a decree declaring the plaintiff entitled to an assignment of the leaseholds for lives and years, which were in the occupation of the tenants mentioned in the second list and were included in the tenancies referred to in that list, and to a demise for the lives mentioned in the Bishop's lease of the freeholds which were in the occupation of the same tenants and included in the same tenancies; and also of the two closes at the rent of 810*l.* 19*s.* 9*d.*, with the addition of the acreage rent for the two closes, with proper covenants on the part of the plaintiff for keeping the "reens" in order, the entire rent to be apportioned as agreed upon at the expiration of the leases for years; with a reference to chambers to ascertain the acreage rent of the two closes, and to settle the assignments and lease. My learned Brother agreeing with the Master of the Rolls, the appeal must, of course, be dismissed.

On the application of *Mr. Jessel*, the deposit was ordered to be paid back to the appellant.

KINDERESLEY, V.C.
Jan. 24, 27.

{ *Re* THE WARWICK AND
WORCESTER RAILWAY
COMPANY, *ex parte*
SIR JOHN DE BEAU-
VOIR.

*Winding-up Order—Notice of Balance
Order for a Call—11 & 12 Vict. c. 45.
ss. 66, 95, 108.—12 & 13 Vict. c. 108. s. 36.*

A winding-up order having been made in 1849 under the Winding-up Act of 1848, in 1862, an order for a call was made in the usual manner, and a circular notice of such order was sent by post, prepaid, to one of the contributories, and the circular notice so sent was not returned. At the expiration of three weeks a balance or four-day order was made, and as it was found impossible to effect personal service, an order for substituted service was obtained, which immediately reached the party, and he took out a summons to discharge the balance order and the order for substituted service:—Held, that both orders were regular, and that the summons must be dismissed, with costs.

This case came on upon a summons, adjourned from His Honour's chambers, taken out for the purpose of discharging a balance or four-day order, made upon the 23rd of April 1862, ordering Sir John De Beauvoir, whose name had been placed upon the list of contributories in the winding up of the Warwick and Worcester Railway Company, under an order made in 1849, to pay a sum of 578*l.* as his proportion of a call of 1*l.* per share; and also to discharge an order for substituted service upon him of such four-day order, made on the 26th of May following.

The summons also asked that the official manager might pay the costs.

This company having been ordered to be wound up, the usual proceedings were taken in the chambers of Master Richards for that purpose, and the list of contributories was settled; and Sir John De Beauvoir appearing as a director and a holder of a specified number of shares, his name was inserted in such list.

In the course of time the winding up of this company became, with other matters, transferred to His Honour's chambers, and in the beginning of 1862 the official

manager made a call of 1*l.* per share upon all those whose names appeared on the list, and amongst the rest upon Sir John De Beauvoir. This was in the usual form of the order for a call, with the appended document relating to process in case of default. The ordinary circular notice was then sent by post, prepaid, under the provisions of the Winding-up Acts, to all the contributories, including Sir John De Beauvoir, but whether he ever received that circular did not appear, except that there was evidence that it was never returned. This was on the 1st of April 1862, and the three weeks prescribed by the act of parliament having expired, the first order now sought to be discharged was made, on the 23rd of April, which order (known as the balance or four-day order) required Sir John De Beauvoir, as one of the contributories, within four days from the date thereof, to pay 578*l.* as his proportion of the call of 1*l.* per share as above. Sir John De Beauvoir took no steps to comply with that order, and therefore the next step was to issue process against him, for which purpose it was necessary to effect personal service upon him. Accordingly, it having been ascertained that he had no residence in London, but had lodgings only, the clerk charged with the service proceeded to such lodgings, when the door was opened by a female, who, in answer to the inquiry whether Sir John De Beauvoir was at home, replied that he was not in London, but was either at Brighton or Hastings, she did not know which, she did not know his address, but believed it might be obtained at the Oriental Club, of which he was a member. The clerk then proceeded to the Oriental Club, Hanover Square, and made inquiries of the porter, who stated that he was unable to give any information as to where Sir John De Beauvoir was; he sometimes came there, but his coming was very uncertain; he might be there the next day, he might not be there for a month; he could not tell. The clerk then proceeded to the office of his solicitors, Messrs. Bevan & Whitting, and asked whether they would accept service of the order on his behalf, but they refused to do so; and therefore, on the 26th of May 1862, an application was made for substituted service of the order, and it being shewn as above that it

was impossible to effect personal service, the order for substituted service was made, to be left at the Oriental Club; and it appeared that he came there on the very next day, and at once instructed his solicitors, Messrs. Bevan & Whitting, to apply in the winding up on his behalf that all proceedings under the order of the 23rd of April might be stayed, with liberty to make such motion as he might be advised, upon an undertaking to be answerable for all damages between that time and the first seal day after Trinity Term then next. Almost simultaneously with these proceedings this summons was taken out, and as it involved questions of some nicety was adjourned into court, and now came on to be argued.

Mr. Baily and *Mr. T. H. Terrell* appeared in support of the summons, and argued, first, that instead of the notice of the order for a call being sent by post it should have been served personally, whereas here there was nothing even to shew that it had ever reached Sir John De Beauvoir's hands. Supposing he knew of the winding-up order, that was fourteen years ago, and after such a lapse of time, when he must have ceased to remember anything about the matter, the least that could have been done was to send him formal notice of any step that was taken, more particularly when a claim was made of so large a sum. It was impossible to suppose that on so serious an occasion it could have been intended by the legislature that an ordinary communication by post (there being nothing to shew that it had even arrived) could subject a man to process for disobedience, and in a matter moreover in which he might well have assumed that nothing had ever been done, so long a time having elapsed. Secondly, there was a compulsory four-day order that required immediate attention, and of this there was no previous notice whatever. Thirdly, the 95th section of the 11 & 12 Vict. c. 45. put these proceedings on the same footing as a suit in equity; but the proceedings which had been taken in this case differed completely from the proceedings in a suit; and, therefore, the requisitions of the act of parliament had not been complied with, and, at all events, the order of the 23rd of April was irregular, no notice having been given of it,

and that being so everything founded upon it was irregular also; and it was unnecessary to consider the question of the order for substituted service, for it shared the fate of the order in pursuance of which it was obtained, which, being irregular, both must be discharged.

Mr. Glasse and *Mr. Roxburgh* appeared for the official manager, and opposed the summons, contending that the act of parliament had been complied with in every respect; according to the usual practice, notice had been sent by post, which was perfectly good service, and as it had never been returned, it must be assumed that it had reached the party for whom it was intended; but it was not necessary to shew that, because it was the proper mode in which notice should be given. This having been done, no further notice was required, and the order of the 23rd of April was merely carrying out the previous order for a call made long before. Sir John De Beauvoir knew perfectly well that the company was being wound up, that he was a director, how many shares he held, and that he was liable, if he did not actually know that he was put upon the list, which there was little doubt he did know, and he did not dispute that the amount claimed was the proper amount. Under these circumstances, the summons ought to be dismissed. As to the costs, of course the official manager was in no case liable where he had acted regularly; but in this case, the estate certainly ought not to bear them, but they must fall on the party raising the objection.

Mr. T. H. Terrell was heard in reply.

Authorities referred to:

11 & 12 Vict. c. 45. ss. 66, 67, 83, 87, 88, 95. and 108.

Needham v. Needham, 1 Hare, 633.

KINDERSLEY, V.C.—This matter comes on upon an adjourned summons, the question being whether two orders, made respectively the 23rd of April and the 26th of May 1862, are irregular, and ought therefore to be discharged. The question is a purely dry and technical one, and I shall entirely abstain from expressing any opinion on the merits of the case. My opinion is that both the orders in question are quite regular; but supposing that they are so in every particular, still, if by reason of

any miscarriage or accidental circumstances the party, in this case Sir John De Beauvoir, has been taken by surprise, or injured or damaged in any way, the Court will willingly entertain any application made on such a ground, assuming that the contention be a *bona fide* one. In this case the terms of the act of parliament appear to have been complied with from beginning to end. So far as the winding-up order is concerned, as I understand it, it is not even suggested that Sir John De Beauvoir was ignorant of it; it is certain that he was a director of the company, and as such was put upon the list of contributories in the winding up, for some, it does not matter what number of shares, and one thing at least is clear, that the official manager had no other ground to proceed upon, except the books, which he referred to for information as to who were shareholders; and, as is usual, opposite the names were the places of residence, and no doubt in this instance, opposite the name of Sir John De Beauvoir, with the number of shares, was a certain address. A call being made, according to the requisitions of the act of parliament, it was necessary to insert an advertisement in the newspapers, and to send a notice by post, prepaid, to each contributory, and this was done; and it appears to me to have been as good service as if such notice had actually been taken to the house of the contributory and put into his hands. According to the usual course, when an order for a call is made in the winding up, a document is affixed to or accompanies it, called an appendix, which leaves the sum in blank, but that document is not, in fact, a part of the order, but nothing more than a formal notice by the official manager that the party upon whom the order is made for the call is liable to process in case he makes default in paying the call. Sir John De Beauvoir must, therefore, be taken to have been informed of the call having been made, having the previous knowledge, as there is no doubt he had, of how many shares he was the holder of in the company; and upon the receipt of the notice, it was his business, either by himself or some one on his behalf, to go to the office of the company, and make himself acquainted with every particular, and if he did not do that, he must abide by the consequences. The matter then stands thus: the notice was

first served, no precise day or sum being named; and there being no cause shewn on the part of Sir John De Beauvoir why he should not pay, the main question that arises is, whether the act of parliament requires that before an order is made ordering him to pay a precise and fixed sum on a precise and fixed day, it is necessary to give him notice of that order? Nothing of the kind. The second order, which fixes the sum and day, is known as the balance order, and is nothing more than an enforcement of the prior order. The argument raised on the construction of the 95th section is certainly an ingenious one, but simply ingenious, for, whereas, I suppose, there have been several hundreds of windings-up in the different chambers of the Master of the Rolls and the Vice Chancellors, there has always been one universal practice, namely, that in order to render the balance order valid, it is quite unnecessary that any previous notice of it should be sent to the contributory; and it appears to me that that practice having been always, from the earliest period of windings-up, recognized, acted upon and universal, has itself put a construction upon the act. The reason for this practice is, that the contributory has already had weeks, nay, even months, to object to and question the call, and if he does not do so, it is assumed that he has no ground to avoid paying it. Let us suppose, however, for a moment that this is in its nature like the proceedings in an ordinary suit, and that notice should have been given in the suit; even if that were so, yet by the 66th section the order for payment by a contributory is to be made—"anything in the present practice of the Court notwithstanding"; and therefore, even supposing that the enforcement of the order was by the usual process of attachment, that would not affect this case. It appears to me that, upon the construction of the act of parliament, it is not necessary to prove that the circular notice sent by post has reached the hands of the party to whom it is addressed: the sending it is good service. The balance order itself, however, requires personal service; but inasmuch as, in the present instance, personal service could not be effected—I am not saying that Sir John De Beauvoir was playing at hide-and-seek, I have no reason to

suppose so—but simply that he was *non est inventus*, and therefore it became necessary to have an order for substituted service, which order was obtained, and the proceedings appear to have been perfectly regular under the act; and such an order, moreover, is never made, unless the Court is satisfied that every means have been ineffectually used to effect personal service. In this case the Court was satisfied on this point, Messrs. Bevan & Whitting refusing to accept of anything on Sir John De Beauvoir's behalf; and there is little doubt that they pursued that line of conduct in consequence of some communication with him. That is evident by the very significant fact that the substituted service immediately reached him, shewing that the place where the order for substituted service was served was the very best place to serve him at. Under these circumstances, my opinion is, that both the orders sought to be discharged, of the 23rd of April and the 26th of May 1862, are perfectly right; and the only thing I can do is to refuse this application, with costs.

WOOD, V.C. }
 April 29; } GURNEY v. GURNEY.
 May 5. }

Illegitimacy—Practice—Jurisdiction.

*In December 1859, M. J. G. eloped from her husband, J. H. G, there being at that time two children of the marriage. Proceedings for obtaining a divorce were immediately commenced by J. H. G; a decree nisi was pronounced on the 13th of February 1861, and made absolute on the 22nd of May 1861. On the 4th of May 1861, M. J. G. was delivered of a full-grown male child. In order to determine the status of this child, J. H. G, in January 1862, vested 2,000*l.* reduced annuities, in trustees, upon trust for "all and every the children then living of the marriage of J. H. G. and M. J. G," and a suit was instituted seeking that the rights of the parties interested under this settlement might be declared, and the trusts of the settlement might be carried out under the direction of the Court:—Held, that although the real object of the settlor might be, and probably was, to obtain a decision*

from the Court that the child in question was illegitimate, and although the decision of the Court might affect property of far greater value, those circumstances were not sufficient to warrant the Court in withholding the exercise of its ordinary jurisdiction.

A suit, such as that above mentioned, is not properly a fictitious suit, but is rather analogous to the class of cases in which a fund is settled on an infant with the view of founding an application to the Court respecting the custody of the infant's person.

Semble—that if the settlement had been made by a mere stranger with a malicious or improper motive, the Court could have declined to exercise jurisdiction.

In 1846 John Henry Gurney married Mary Jary Gurney, and there were two children of the marriage, viz., John Henry Gurney the younger and Richard Hanbury Joseph Gurney.

On the 13th of December 1859, Mary Jary Gurney eloped from the house of her husband, accompanied by William Taylor, and, after remaining for a few days in England, went to Boulogne with W. Taylor, and remained in France until September 1860, when she returned to England.

On the 31st of December 1859 John H. Gurney instituted a suit in the Divorce Court, for a dissolution of marriage on the ground of the adultery of M. J. Gurney with W. Taylor. On the 13th of February 1861 a decree *nisi* was made in the suit, and on the 22nd of May 1861, the decree was made absolute, and the marriage was declared to be dissolved.

On the 4th of May 1861 M. J. Gurney, who was then living in England with W. Taylor, was delivered of a full-grown nine months male child, afterwards called William Anselm Gurney.

In January 1862 J. H. Gurney transferred the sum of 2,000*l.* 3*l.* per cent. reduced Bank annuities into the names of trustees; and by an indenture dated the 30th of January 1862, and made between the said J. H. Gurney of the one part and the said trustees of the other part, it was declared and agreed that the said trustees and the survivor of them, his executors and administrators, should stand possessed of, and interested in the said trust money, and the stocks, funds and securities in or

upon which the same might from time to time be invested, and the interest, dividends and annual proceeds thereof, in trust for all and every the children then living of the said marriage of the said J. H. Gurney and M. J. Gurney, and their respective executors, administrators and assigns, to be divided between and amongst them in equal shares, as tenants in common. And it was by the said indenture declared that it should be lawful for the said trustees and the survivor of them, and the executors and administrators of such survivor, by any writing or writings under their or his hands or hand, to levy and raise any part or parts of the said share or shares of the said children, under the trusts thereinbefore declared, and to pay and apply the same for his, her or their preferment, advancement or benefit in such manner as the said trustees or trustee should think fit; and it was by the said indenture declared that it should be incumbent on the said trustees or trustee for the time being to pay and apply the whole of the interest, dividends and income of the shares of or to which any of the said children should for the time being be entitled under the trusts thereinbefore declared for and towards the maintenance and education of such child or children respectively; and that the said trustees or trustee for the time being might, either themselves or himself, so apply the same, or might pay the same to the guardian or guardians of such child, for the purpose aforesaid, without seeing to the application thereof.

On the 1st of April 1862 a bill was filed, by J. H. Gurney the younger and R. H. J. Gurney, both infants, by J. H. Gurney, their father and next friend, against the trustees of the above-mentioned settlement and W. A. Gurney; in which bill the plaintiffs averred that they were the only children of the said marriage, and that they were absolutely entitled as such children to the whole of the said sum of 2,000*l.* 3*l.* per cent. reduced Bank annuities comprised in the said indenture of the 30th of January 1862; and that the defendants, the said trustees, ought to pay and apply the whole of the income of the said trust funds for and towards the maintenance and education of the said plaintiffs, in compliance with the provisions in that behalf contained

in the said indenture; that the defendants, the said trustees, however, were unable by reason of the birth of the said infant defendant W. A. Gurney, to pay and apply the income of the said trust funds or any part thereof towards the maintenance or education of the plaintiffs in pursuance of the directions contained in the said indenture, or to carry into execution the trusts of the said indenture, or any of them, except under the order and direction of the Court of Chancery. The bill also contained an averment that the defendant W. A. Gurney was not a child of the said marriage between the said J. H. Gurney and M. J. Gurney, but that he was the illegitimate child of the said M. J. Gurney; and the plaintiffs charged that the trusts of the said indenture ought to be carried into execution under the order and decree of the Court of Chancery, and that it ought to be declared by the Court that the plaintiffs, as the only children of the said marriage, were absolutely entitled, as tenants in common, to the whole of the trust funds comprised in the said indenture; and that all proper directions should be given and inquiries made for carrying such declaration into effect. The bill prayed that the trusts of the said indenture of the 30th of January 1862 might be carried into execution under the order and direction of the Court. That it might be declared that the plaintiffs, as the only children of the said marriage, were absolutely entitled as tenants in common to the whole of the trust funds comprised in the said indenture. That the interest and income of the shares of the plaintiffs of and in the said trust funds might be raised and applied for the maintenance and education of the plaintiffs, according to the provisions in that behalf contained in the said indenture.

A great mass of evidence had been taken (before a special examiner on the application of the defendant W. A. Gurney) tending to rebut any presumption of access at any time after the elopement.

The defendant W. A. Gurney put in no answer; but it appeared from an affidavit made by the solicitor for M. J. Gurney that property to the amount of more than 400,000*l.* had been settled by the will of R. H. Gurney upon trusts for the benefit of the children of M. J. Gurney.

The Solicitor General, Sir H. Cairns, Mr. Aspland and Mr. Hutton, for the plaintiffs, contended that the presumption of access did not arise where there had been a divorce *à mensa et toro*—*Hubback on Succession*, 412; and although in the present case the decree had not been made absolute at the time of the birth of the child, yet proceedings had been going on in the Divorce Court from the 31st of December 1859. The decree *nisi* had been made before the time of the birth of this child, and the suit for a divorce was successfully prosecuted to the end. If there had been condonation, the decree would not have been pronounced. Taylor was living with Mrs. Gurney at the time of the birth of this child, and acknowledged it as his. These circumstances were sufficient to shift the onus of proof; and it was for the defendant to shew that access did take place. The evidence proved conclusively that no access did take place; and it was not now necessary to prove that it was impossible that access could have taken place.

Morris v. Davies, 5 Cl. & F. 163.

The Banbury Peerage case, 1 Sim. & S. 153.

Goodright v. Saul, 4 Term Rep. 356.

Plowes v. Bossey, 31 Law J. Rep. (N.S.) Chanc. 681.

Mr. Walford appeared for the trustees.

Sir F. Kelly, Mr. Serj. Ballantine and Mr. G. N. Colt (*Mr. Rolt* with them), for the defendant W. A. Gurney, submitted that the real object of the plaintiffs was to place on the file of the Court depositions to be used at a future time in far more important matters: the suit being, in fact, a contrivance to effect that indirectly which could not be done directly, namely, to obtain a declaration of illegitimacy in a Court of equity. Fictitious issues could not be tried, except by the consent of the Court—

Hoskins v. Lord Berkeley, 4 Term Rep. 402.

Re Elsam, 3 B. & C. 597.

And the legislature had carefully abstained from conferring on any Court the power to declare the illegitimacy of an individual. On this point they referred to the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93). The plaintiffs had cited no

authority for adopting this very peculiar course, which if it was a course permitted by the practice of the Court would, no doubt, have been adopted in many previous instances; but such was not the case. If the plaintiffs were to succeed in their suit a very dangerous precedent would be introduced, because it would be competent to any stranger to call in question the *status* of any member of a family, when, perhaps, all evidence had been lost or destroyed. It was obvious that the plaintiffs were not in reality anxious about the subject-matter of the present suit; because an offer had been made to settle a precisely similar sum upon the same trusts, by which the plaintiffs' interests would have been protected, and the suit, so far as it was not fictitious, would have been rendered unnecessary; but such offer had been rejected by the plaintiffs.

As to the presumption of legitimacy and period of gestation, they cited

Head v. Head, 1 Sim. & S. 150; s. c. Turn. & R. 138.

The Gardner Peerage case, by Le Marchant.

The Solicitor General, in reply, submitted that this was not in any sense a fictitious suit; the trust was properly created, and there was nothing to vitiate the *locus standi* of the plaintiffs. The question as to the legitimacy of the defendant, W. A. Gurney, might, no doubt, involve more important consequences than the question immediately before the Court. But no answer or evidence tending to throw discredit on the object of the suit had been put in by W. A. Gurney. He had joined issue with the plaintiffs; on his application, evidence was taken before the special examiner; and then, finding he had no case, he attempted to take this objection to the jurisdiction. Even if the objection were valid, it was now too late for the defendant to raise it. But the Court had in several instances done what was now asked by the plaintiffs: as in the cases of

Shelley v. Westbrook, Jacob, 266.

In re Alicia Race, before Kindersley, V.C., and not reported.

Hope v. Hope, 4 De Gex, M. & G. 328; s. c. 23 Law J. Rep. (N.S.) Chanc. 682.

The authorities clearly shewed that where the purpose was honest there was no

impropriety in taking steps, in order to give jurisdiction to a tribunal to try any question on which the parties were at issue.

Wood, V.C. (May 5).—I should have taken a little time to consider my judgment if this point had escaped my attention until to-day. But certainly it struck me from the first (as it would strike any one who had paid the least attention to the important cases that have occurred in this country with reference to legitimacy) that the course which has been adopted by the plaintiffs, for the purpose of obtaining at so early a stage the decision of such an important question, is entirely novel. And the arguments used by Sir F. Kelly with reference to its novelty are certainly entitled to great consideration, viz., that although in a number of these cases very large interests have been involved, and very great anxiety has been evinced to obtain a decision on points of vital interest to families earlier than according to the ordinary course of law such decision could be obtained, yet the course now adopted here (which one must necessarily see is an extremely simple method of having the question tried) is one which has never been suggested, or, at all events, has never been put in execution before. At the same time, having all that present to my mind, I did not think it right to place the point before the consideration of counsel when the case was opened, because I waited to know whether or not there was any objection raised to the course of proceeding, or what particular defence might be adopted. For aught I knew there might be an equal anxiety on the part of those who were instructed to support the legitimacy of this child to have the *status* of it finally determined, as there was on the part of those who have filed the bill; because as regards the comparative justice or injustice of such a proceeding, or the comparative advantage or disadvantage to the child, I must say it is very difficult to discover any consideration whatever which can make it to be more to the interest of this child than this matter should be determined after he may have attained riper years, and after his education has been concluded upon an uncertain footing, than

to have it determined at once, when his whole *status* and career may be to a certain extent guided by that determination. I am referring to any interest that justice may allow; of course, I could not include in such a consideration the possible interest that the child might derive from the truth being obscured in consequence of the perishing of evidence that would be important for the determination of the question. That cannot be urged as a legal consideration why the Court should not come at once to a conclusion. I confess it strikes me that in every possible point of view it is for the interest of all persons to have the *status* of their children determined at the earliest period of their existence, in order to guide them with regard to the future course they are to pursue in life.

However, the point is a grave one, I admit; and the cases at common law cited by Sir F. Kelly do not appear to me to raise any serious question on this part of the case. They are simply cases in which the Court has said: We will not allow the forms of justice to be trifled with by having fictitious cases brought before the Court for decision, the Courts of this country not being constituted as tribunals to advise, but as tribunals to decide, and to dispense justice, rendering to every one his due when matters calling for the interference of the Court in that respect shall arise; and therefore every Court sets its face against fictitious cases of the character described in the authorities cited. This Court, I am afraid, is very frequently made use of in cases of a fictitious description, where it is very difficult to avoid being so made an instrument,—I mean the large class of cases with reference to fancy articles of various descriptions which, I believe, are advertised through the medium of this Court; it would be very desirable if we could have an affidavit in the first instance, instead of having the submission of the defendant. That class of cases is much more analogous to the cases at law which have been cited, and with respect to which the Court might well adopt some test. Of course, this Court could no more interfere than a Court of law where there was no case to be tried, if it was aware of the fact; and that is all that the authorities at common law amount to.

Now, in this case there can be no doubt at all that there is a grave and serious interest at stake. But it is said, that is not the question raised by the bill; that the bill merely asks for the administration of a trust, and that the administration of that trust is put simply as a pretext for arriving at a conclusion upon a matter of much more vital importance to all parties concerned. I think, however, that that is not an answer to the case as it is presented to me by the counsel for the infants on whose behalf the bill has been filed, because neither by this Court nor by the Courts of common law has it ever been said that they would not try a point brought before them which was legitimately in issue and which required determination, because it would involve interests of far greater magnitude than the matter immediately before them. One may easily conceive cases in which, without any previous arrangement for the purpose, the decision of a very simple and comparatively trifling matter may involve consequences of the gravest possible interest to the parties concerned. But, further than that, I think the Solicitor General in his reply placed a class of cases before the Court which bear a striking analogy to the one before me. This Court does not only decide questions which incidentally involve matters of great magnitude, because it is obliged to determine them upon the existing state of circumstances, not brought about for the purpose of having those graver questions decided but occurring simply and naturally (if I may use such an expression) in the ordinary course of business, and only collaterally giving rise to the more important issue; but the Court has acted, and does continually act in cases where the circumstances upon which the Court is to exercise its jurisdiction are created expressly for the purpose of raising some larger and graver question. There cannot be a stronger instance than the decisions with reference to children, and the right which the parent has over the child, a right quite as important as the *status* of the child itself. Cases of that description arise here, where it has been supposed, correctly or incorrectly, that the question could not be raised without a provision of some sort or other being made for the child, in

order that the Court might have jurisdiction to deal with the custody of the child as one of its wards, whose education it will undertake to superintend and direct. That has been notoriously done for the express purpose of taking a child from its father; and it has been notoriously done to provide that the child should be educated in a different faith from that which the surviving parent desired; and with success in each case, as in the case of *Shelley's child*, and in the case of *Alicia Race*, before Vice Chancellor Kindersley. That being so, can I, on principle (having before me the fact of the settlement), escape from determining who are to be the objects of the trust, because I know (assuming I do know such a fact—and I only know it here from the strongest probability, amounting almost to a legitimate conclusion in the mind of the Court,) that the father made that settlement for the purpose of having it ascertained whether or not a particular child was one of his family? It is true that you might allow the peace of families to be disturbed by permitting some stranger to make provision for a child of a family, for the express purpose of having it decided whether one or other of the children, against whom he had some personal antipathy, was legitimate or illegitimate; and that class of cases would have a considerable bearing on another class which were present to my mind, where the Courts of common law have refused to allow wagers to be made, which they consider contrary to public policy, as interfering with the peace and comfort of families. Again, where there was a provision for the children of a family, and a limitation to the use of one of the ladies (against whom there was no imputation) "if she should remain chaste," the Court struck out altogether the condition, and treated the trust as simple and absolute. I think the answer, however, has been given to that by the Solicitor General in his reply, namely, that the Court must deal with those matters as it finds them, and when the circumstances arise. Nothing that I decide in this case will determine that it will be competent to a stranger to create a trust of that description, where no other object can be in view, and where nothing can be suggested beyond a trust created for the express purpose of disturb-

ing the peace and happiness of a family, with which that stranger has no connexion whatever.

The case here before me is that of a father, who is desirous, and for good reason, as the rest of my judgment will shew, to dispute the legitimacy of a child who has been born during the period that he was still united to the mother in wedlock. He has other children, and he considers it to be of the deepest importance, and for the happiness of his family (and nobody can dispute that it must be so, both for the children themselves and for this unhappy infant also), that it should be ascertained what the exact *status* of the family is; whether there are two or three children who are to be deemed children of the marriage between himself and his wife. An object more legitimate and proper than that can scarcely be conceived, if you look to the end which he had in view. Then the settlement is made, and those who raise this question are the two infants. No one can dispute that it is greatly for their interest, in every point of view, that the question should be determined. They have a right, as it appears to me, to have their interests in this trust fund ascertained; that, in fact, could hardly be disputed by anybody if it were an ordinary case; and there is nothing to impede their right in the circumstance that the father has made that provision with such an object as has been pointed out. The mode of meeting the case that has been suggested, I could not listen to. In order to preserve to this child a remoter period for ascertaining its *status*, the suggestion has been this: the guardian of the child says, "I will provide, if you please, a like sum, and the Court shall deal with that sum, in order to postpone for this child any decision that may be come to on its *status*; the infant plaintiffs will have all they can require; they shall have this fund found for them, and it shall be applied solely to their use." If I were to allow that, it would be simply stultifying the whole proceedings of this Court in this very absurd way, that a suit of this kind could be got rid of when a sum of 2,000*l.* was settled, and somebody was content to offer a like sum in return; but if 20,000*l.* were settled, and it was not so convenient or easy to find some one with so large a

sum to buy off the suit, then the proceeding must take its course. The Court could not be party to a bargain or arrangement of that kind, and the matter must necessarily be decided on the strict rights of the parties, and the strict course of procedure of the Court.

I was struck, at the moment, with one suggestion made by Sir F. Kelly, with reference to the course that has been taken by the legislature of allowing declarations of legitimacy to be obtained; whereas it has not been thought proper to allow any course to be taken for obtaining declarations of illegitimacy. It is a sufficient answer to that to say, that the declaration of legitimacy would be at once a matter fixing the *status*; it would be a proceeding *in rem*; a proceeding conclusive on all persons whomsoever; and was therefore a totally new remedy, introduced by the legislature for the particular class of cases. At the same time the legislature may well have thought it would be a disturbance of the peace of families to allow any person to take a course of procedure for obtaining a declaration of illegitimacy. But still we must bear in mind that the legislature must have been aware that, continually and collaterally, in the same way as it arises here, the question of legitimacy and illegitimacy is constantly occurring; because, though I have here the case of a father proceeding with a particular view in the manner which I have referred to, the case might at any time happen of any collateral relation simply making a settlement on the same children; he might do so to-morrow; an uncle or aunt, or any other person, might die, leaving a provision for the children, and then the matter would have to be decided. With that the legislature has not thought fit to interfere; and therefore I cannot presume anything one way or the other from the course which has been taken by the legislature, where it has given a different remedy, which is to be binding and conclusive for all time, and against all persons—(being a declaration *in rem*, which the declaration of *status* would be)—I cannot gather from that any inference as to their wishing to interfere with the course of proceeding where there is a totally different species of jurisdiction, such as I am now called upon to exercise in the

declaration of this trust—as I said before, I would have waited longer to consider this question, had it not been well before my mind. Since the case was first opened I have had time to consider it a good deal. Although Sir F. Kelly says, it is a case of the first impression from the circumstances under which he comes before me, yet it is not a case in which I can say, I am not bound to exercise the ordinary jurisdiction of the Court.

As regards the facts, it may be said to be an undefended case. I do not mean undefended by the able counsel who have been engaged in the case for the defendants; it is a satisfaction to the Court to have had their assistance. I have not the least doubt that, from first to last, every step has been taken that could be taken, and there has been no lack of means, in any sense, for obtaining ample assistance for this child. Everything has been done which could have been done to prove—if it could possibly be proved—the legitimacy of this third child.

What is the result? The case is very much stronger than *Morris v. Davies*—it is scarcely necessary to dwell on the evidence for a moment, and it has, I think very properly, not been thought necessary by the learned counsel who wish to support the legitimacy of the child, to dwell on the facts at length. In *Morris v. Davies* there was the circumstance that the wife was living with a paramour, and the child born was treated by the paramour as his child, exactly as in the case before me; but then in that case you had the extraordinary fact (which always made it a very strong case, although I doubt not most righteously decided), that the parties were living within fifteen miles of each other (not living as here without the facilities of intercourse between them, the sea running between them), but living all the time in villages only fifteen miles apart, when there was the possibility every night of some sort of intercourse taking place without the knowledge of third parties; there was actually the fact of a visit of the husband to the wife, their being for a short time alone together, he going on some particular business referred to; yet nevertheless with all those circumstances the conclusion was come to that the child was illegitimate.

In this case it is proved as far as negative evidence can prove anything, that there has not been one single moment of personal intercourse since the elopement; they may possibly have been within sight, but they have never been within hearing of each other from the first time of the unhappy elopement of this wife down to a period of not quite eight months before the birth of this child, which would make it almost impossible, and certainly very improbable on the facts of the case, that her husband was the father; the husband was proved to be in England and the wife proved to be abroad, and although the husband may not be accounted for every single day in the interval, yet he is so accounted for that there is not the most distant presumption to go to a jury, or reason for inferring for a moment that he had gone beyond the seas, or had left this country; the wife during the same time was residing abroad; all that is brought down to the September before the wife returns to this country, the child being born in May. Then it is some time in September before she is found to be at all near where he was; but so far from there being any proof of the two being brought together, there is every possible reason on all the circumstances of the case, even if no steps had been going on in the Divorce Court or elsewhere, to presume that no interview took place; and when you couple with that the fact that from the very first moment he could do so this gentleman endeavoured to vindicate his honour by taking proceedings against the wife who had broken those ties by which they had been hitherto united; considering that from the first moment he could take that step he pursued it without hesitating or wavering for an instant and did pursue it up to the last with success, I think under those circumstances to presume that there was any intercourse between them which could have led to the birth of this child, would be a presumption of the most violent description, because it is manifest that on the only occasion on which there was any conceivable possibility (if the evidence could have borne it out) of an interview taking place, there was everything that would negative that interview, and the circumstances are such as would lead any

Judge to direct a jury to find that no such interview had ever taken place. This case is a vast deal stronger than the case of *Morris v. Davies*. I have not commented upon the other circumstances of the case; the period of gestation, or the continuous living of this lady with her paramour. If the case rested simply upon the fact of whether or not under the circumstances such access had been proved as might result in the birth of this child, I apprehend that any tribunal before whom the question came must hold that the presumption of law which exists where there is proved to the satisfaction of the Court any fact that would in itself render the birth of the child possible is rebutted. Under these circumstances, I think that it is impossible that this child can have been the offspring of the imaginary reunion. I think, therefore, that the plaintiffs are entitled to have a decree in the terms of the first and second paragraphs of the prayer of the bill, namely, a direction to have the trusts of the indenture carried into execution and a declaration that the plaintiffs, as the only children of the marriage, are absolutely entitled as tenants in common to the whole of the trust funds comprised in the indenture, with liberty to apply at chambers with reference to their maintenance.

KINDERLEY, V.C. { *Ex parte* THE VICAR
Feb. 19. { AND CHURCHWARDENS
OF ST. SEPULCHRE'S,
in re THE WESTMIN-
STER BRIDGE ACT, 1859.

Commissioners of Works and Public Buildings—Costs of Purchase and Reinvestment in Land—Payment into Court.

The Commissioners of Works and Public Buildings took certain lands vested in charity trustees, and by reason of difficulties in the title paid the purchase-money into court, and it was subsequently reinvested in the purchase of other lands under an order made for that purpose, and the costs were ordered to be paid according to the act:—Held, upon the construction of the 49th section of the 9 & 10 Vict. c. 39, that the costs to be paid by the Commissioners were the

costs of the original purchase and of the re-investment in other lands.

The question raised upon this petition was whether the costs of the purchase of certain premises taken by the Commissioners of Works and Public Buildings were payable by them under the 49th section of the 9 & 10 Vict. c. 39.

The facts were these: In consequence of the improvements which had been made in the approaches to Westminster Bridge, it became necessary to take a house and premises at the junction of the bridge and Palace Yard, which premises were charity property, and, as such, were vested in the vicar and churchwardens of St. Sepulchre's, in the county of Middlesex, as trustees of the charity. Considerable difficulties arose with respect to the making out a title, the abstract being considered very imperfect, and eventually 3,300*l.* was paid into court by the Commissioners. The title being subsequently approved of, and a conveyance executed, the trustees procured an eligible landed investment for the purchase-money in court, and, in July 1862, a reference was directed in the usual way. On the 16th of January 1863 an order was made for the payment out of court of the 3,300*l.* so paid in to the trustees of the charity (the vendors) to be laid out in the purchase of the lands, the title to which had been approved of in chambers, and the costs were ordered to be paid according to the act. In drawing up this order, the registrar (Mr. Munro) raised the question whether those costs so ordered to be paid by the Commissioners included not only the costs of the reinvestment in the purchase of other lands, but the costs of the original purchase by them. The act of parliament under which the premises were taken was the 22 & 23 Vict. c. 58, 1859 (the Westminster Bridge Act), with which were incorporated the 16 & 17 Vict. c. 46. and the Chelsea Bridge Act, 9 & 10 Vict. c. 39, such last act, as to the enabling clauses, being also incorporated with the 16 & 17 Vict. c. 46. The 49th section of the Chelsea Bridge Act was as follows: "And be it further enacted that where, by reason of the disability or incapacity of any body or bodies, trustee or trustees, corporations, or any persons

or person entitled to any house, buildings, ground, tenements or hereditaments, or any part or parts thereof, or share or shares, estate or estates, interests or interest therein, or charges or charge thereon, to be purchased or taken under the authority of this act, the purchase-money for the same shall be required to be paid into the Bank of England in the name or with the privity of the Accountant General of the Court of Chancery, and to be applied in the purchase of other lands, tenements or hereditaments to be settled to the like uses in pursuance of this act, it shall be lawful for the Court to order the expenses of all purchases from time to time to be made in pursuance of this act, or so much of such expenses as the Court shall deem reasonable to be paid by the said Commissioners, who shall from time to time pay such sums of money out of the monies applicable to the purposes of the act as the Court shall direct."

Mr. Pontifex, on behalf of the petitioners (the vicar and churchwardens), now moved that the Commissioners, out of the monies in their hands applicable to the purposes of the act, should pay, not only the costs of the reinvestment in other lands, but the costs of the original purchase. The intention of the act was that every expense to which a vendor was put by reason of the compulsory taking of his lands should be paid by the Commissioners, otherwise great injustice would be done; and therefore, on the construction of the act, and under the circumstances, they ought to be ordered to pay all the costs that had been incurred.

Mr. Hanson, for the Commissioners, contended that the words of the section were express, and provided that in the case of payment of purchase-money into court, the Court should order the costs of all purchases (in the prospective sense) to be paid by the Commissioners. These words only applied to such purchases as were made *after* the payment into court, and therefore included only the costs of the reinvestment of the purchase-money in other lands. In confirmation of this the act referred to something on the part of the vendors, which rendered the payment into court necessary; here it was a defect of title, and

hence the latter part of the section gave a discretion to the Court to apportion the costs according to the circumstances of the case—

Re Cherry's Trust, 31 Law J. Rep. (N.S.) Chanc. 38, 351.

In re Strachan's Estate, 9 Hare, 185; s. c. 20 Law J. Rep. (N.S.) Chanc. 511.

KINDERSLEY, V.C.—The question upon this petition turns upon the construction of the 49th section of the 9 & 10 Vict. c. 39. —[His Honour read the section.] I think that I ought to put upon these words a *prima facie* interpretation, unless there be something which leads to the conclusion that they ought not to bear that meaning. This act authorizes the Court to order that the expense of all purchases to be from time to time made in pursuance of the act shall be paid by the Commissioners out of monies in their hands; and therefore the question is whether the purchase of these premises in Palace Yard is a purchase in pursuance of this act? Upon the literal interpretation of the act no doubt it is. This act is incorporated into the act of 1859 (22 & 23 Vict. c. 58.) by a double reference, and the purchase is in fact under this act. It is contended, on the part of the Commissioners, that it is only when the money has been paid into court that the Court has jurisdiction; and that therefore the words of the 49th section as incorporated into the act of 1859 cannot receive what would otherwise be their ordinary construction, but must be held to apply only to that period after the money has actually been paid into court. It appears to me that such a construction as that would not be a reasonable one. The abstract justice of the case is, that where individuals are liable to have their property taken for public purposes it must be presumed that they are entitled to be paid all expenses which are entailed upon them by such taking, otherwise the greatest injustice might be done; and therefore whatever expense a person is put to in such a case, justice requires that he should be repaid that expense. Now, I am of opinion that there is nothing in this act to prevent the application of this general well-established rule. The Commissioners, therefore, out of the funds in their

hands applicable for the purpose, must pay the costs of the original purchase as well as the costs of all future purchases by way of reinvestment of the money in the purchase of other lands.

ROMILLY, M.R. }
Jan. 27, 28. } FORD v. TENNANT.

Solicitor and Client—Privileged Communications.

Information obtained by a solicitor from a third party, though while acting professionally for a client, is not privileged.

Greenough v. Gaskell (1) not followed.

George Booth, as the solicitor of Captain Rooke, was employed in certain business, in which he and the family were interested, in relation to an annuity which they claimed to be entitled to against Charles Tennant. While so employed Mr. Booth had several interviews with Mr. Tennant, and also with Messrs. Harrison & Finch, his solicitors; he also received from them several letters and memoranda which had reference to the business. In September 1862 the plaintiff's solicitor in this suit applied to Mr. Booth for information which it was assumed he had acquired from Mr. Tennant and Messrs. Harrison & Finch, in the course of the business in which he had been employed as the solicitor of Captain Rooke. Mr. Booth, by Captain Rooke's direction, refused to give the information sought.

The plaintiff then subpoenaed him as a witness to give evidence *ex parte*. The following examination was the result.

"In November 1857, as I believe, Mr. Rooke employed me as his solicitor respecting a matter relating to Lord Kenaington's estate. That matter was in respect of an annuity granted to a Mr. Savage. I communicated with Mr. Finch, of the firm of Harrison & Finch, on the subject, and I also saw Mr. Tennant on the matter. I have some papers with me relating to the matter. The date of the first letter I received from Messrs. Harrison & Finch was in January 1858. I decline to produce that letter, on the ground that I consider all letters received by me respect-

ing the business of my client are privileged communications, and that I ought not to produce that letter. I was employed by Mr. Rooke and his brothers; and I hold that letter and other papers as the solicitor and professional adviser of Mr. Rooke and his brothers. Q. I ask the dates of all the other letters you have. A. I decline to give the dates.—Q. Did you make a claim on behalf of your client on Messrs. Harrison & Finch? A. I decline to answer the question.—Q. Did Messrs. Harrison & Finch make any representations to you on the subject of Savage's annuity? A. I had several conversations with them and they with me on the subject, chiefly with Mr. Finch, but I had some with Mr. Tennant; Messrs. Harrison and Finch were then the firm.—Q. What did Mr. Finch say? A. I decline to state. I was directed by Mr. Rooke not to give any information I was in possession of as his solicitor respecting Mr. Rooke's matter.—Q. When did you last see Mr. Finch? A. I cannot say when I last saw Mr. Finch. It was, perhaps, in 1858 or 1859 that I last saw him about Mr. Rooke's matter. I have not had any conversation with him respecting the matters of this suit. I prepared a case for the opinion of counsel, and I obtained my information to enable me to prepare that case from my clients—some from Mr. Rooke, and some from his brothers. I cannot remember whether I obtained any information from any other person. I do not remember whether I obtained any information from Mr. Tennant, and I decline to look at any papers. I may have to search whether I received any information from Messrs. Harrison & Finch. I obtained some copies of documents from some one, but I do not remember from whom I received them. I do not remember whether I received any documents from Mr. Tennant. I do not know what is meant by documents; but I believe I received some papers from Mr. Finch: to the best of my remembrance I received a copy of some deed from him, but no agreements or copies of agreements that I remember. I ceased to act as solicitor for Mr. Rooke in that matter either in 1858 or 1859. I believe that my bill has been paid.—Q. By whom was it paid? A. I decline to answer the question. I did not act for Mr. Rooke

(1) 1 Myl. & K. 98.

NEW SERIES, 32.—CHANC.

3 O

in the matter of an assignment of Savage's annuity.—Q. Did you act as Mr. Rooke's solicitor on the occasion of his advancement of his claim to Savage's annuity? A. I object to answer the question."

The plaintiff, in consequence of this refusal to give any evidence, presented a petition, and after stating the circumstances, prayed that the objections of the witness might be set down to be argued after the pleas and demurrers already appointed.

Mr. Lloyd, in support of the demurrer.—*Mr. Booth* was justified in the course he had taken; he was asked to disclose professional communications when requested not to divulge them by his client. The communications of Messrs. Harrison, Finch and Tennant to *Mr. Booth* must be considered as if they had been made to *Mr. Rooke* himself; in that case, if *Mr. Rooke* had communicated what had been told him to *Mr. Booth*, they would have been privileged communications. It was, in fact, confidential information obtained by *Mr. Rooke* through his solicitor. There had been great innovations upon the privilege of solicitors; the relaxation of a right was not a denial of its existence, the right was clearly recognized in—

Greenough v. Gaskell, 1 Myl. & K. 98.

Jones v. Pugh, 1 Phill. 96.

Desborough v. Rawlins, 3 Myl. & Cr. 515; s. c. 7 Law J. Rep. (N.S.) Chanc. 171.

Herring v. Clobery, 1 Phill. 91.

Steele v. Stewart, 13 Sim. 533; s. c. 12 Law J. Rep. (N.S.) Chanc. 473.

Bolton v. the Corporation of Liverpool, 1 Myl. & K. 88; s. c. 1 Law J. Rep. (N.S.) Chanc. 166.

Mr. Southgate and *Mr. Hemming*, for the plaintiff.—Direct communications between solicitor and client were no doubt privileged; but communications obtained by the solicitor from third parties were in no way protected: a solicitor could claim no privilege for them: though they were obtained in the prosecution of inquiries in relation to the business of the client, it must be considered as information generally obtained, and he is bound to disclose it when required to do so in furtherance of justice.—

Spenceley v. Schulenburg, 7 East, 357.

Sawyer v. Birchmore, 3 Myl. & K. 572.

Griffith v. Davies, 5 B. & Ad. 502.

Bramwell v. Lucas, 2 B. & C. 745; s. c. 2 Law J. Rep. K.B. 161.

Tippins v. Coates, 6 Hare, 16; s. c. 17 Law J. Rep. (N.S.) Chanc. 17: on appeal, 17 Law J. Rep. (N.S.) Chanc. 337.

Gore v. Bowser, 5 De Gex & Sm. 30; s. c. nom. *Gore v. Harris*, 21 Law J. Rep. (N.S.) Chanc. 10.

1 *Taylor on Evidence*, 771, 3rd edit.

Mr. Lloyd, in reply.

THE MASTER OF THE ROLLS.—The question to be determined was whether the information obtained by *Mr. Booth* while acting as the solicitor for *Captain Rooke* was privileged. It was not derived from the client, but from a stranger to the client while as solicitor for that client *Mr. Booth* was transacting his business. The reason why communications were held privileged was in the furtherance of justice: it was considered essential that there should be the most full and unfettered communications between a client and his solicitor. If that rule did not exist a suit could not be carried on, and justice possibly could not be obtained. There ought, however, to be no extension of the rule if it would prevent the disclosure of truth. A suggestion certainly might be made that the rule could not be extended to information obtained by a solicitor while acting in that character for a client when it was not derived from the client himself. It was admitted that the rule could be applied to those things only which affected the client's interest; and if he had no interest, that the solicitor, though he acquired the information while acting in that character, could not refuse to disclose what had come to his knowledge. The cases confined the rule to communications between the client and his solicitor, and it was extended to all purposes necessary to enable the solicitor to conduct the cause of his client: communications therefore between a solicitor and his agent were privileged. But there was a great difference between these cases and cases in which the information was derived from third parties, whether they were strangers to the client or his opponents, though it was given to the solicitor while he was acting as such; and there would be but little doubt of it, were it not for *Greenough*

v. Gaskell, in which it was said, "If, touching matters that come within the ordinary scope of professional employment they receive a communication in their professional capacity, either from a client, or on his account and for his benefit in the transaction of his business, or which amounts to the same thing, if they commit to paper in the course of their employment on his behalf matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them; and they will not be compelled to disclose the information or produce the papers in any Court of law or equity, either as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential and, it may be, the most important of all communications—those made with a view of being prepared either for instituting or defending a suit up to the instant that the process of the court issued." This comprised more than mere communications between solicitor and client: it decided that if the solicitor received the communications in his professional capacity, either from the client or from others, it was privileged. That decision, it was said, was not an *obiter dictum*, as the solicitor was not compelled to set out a list of the papers, some of which were clearly privileged, while others were not. The better opinion, however, would seem to be, that such of the papers as were obtained from the client should have been protected, but that those derived from other sources should have been set forth. This was suggested in *Desborough v. Rawlins*; still *Greenough v. Gaskell* had been followed repeatedly, but no cases appeared to have been cited, though some were referred to in the judgment; but there was no reference to *Spenceley v. Schulenburg*, and it would hardly be supposed that Lord Brougham intended to overrule the previous cases which confined the privilege to communications between the client and the solicitor or his agent. It does not appear that there is any case in which that part of the judgment in *Greenough v. Gaskell* above stated has been followed. In *Spenceley v. Schulenburg* Lord Ellenborough admitted that at the trial he had been wrong in rejecting the evidence

of a witness, and he was satisfied afterwards that he had acted hastily; he said "that the privilege was restricted to communications whether oral or written from the client to his attorney, and could not extend to adverse proceedings communicated to him as attorney in the cause from the opposite party, in the disclosure of which there could be no breach of confidence." In *Desborough v. Rawlins*, without professing to doubt the passage above stated, Lord Cottenham said that "both *Bramwell v. Lucas* and *Greenough v. Gaskell* shew that the privilege only applies to cases in which the client makes a communication to his solicitor with a view to obtaining his legal advice." It was upon that ground, in *Sawyer v. Birchmore*, that a solicitor when examined as a witness was held bound to produce letters communicated to him from collateral quarters, and to answer questions relating to matters of fact as distinguished from confidential communications. This was decided, not on the authority of *Bramwell v. Lucas* only, but *Spenceley v. Schulenburg* was also referred to. In *Sawyer v. Birchmore* a solicitor was required to disclose circumstances arising out of transactions in which he had been concerned as solicitor; and it was considered that the facts brought forward did not disclose enough to shew that they were privileged, as the Court of King's Bench had said that communications privileged when they came from the client would not be privileged if they came from any collateral quarter. It was clear, therefore, that there might be a case in which a solicitor might hold papers which were not privileged. The facts did not bring the case within the privilege applicable to confidential communications. These passages, therefore, could not stand side by side with the *dictum* in *Greenough v. Gaskell*. They said that the privilege did not extend to communications which came from any other quarter than from the client, whether they came directly or indirectly. In *Gore v. Bowser*, also, a witness who had acted as agent for the plaintiff refused to be examined, on the ground that his information was obtained through confidential communications made to him in the course of his agency, and while acting as their solicitor, and it was considered to be neither confidential nor privileged, and that the defendant was enti-

tled to examine the solicitor as a witness. Had the communication been made by letter, it is the practice to order the production of letters, and copies of letters, which pass between the plaintiffs and the defendants and their respective solicitors.

The *dictum* in *Greenough v. Gaskell* must either be adopted as a decision, or the other cases must be overruled. As, however, the point in that case did not seem to have been seriously considered, Mr. Booth's objection must be overruled, and the usual order for his examination must be made.

Wood, V.C. }
 April 30; } PAGET v. HUISH.
 May 4. }

Charge of Annuities—Specific or Demonstrative.

F. H., by his will, gave certain annuities, and directed that they should be paid by his trustees out of the rents of his real estate. The testator then devised his real estates to trustees, upon trust out of the rents and income to pay the annuities, and subject thereto upon other trusts.

F. H. died, and the rents and income of his real estates were insufficient to satisfy the annuities:—Held, that the gift was not specific, but demonstrative, and that the deficiency must be paid out of the capital of the testator's residuary personal estate.

This was a SPECIAL CASE.

Francis Hart, by his will, dated the 27th of June 1857, directed his debts, &c. to be paid out of his personal estate, and after making a specific bequest of furniture and effects, he gave and bequeathed certain pecuniary legacies, and directed that the several legacies thereinbefore bequeathed should be paid out of his personal estate at the end of six calendar months from his decease; and the testator gave and devised annuities to five persons, and declared that each of the said five annuities should be paid by the trustees of his will out of the rents of his real estate thereby devised, half-yearly, and that the first payment thereof should be due and be made at the end of six calendar months from his decease, and he gave the said five annuities

free of legacy duty, which he directed should be paid out of the rents of his real estate; and the said testator devised and bequeathed all his real estates and the residue of his personal estate to trustees, upon trust with and out of the rents and income of his said real estates to pay the said several annuities, and subject thereto to permit his grandson, Charles F. Fellows, to receive the rents, dividends, interest and annual income of all and singular the said real and residuary personal estates for and during the term of his natural life, for his own use and benefit, and from and after the decease of the said C. F. Fellows, the testator directed that his said trustees should stand seised and possessed of the said real and residuary personal estates, upon trusts for the benefit of the child, children, or other issue of the said C. F. Fellows, and in case of the death of the said C. F. Fellows without leaving issue who should live to acquire a vested interest, then upon trust for other persons.

By a codicil dated the 9th of July 1847, the testator gave annuities to six persons; and the testator directed that each of the said six annuities by his said codicil given and devised, should continue and be payable to or for each of the said annuitants if he or she respectively should so long live until the said C. F. Fellows should attain the age of twenty-one years, or should die under that age without leaving any child or children him surviving, or if he should die under that age, leaving a child or children, then until such child, if he should leave only one, or some one of such children, if he should leave more than one, should attain the age of twenty-one years, or until such child or all of such children should die under that age; and the testator declared that the several annuities by his said codicil given and devised should be a charge upon and be paid out of the rents of his messuages or tenements, lands, hereditaments and other real estates by his said will devised or otherwise disposed of in the same manner in all respects as the annuities by his said will given and devised; and that the trustees of his said will for the time being should, with and out of the rents of the same hereditaments and real estates, and before making any other payments thereout, except

the annuities by his said will given and devised, pay the said annuities by his said codicil given and devised when and as from time to time due during the continuance thereof respectively, and that the same annuities should be due and be paid and payable half-yearly, and the first payment thereof should be made at the end of six calendar months from his decease; and he gave all the said annuities by his said codicil devised free of legacy duty; and he directed that the legacy or annuity duty should be paid out of the rents of his real estate.

The testator died on the 21st of March 1862; and the annuities, which became payable under the said will and codicil, amounted to the yearly sum of 660*l.* The yearly rental of the real estate, which passed by the above-mentioned will, did not exceed 480*l.*

At the time of his death the testator was possessed of personal estate to a very large amount. As the rents of the real estate were insufficient to pay the annuities, the question brought before the Court was, whether the deficiency ought to be made good out of the income or capital of the residuary personal estate, or whether the residuary personal estate was exonerated from such payment.

Mr. W. F. Robinson appeared for the trustees.

Mr. Kay (with whom was *Sir H. Cairns*), for the annuitants, contended, that this was not like the case of a specific legacy. The rents of the real estate were pointed out by the testator as the property primarily liable, but if they proved insufficient there was nothing in the will to exonerate the personal estate. The evident object of the testator was to give annuities to this amount, whether the rents of the real estate were sufficient or not; the deficiency therefore must be made up from the personal estate. On these points the following cases were cited—

Mann v. Copland, 2 Madd. 223.

Fream v. Dowling, 20 Beav. 624.

Hancox v. Abbey, 11 Ves. 179.

If the Court should be of opinion that the personal estate was exonerated, the annuitants were entitled to have the deficiency made up by a mortgage or sale of part of the real estates, as the words "rents

and profits" might be extended beyond their natural meaning when necessary for the object of the testator—*Allan v. Backhouse* (1).

Mr. Giffard and *Mr. Field*, for C. F. Fellows, contended that if not a specific gift, this was in the nature of a specific gift, and could not be governed by the rules applicable to a demonstrative legacy—

Dickin v. Edwards, 4 Hare, 273; s. c. nom. *Dickin v. Barker*, 14 Law J. Rep. (N.S.) Chanc. 22.

Gordon v. Duff, in re Ward, 28 Beav. 519.

Williams v. Hughes, 24 Ibid. 474; s. c. 27 Law J. Rep. (N.S.) Chanc. 218.

The amount of the personal estate could not be inquired into as a ground of construction—*Bootle v. Blundell* (2). Having regard to the terms of the gift over, it was clear that the annuitants could not claim to have the deficiency raised out of the corpus of the real estates; on this point they cited—

Phillips v. Gutteridge, ante, Chanc. 1; *Stellfox v. Sugden*, Johns. 234.

Mr. Kay, in reply.

Wood, V.C. (May 4.)—The question which arises is one which has very frequently received the consideration of the Court, namely, whether or not these are annuities given as part of a certain distinct property, or whether they are simply charged upon the property, either primarily or secondarily, as the case may be, so that, in the event of the fund itself failing, they became charges upon the general personal estate.

The cases are very numerous upon this subject, and may be divided into three separate heads, which are clear and distinct in themselves, though the application of the doctrine applicable to the particular case before the Court is frequently one of some difficulty. There is, first, the case in which a simple gift of an annuity or legacy is made with a charge of that annuity or legacy upon the real estate, in which case the personal estate is not, even in the first instance, exonerated, but remains primarily

(1) 2 Ves. & B. 65.

(2) 1 Mer. 193.

liable; it is simply like a charge of debts or other payments on real estate, and the gift takes effect as a gift of a legacy or annuity; there is a charge made upon the real estate; but the personal estate is primarily liable. The second case is this; where the gift is in such a form that the Court has held that it is a specific gift of so much of the real estate as would be sufficient to raise the amount charged, in which case the personal estate is in no way liable, and the charge takes effect out of that specific property of which it forms a part, and that property failing, the gift must fail, like every other specific gift. The third and intermediate class of cases is where the legacies are what the Court has termed "demonstrative," that is to say, where there is a clear indication of intention to give a legacy; but where there is also pointed out a specific fund, out of which it is to be paid, and in that case the specific fund so pointed out is the primary fund to answer the charge; but in the event of that fund failing, the gift itself does not fail, but the testator's general personal estate remains liable.

Cases of the first class, where there is a simple gift of a legacy charged upon an estate, are so common that I need scarcely mention them; the personal estate is first applicable, and the charge on the real estate only takes effect in aid of the personal estate. Of the second class of cases, a very good type exists in the case of *Dickin v. Edwards* (3), where Wigram, V.C. refers to the several authorities upon the subject, and points out the distinction which was laid down by Lord Macclesfield in *Savile v. Blacket* (4). The question is, whether or not the gifts of the several annuities in this particular will are to be treated as gifts of that description. An instance of the third class is that case of *Mann v. Copland* (5), in which, although there were two specific funds out of which the legacy was to be paid (it was to be paid, in the first instance, out of the real estate, and if that failed, out of another specific fund, and both funds did fail), it was held that the gift was simply demonstrative, and that the annuity was to take effect, though both funds, which were

pointed out as the funds proper to answer the gift in question, had failed.

The Court has now to consider whether the testator here has so expressed himself as to indicate a clear intention to confer a gift at all events, simply pointing out the fund which he wishes to be applied, in the first place, to make good that gift, or whether he has only given such a portion of the specific fund as will be adequate to meet the existing charge. In the case of *Dickin v. Edwards* the Court held that the thing given was the thing created by the charge; it was not a gift of a sum equivalent to the charge, but a gift of so much of the estate as formed that charge.

This class of cases has been commented upon at some length by Lord Cottenham in the case of *Creed v. Creed* (6), which was an appeal from the decision of Sir Edward Sugden. Sir E. Sugden had reversed the decision of Lord Plunket, and the House of Lords reversed Sir E. Sugden's decision. In that case the gift was in this form: the testator bequeathed to his wife an annuity or yearly rent-charge of 1,000*l.* during her life, charged upon and to be issuing and payable to her out of all his real and freehold estates. Perhaps one may say that that was not a very difficult case; but nevertheless Lord St. Leonards held that it was not there a specific gift of an interest in the real estate; and the form in which it came before him was this, the real estate being clearly primarily charged in that instance, the other legacies had been charged on the personal estate, and had exhausted it entirely,—then they also were charged on the real estate, and the question was, whether they were to be paid *pari passu* with the rentcharge, or whether the rentcharge took priority, and in that case Lord St. Leonards held that there was no specific gift, that it was merely a gift of an annuity charged upon and issuing out of the lands, and that the annuities and gifts payable first out of the personal estate were chargeable *pari passu* with this particular annuity. As regards the annuities in the case before me, it appeared to me during the argument, and it appears to me still, that there was a clear intention to make the gift at all hazards, and that the fund

(3) 4 Hare, 273.

(4) 1 P. Wms. 777.

(5) 2 Madd. 223.

(6) 11 Cl. & F. 491.

was only pointed out as the property which the testator wished to be primarily applied towards its satisfaction. The gift is in this form—the testator gives several legacies in the first instance; and then come these words, “to my said nephew Charles Lloyd during his life the annuity or yearly sum of 120*l.*, to be paid to him or applied by my trustees for his benefit; to my said nephew Robert Lloyd during his life, the annuity or yearly sum of 120*l.*; to Harriet Huish, wife of my late wife’s said brother Calverley Huish, during her life, the annuity or yearly sum of 30*l.*”—and so on: he gives a number of annuities in those terms, and then he says at the end of the clause, “and I declare that each of the said five annuities shall be paid by the trustees of this will out of the rents of my real estates hereby devised half-yearly, and the first payment thereof shall be due and be made at the end of six calendar months from my decease, and I give the said five annuities free of legacy duty, which I direct to be paid out of the rents of my real estate, and I expressly declare that each of the said annuities of 30*l.* and every payment thereof shall be for the separate and inalienable use,” and so on of the different persons. Therefore, there is in that instance a clear and distinct gift of an annuity or yearly sum of money, and then a direction to the trustees to pay it out of his real estate; and then there is a subsequent gift of all the hereditaments of which the testator may be seised, and of all the residue and remainder of his personal estate and effects to the trustees, upon trust with and out of the rents and income of his said real estates to pay the said several annuities. He again evidently desires that to be the first fund to be applied.

All that as it appears to me can be said upon this will is, that the testator has made a clear gift of an annuity or yearly sum, and then there is a direction that it shall be paid out of a certain fund, which he considers, as most testators do, will be fully adequate for the purpose. As regards the real and personal estate, he prefers the application of the real estate towards the gift he has made; but the question in all these cases is, does he prefer the total failure of the gift to its being payable out of other

property, if the property indicated as the fund which is to be first applicable to the legacy shall happen to fail? It appears to me that the present case is similar in that respect to the case of *Mann v. Copland*, and that no such intention can be gathered from the will. I think the codicil does not at all assist the contrary view, but it seems to me exactly to tally with the provision which the testator has made in his will, and to be in a very marked manner a positive gift in the same form as the gift of the other annuities. There is a particular limitation as to age, which might have had some bearing as to the question of making the *corpus* of the real estate available if that had been of importance, and the codicil contains the following clause—“and it is my will and I declare that the several annuities hereby given and devised shall be a charge upon and be paid out of the rents of my messuages or tenements, lands, hereditaments and the real estates.” What is that but the ordinary form of a gift of annuities charged upon real estate? the gift of the annuity being absolute and simple, and then there being a direction or demonstration of the fund out of which it is to be raised.

I think, therefore, that this case comes within that class of authorities of which *Mann v. Copland* is an instance, which are all well collected in Mr. Hawkins’s very able and concise *Treatise upon the Law of the Construction of Wills*, p. 289, and I must hold that the deficiency of the yearly rents ought to be supplied out of the capital of the residuary personal estate of the testator.

WESTBURY, L.C. }	
March 11; }	ROLFE v. PERRY.
May 6. }	

Mortgage—Exoneration—“*Locke King’s Act*,” 17 & 18 Vict. c. 113.—Will already made.

A will executed before the 1st of January 1855, is a will already made within the meaning of the 17 & 18 Vict. c. 113, notwithstanding it does not come into operation by the death of the testator till after that day. Nor will a mere republication by codicil, giving no new operation to the

material dispositions in the will, deprive it of the character of a will already made. Therefore, where a testator, by his will, dated before the 1st of January 1855, devised real estate (which was then subject to certain mortgages) to T. P. in fee, and after that day made a codicil which did not affect or refer to the devise, it was held, that the devisee was entitled to have the devised estate exonerated out of the personality.

In this cause, the facts of which are reported *ante*, p. 149, the question whether the defendant, T. Perry, was entitled to have the mortgages on the real estate devised to him by the will of Nehemiah Perry, paid off out of the testator's personal estate, came on to be argued, in pursuance of the agreement come to in the court below.

The question turned upon the construction of the 17 & 18 Vict. c. 113, commonly called "Locke King's Act," section 1. of which enacts, "That when any person shall, after the 31st of December 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already

made, or to be made before the 1st of January 1855."

Mr. Wickens, for the plaintiffs, the executors of the testator, submitted the question to the Court.

Mr. Daniel, for the parties claiming under the devisee, Thomas Perry, who had died since the institution of this suit, submitted that the case was clear. The will having been made before the passing of the act, the rights of the devisee were protected by the second proviso—*Eno v. Tatam* (1).

Mr. Amphlett, for the widow, and

Mr. Rendall, for the next-of-kin of the testator, contended that a will, being ambulatory during the life of the testator, was not made till his death; but if the will were to be considered as made at the time when it was executed, then the codicil, which was executed after the passing of the act, must be taken as a republication of the will, which is tantamount to the making of the will *de novo*.

The following cases were cited—

Moore v. Moore, 10 W. Rep. 877.

Woolstencroft v. Woolstencroft, 2 De Gex, F. & J. 347, 350; s. c. 30 Law J. Rep. (N.S.) Chanc. 22.

Pembroke v. Friend, 1 Jo. & H. 132.

Mellish v. Vallins, 2 Ibid. 194; s. c. 31 Law J. Rep. (N.S.) Chanc. 592.

The Attorney General v. Heartwell, Amb. 451.

Webb v. Byng, 2 Kay & J. 669; s. c. 26 Law J. Rep. (N.S.) Chanc. 107.

1 *Williams on Executors*, 156, 3rd edit.

1 *Jarman on Wills*, vol. i. 310, 3rd edit.
1 *Vict. c. 26. s. 34.*

THE LORD CHANCELLOR.—Two questions have been argued before me on a recent statute of the legislature, passed in the year 1854. The first question is, whether the act has any application whatever. The second question will be, supposing it to apply, whether there be not found in this will words which, according to the exception contained in the statute, would prevent the statute from being the rule touching the payment of the mortgage debt. It was the object of the legislature plainly in this statute, in the first place, to prevent it being a retrospective rule. Accordingly, it has

(1) *Ante*, p. 311.

defined very accurately from what period it shall come in force, and what effect it shall have prospectively. It declares expressly that it shall not have a retrospective operation to affect the rights of persons claiming under "any will already made." Now, I have before me persons who, so far as the present controversy extends, claim, both of them, under a will made in 1848; because the devisee of the real estate refers his rights entirely to the devise contained in the will which was duly made and executed in the year 1848. And the other question, so far as relates to the indication of a contrary intention, depends on the meaning of the words written by the testator in the will made and executed in the year 1848. What, then, does the legislature intend by the words "will already made"? It is said that nothing can be properly denominated a will until after the death of the testator, when it comes into operation. I am not of opinion that that is the meaning of the word "will" in this part of the statute. I think the design of the legislature, as evidenced from the whole of the act, was to prevent this new rule of distribution being applied to any landed estate, when that estate is found to be disposed of and governed by the operation of a will actually made antecedently to the time fixed by the legislature—namely, the 1st of January 1855. And the word "will" is, of course, used here with reference to its state and effect as a will; but it denotes an instrument already made as an instrument which shall hereafter come into operation as such. The proviso is express that the statute shall not affect the rights of persons claiming under or by virtue of "any will already made." Of course no person can claim under a will until after the death of the testator; but any person may claim under a will coming into operation after the 1st of January 1855, but actually made and executed at a date anterior to that time. My opinion is, therefore, that here the parties before me do claim under a will which was in existence at the time of the passing of this act, and therefore was already made, and which, as so made, does, for the purpose of this controversy, come into operation after the time fixed by the act, and the parties before me claim under that instrument. A difficulty would undoubtedly

have arisen if the parties were claiming the property in question not entirely under the will of 1848, but under and by virtue of a will actually made in 1848, but republished at a subsequent time, and the devises in which took effect, *quoad* any particular estate, by virtue only of that subsequent republication. There would have been a difficulty in applying to devisees claiming by virtue of a testamentary instrument made at one time and republished at another, and having an effect partly upon property existing before the date of the original making, and partly upon property acquired in the interval between the original date and the date of the republication; because such persons could not be said, in the language of the statute, to be claiming under "a will already made." They would be claiming partly by virtue of a will that was already made, and partly by virtue of the operation given to that instrument from the fact of its republication. But that is not the case here. The parties here claim under and by virtue of the will of 1848, and the will of 1848 does not cease to answer the description of "a will already made," because it may have been republished at a time subsequent to the 1st of January 1855. I am therefore clearly of opinion that, within the spirit of the act, and the intent of the act to prevent an unjust retro-activity of the statute, and within the words of the act, this will, under which the present controversy arises, was "a will already made," within the meaning of those expressions—at the time when this act received the Royal assent. Now, that would render it unnecessary to enter upon the other question; and that being so I should be very unwilling to discuss the other question, because I understand there has been a contrariety of decisions on the matter; and it may not be necessary to do more than to put this particular case upon a basis which is sufficient for my decision, without giving it any auxiliary ground which is not necessary for that determination. Undoubtedly, I should be very unwilling to hold that a mere technical rule of interpretation is to be regarded, in all cases, as sufficient to exclude, or signifying marks of intention, so as to bring the case within the statute. It may be better, probably, to rest each case

on its own particular circumstances; and it is unnecessary, therefore, to enter into the discussion of those contradictory decisions, for it will be impossible to lay down, I think, a general rule that shall be applicable to all the cases, because in every particular case the signification and intention may be collected, not only from the words, but also from the effect of the disposition; from the whole will and the nature of the gifts made by that will. It is utterly impossible therefore that the decision of one case can be properly taken or established as a guide for the decision of any other. In this particular case I hold the will to have been made at the time of the statute within the meaning of the statute; and that, therefore, Locke King's Act has no application, and that the devisee is entitled to the old rule of the Court, namely, to have the devised estate exonerated out of the personalty.

ROMILLY, M.R. }
Dec. 2. } ACLAND v. GRAVENER.

Receiver—Mortgagee—Legal Estate—Secondary Security.

A brother and sister conveyed their separate estates to a mortgagee, and the deed contained a proviso that recourse should not be had to the sister's estate so long as the brother's estate was sufficient to pay the money lent. The brother's estate, owing to prior mortgages, was insufficient, but no formal administration of his estate had been made. Upon a bill to foreclose the sister's estate,—Held, that the plaintiff, like a subsequent mortgagee, was entitled to a receiver.

Mrs. Acland lent to Thomas Waller a sum of 5,000*l.* upon a mortgage, dated the 30th of August 1830, which comprised certain freehold and leasehold estates, situate at Ospringe and Faversham, and his life interest in the Stodmarsh estate, all of which were in the county of Kent.

These estates were the property of Thomas Waller.

His sister, Sarah Juliana Waller, also joined in the mortgage, and she conveyed her Chapel House estate, in the parish of Ospringe, to the plaintiff and her heirs.

The estates were subject to redemption on payment of the principal and interest, with powers of sale in default.

Miss Waller's property was an auxiliary security only, and she did not covenant for payment of the mortgage-money or interest.

The mortgage deed provided that the power of sale should not prejudice the plaintiff's right to foreclose; but it also provided that recourse should not be had to the property of S. J. Waller thereby mortgaged, and that the same should not be sold unless the property of the said T. Waller thereby mortgaged should prove an insufficient security and the monies produced by the sale thereof should prove insufficient to pay and satisfy to the plaintiff such sum or sums of money as might be due and owing to her by virtue of the said indenture.

S. J. Waller, by her will, dated the 31st of March 1847, directed that any mortgage debts which she might owe should be paid exclusively out of the property comprised in such mortgages, and she thereby devised her freehold dwelling-house called Chapel House and her other lands comprised in the mortgage, to the defendants George Wright Gravener and Augustus Volney Waller, their heirs and assigns, upon trust, at their discretion, to sell the same, and she directed that the proceeds of the sale, and the rents and profits in the mean time should form part of her personal estate, which was to be applied for the benefit of her nephews as therein mentioned.

The testatrix died on the 12th of May 1847, having appointed the defendants her executors.

The plaintiff's mortgage upon T. Waller's property was subject to two prior mortgages, exceeding its value. The plaintiff instituted a suit to reduce these claims, but, upon an examination of the accounts, that was found impossible. She, therefore, under the power of sale in her mortgage, sold all T. Waller's property comprised in the mortgage, subject to the claims of the prior mortgagees for 300*l.*

The plaintiff then instituted this suit, and submitted that until the accounts were taken, the rents and profits of the Chapel House estate ought to be secured for her benefit. She then prayed that she might be declared entitled to have recourse to the

Chapel House estate for the payment of her mortgage debt; for leave to enter into possession, or otherwise for a receiver; and for foreclosure in default of payment of what upon taking the accounts should be found due. The plaintiff now moved for a receiver.

Mr. Selwyn and *Mr. Erskine*, for the plaintiff.—The whole of the principal money is due, and the Chapel House estate is the only security; the mortgagor is under no personal liability to pay the money, and from the provisions in the deed no direct recourse can be had to the estate of the surety until the primary estate is exhausted. The defendants say, that there is nothing to shew that the primary estate is insufficient; the plaintiff says there is, and she asks for the appointment of a receiver to get in the rents until the questions between the parties are determined.

Mr. Martindale, for the defendants.—Miss Waller joined in the mortgage as surety. She conveyed her estate, subject to the proviso for redemption; she never covenanted to pay the money lent; there is, therefore, nothing to prevent the plaintiff from obtaining possession of the estate as legal owner. If her brother's estate was insufficient to pay the money lent, the proviso against having recourse to the Chapel House estate was effectual only so long as there was a probability of her brother's estates being sufficient to pay the principal and interest. In the present case, it cannot be said that the brother's estate has been administered; its real value has not been ascertained. It is therefore denied that the events have happened which entitled the plaintiff to have recourse to the secondary estate.

THE MASTER OF THE ROLLS.—I must make an order for the appointment of a receiver. It is certainly true that if the mortgagee has the legal estate she can take possession, and no reason exists for asking for a receiver; and there certainly is no right to have the advantage of a receiver when a mortgagee can take possession; but the reason for refusing the appointment is on the ground of the mortgagee being able to take possession. A receiver, however, will be appointed upon the application of a second mortgagee. It is true that the legal

estate is in the plaintiff; but no recourse is to be had to the Chapel House estate until the primary estate of Thomas Waller is ascertained to be insufficient. The question, it is true, might be tried at law, but it can also be tried in this court; the defendants, by their answer, admit that the plaintiff can have relief at law as well as in equity. They are, however, at liberty to pay the money into court. If they decline to do so, I must grant a receiver.

On the 31st of January 1863 a decree was made foreclosing the estate in the event of the principal and interest not being repaid.

ROMILLY, M.R. }
Jan. 16. } BONFIELD v. HASSELL.

Annuity—Cesser—Assignment—Marriage.

Marriage will not determine an annuity given to a feme sole for life until she shall be bankrupt or insolvent, or shall assign or dispose of it, or do any act whereby the annuity, or any part thereof, shall be vested, or become liable to be vested, in any other person.

James Hassell, by a deed dated the 5th of October 1852, covenanted with Emily Goode that he, his heirs, executors and administrators, would pay or cause to be paid to her an annuity of 100*l.* a year, "for and during the natural life of the said Emily Goode, until she shall be declared a bankrupt or take the benefit of any act of parliament for the relief of insolvent debtors, or shall assign or dispose of the said annuity or yearly sum, or do any act whereby the same or any part thereof shall be vested or become liable to be vested in any other person;" such annuity to be paid and payable quarterly.

On the 25th of March 1859, Emily Goode intermarried with Mr. Bonfield.

Mr. Hassell retained the deed in his possession, and without informing Mrs. Bonfield of the provision he had made for her, he paid the annuity to her up to the quarter previous to his decease, which took place on the 25th of December 1861. The

deed was delivered to the plaintiff, Mrs. Bonfield, after the decease of James Hassell, in pursuance of directions found with the deed.

By his will Mr. Hassell appointed the defendants his executors, but they refused to pay the annuity, and alleged that on the marriage of Mrs. Bonfield the annuity became vested or liable to be vested in her husband, and that the estate of the deceased ceased to be liable to the payment.

Mr. and Mrs. Bonfield then filed this bill, asking that she might be declared entitled to the annuity and to payment of the arrears, and also asking for a proper administration of the estate of the testator.

Mr. Selwyn and *Mr. Freeling*, for the plaintiffs, insisted that the marriage was not such an act as worked a determination of the annuity—

Avison v. Holmes, 1 Jo. & H. 530, 540, note (a); s. c. 30 Law J. Rep. (N.S.) Chanc. 564.

Mr. Pridcaux and *Mr. Druce*, for the defendants.—The annuity was personal to the wife; by her marriage, it was either “vested or became liable to be vested” in her husband; he could receive the quarterly payments and give receipts for the amount as they became due; he could assign it for value certainly during their joint lives. And even if he did not sell, the wife had no equity for a settlement so long as she was maintained by her husband; and therefore, by her marriage, she must be considered as having destroyed her title and determined her interest—

Stiffe v. Everitt, 1 Myl. & Cr. 37; s. c. 5 Law J. Rep. (N.S.) Chanc. 138.

Tidd v. Lister, 3 De Gex, M. & G. 857; s. c. 10 Hare, 140; 23 Law J. Rep. (N.S.) Chanc. 249.

Croft v. Lumley, 6 H.L. Cas. 672; s. c. 27 Law J. Rep. (N.S.) Q.B. 321.

The MASTER OF THE ROLLS.—I have to consider whether the marriage of the annuitant was an act on her part which vested the annuity or made it liable to be vested in any other person. The settlor certainly did not so consider it, since he paid it quarterly for two years and a half after she was married. This could not affect the construction of the covenant which he had entered into for payment of the

annuity. It did not by the solemnization of the act of marriage become vested in the husband, neither was it liable to vest in him. The accruing payments as they became due might certainly be received by the husband; he could give a valid discharge for them. The covenant, however, must be strictly construed against the covenantor, and the utmost that could be said on behalf of his estate was, that the annuitant was so situated that her husband was able to give valid discharges for the payments when due; on the application of the wife, however, this Court would secure a portion of the annuity for her benefit, and with his assent it would settle the whole upon the wife. If she joined with her husband in assigning it, she would then violate the conditions upon which it was held; the annuitant, however, had done nothing either to vest the annuity or make it liable to be vested in any other person. At the request therefore of the husband, I will settle the annuity upon the wife for her separate use without power of anticipation, as this will prevent her from in any way assigning it. I shall therefore declare, that the plaintiff, Mrs. Bonfield, is, notwithstanding her marriage, entitled to the annuity, and order the arrears and future payments to be made to her for her separate use without power of anticipation, and reserve liberty to apply. In other respects there must be the usual administration decree.

WESTBURY, L.C. }	WETHERELL v.
Jan. 16, 21. }	WETHERELL.

Will—Construction—Indefinite Gift of Interest—Remoteness.

A testator, by his will, directed the interest only of all the residue of his property to be divided into as many equal parts or shares as there might be children of N. T. W., share and share alike, as each of the said children should come of age; and in case any one of them should die without any children of their own, his or her share of the said interest should devolve to the surviving children, share and share alike, and so on successively until the whole amount of the said residue should come into the hands of the grandchildren and great-grandchildren of N. T. W.:—Held, first, that the children

took immediate vested interests in the shares, subject to the executory gift over, and that the enjoyment only was postponed till twenty-one; secondly, that the children took life interests only, and not absolute interests in the shares; and, thirdly, that the gift to the grandchildren and great-grandchildren of N. T. W. was not void for remoteness, as in the event of a child dying leaving issue, the death of that child was the period at which the class of persons to take his share was to be ascertained.

William de Caulier made his will, dated the 30th of September 1855, containing the following clause: "My will is, that the annual interest only of all the residue of my property, of whatsoever kind or where-soever placed, shall be divided into as many equal parts or shares as there may be children living and begotten of the body of Thomas Nathaniel Wetherell, surgeon, on the body of his present wife, Louisa Wetherell, share and share alike, as each of the said children come of age; and in case any one of the said children shall die without any children of their own lawfully begotten, then and in that case his or her share of the said interest (as the case may be) shall devolve to the surviving children, share and share alike, and so on successively until the whole amount of the said residue comes into the hands of the grandchildren and great-grandchildren of the aforesaid T. N. Wetherell and of his wife Louisa Wetherell."

The testator died in April 1861, and the will was proved in the following June by N. T. Wetherell, his executor, who filed the bill in the present suit for the administration of his estate.

There were seven children of N. T. Wetherell (in the will called T. N. Wetherell) and his wife, who were living at the death of the testator. At the time of filing the bill three of these children had attained twenty-one, and there was also one grandchild. By the order of Stuart, V.C., made on further consideration, it was declared that according to the true construction of the will the seven children of the plaintiff and his wife who were living at the time of the death of the testator became entitled upon his death to the whole annual interest, rents and profits of the clear

residue of the real and personal estate as tenants in common for life, with remainder to all the children of such children, as to the personal estate as tenants in common *per stirpes*, and as to the real estate as tenants in common in fee simple *per stirpes*; and that in case any one or more of the said seven children should die without ever having had any child, then the share or respective shares of such child or children so dying, as well original as accruing, should go to the other or others of the said children as tenants in common for life, with remainder to all the children of such other or others of the said children as should have any child; and as to the personal estate as tenants in common absolutely *per stirpes*, and as to the real estates as tenants in common in fee simple *per stirpes*.

Some of the next-of-kin of the testator presented a petition of rehearing, contending that there was an intestacy.

Mr. Hobhouse and Mr. Fry, for the appellants.—The will cannot be interpreted at all, and is void for uncertainty. At all events there is a partial intestacy as to the income, which does not vest till the children attain twenty-one; and the gift of the corpus, if there is any gift of the corpus,—for the rule that an unlimited gift of the income is a gift of the principal, does not apply where there is a contrary intention, and such intention appears here throughout the will—is void for remoteness.

1 *Jarman on Wills*, 527, 3rd edit.

Ranelagh v. Ranelagh, 12 Beav. 200;

s. c. 19 Law J. Rep. (n.s.) Chanc. 39.

Blann v. Bell, 5 De Gex & Sm. 658;

2 De Gex, M. & G. 775; 21 Law J.

Rep. (n.s.) Chanc. 811; 22 *Ibid.* 236.

Mr. Malins and Mr. Pemberton, for the children of N. T. Wetherell.

Mr. Greene and Mr. Eddis, for the grandchild, referred to

Ex parte Rogers, 2 Madd. 449.

Mr. Bacon and Mr. G. L. Russell, for the executor.

Mr. Hobhouse replied.

THE LORD CHANCELLOR.—The only question I have to decide upon this appeal is, whether there be an intestacy of the whole, or any part, of the personal estate. The intestacy might be produced in one of three ways—either, as has been suggested,

I can hardly say argued, the will might be void altogether for uncertainty; or there might be an intestacy in respect of the interest not being disposed of until the children attained twenty-one; or there might be an intestacy in respect of the corpus not being validly given, by reason of its being given to the class which would comprehend objects not capable of keeping within the rule against perpetuities. I am clearly of opinion that the will admits of a reasonable construction, and, therefore, there is no ground for holding that there is a case of uncertainty or impossibility of construing the will. The first point, therefore, and the more important one, and perhaps the more convenient one, is the question as to the gift of the life interest. I am called upon by the appellants to hold, that the life interest is given to the children at twenty-one, and, consequently, that no interest vests in any child until he shall have attained twenty-one. I am clearly of opinion that that could not have been the natural meaning of the words. The words, collocated as they are, seem to point to the age of twenty-one as the period when the enjoyment or perception of the interest by the different children is to arise; but it is quite clear, from the gift over, that in the case of a child dying under twenty-one leaving no children, his or her share would be transmitted to the surviving children. It is impossible, therefore, to refuse to hold, that the children take immediately a share in the estate, and that the period for the enjoyment only is indicated by the words "share and share alike, as each of the said children come of age." I am, therefore, of opinion that there is no void in the will, and that the interest, so far as the children are concerned, takes effect immediately; that they are entitled, on the death of the testator, subject to the executory bequest over, to take a personal interest and share in the estate, receiving the interest on that share upon arriving at the age of twenty-one years. The next consideration is, whether the children take absolutely, or whether they take a life interest only. I shall examine the question merely for the purpose of seeing whether there be or be not an intestacy, for I shall take care that the order that I make shall not prejudice or affect any question which may arise

upon the construction of the will, as between the respondents. Upon that point, I think we are not left to any rule of implication, because the direction is, that if a child should die without leaving any children, the share of that child shall go to the surviving children. Then follow the more material words, "and so on successively"; that is, from child to child, "until the whole amount of the interest in the residue comes into the hands of the grandchildren and great grandchildren." Those words are utterly inconsistent with the idea that the immediate children were intended to take an absolute interest, which could only be devised in the event of the death of a child without leaving a child. I think it clear, upon those words, that the testator contemplated that the interest should go ultimately to the children of the children; and if there were not any children, then possibly to the grandchildren of those children; and consequently the children would not take an absolute interest, but an interest for life only. That is confirmed by the use of the word "only" after the word "interest," which translated into other language would be, "the interest, and nothing but the interest;" and therefore it would not be consistent with the application of the ordinary rule, that an indefinite gift of the interest amounts to a gift of the capital. It is clear from the word "only," that nothing was intended to be taken by the children except the interest in the estate given during their lives. The final question then comes, is the gift to the children's children void by reason of its being expressed to be to the grandchildren and great-grandchildren? The question is, at what time by the will you are to ascertain the class, because it is immaterial if he had included in the description of the class great-great-grandchildren, or any number of future generations, provided the direction be explicit and clear, that the class, whatever it be, is to be ascertained, and to come into the enjoyment of the property within the time allowed by the rule against perpetuities. Now, I think it is perfectly clear that in the event of a child dying leaving issue, the death of that child is the time when persons taking under the definition "grandchildren and great-grandchildren" are to enter into the enjoyment of the shares of

that child. Therefore I do not find any necessity for holding that the mention of the words "great-grandchildren" at all involves any intention of giving the interest to an object which would not of necessity come into being within the period of time allowed by the rules against perpetuities. It is not necessary for me to give any opinion as to whether the words "great-grandchildren" are intended to operate only where there are no grandchildren, which may be one interpretation, or whether the words are intended to operate as giving to a grandchild who might die during the life of the parent a right to have his issue substituted in lieu of the grandchild. Of course, the same time for enjoyment being all along remembered to be the only period, namely, the death of the child who is living at the date of the death of the testator. There might be another interpretation, namely, that the grandchildren and great-grandchildren to be ascertained as a class at the death of the grandchildren should take collectively, and without distinction, *per capita* amongst themselves. It is unnecessary to enter into this, because it is quite sufficient to declare that the gift to the grandchildren is not void by reason of the rule of law against perpetuities; and upon that ground, therefore, there is no intestacy. Without determining what is the true construction of the rest of the will as made, only holding it to be a legal and effectual disposition of the property, I dismiss this petition. The next-of-kin have come in, in prosecution of their interest, and they have been seeking to gain their advantage; in dismissing this petition, therefore, I must of necessity dismiss it with costs; but I particularly beg that the order may be so worded that it shall not involve any affirmance of the decree; and that in dismissing the petition with costs, there shall be these words also added—"without prejudice to any question upon the construction of the will as between these parties."

KINDERSLEY, V.C. }
Jan. 30. } SWIFT v. SWIFT.

Period of Distribution—Gift to Children by Reference.

*A testator gave certain property, including a sum of 2,700*l.* stock, to his wife for life, and after his wife's decease as to 800*l.* part of the said stock upon trust for his daughter A. E. Y. as therein mentioned, and after the decease of A. E. Y. in trust for her children living at the time of her decease equally. The testator subsequently gave 1,200*l.*, further part of the said stock, upon trust for his daughter S. A. V. in similar terms to those used with respect to the gift of the 800*l.* stock to his daughter A. E. Y.; and after the decease of his said daughter S. A. V. upon trust to transfer the said 1,200*l.* stock to all and every the children of his said last-mentioned daughter at the same time and in the same manner as was thereinbefore mentioned with respect to the sum of 800*l.* for the benefit of his daughter A. E. Y.:—Held, that a child of S. A. V. who predeceased her mother, took no share in the fund.*

In this case, Cornelius Swift, by his will, dated the 20th of August 1819, gave his property to trustees upon trust as to his real estate, and as to a sum of 2,700*l.* stock, to pay the rents, dividends, and interest to his wife, Sarah Swift, for her life, and after her death trusts were declared in the following words: "As to the sum of 800*l.*, part of the said sum of 2,700*l.*, upon trust to pay the dividends and interest thereof to such person or persons as my daughter Ann Elizabeth Young shall by any writing under her hand, but not by way of anticipation, appoint; and in default of any appointment by her, to her for her separate use, and after her decease upon trust to assign and transfer the said capital sum of 800*l.* unto all and every the child and children of my said daughter who shall be living at the time of her decease, equally between them, if more than one, the shares of sons to be paid at twenty-one, the shares of daughters at twenty-one or marriage;" and then followed a trust for maintenance in the ordinary form, and the testator, after making other bequests, proceeded: "And

as to the sum of 1,200*l.*, further part of the said sum of 2,700*l.*, upon trust to pay the interest and dividends thereof unto such person or persons as my daughter Sarah Ann Vowles shall by any writing under her hand, but not by way of anticipation, appoint, and in default of any appointment by her, to her for her separate use, my will being that the receipts of my said two daughters shall be sufficient discharges to my said trustees; and after the decease of my said daughter Sarah Ann Vowles, upon trust to pay, assign and transfer the said capital sum of 1,200*l.* unto all and every the child and children of my said last-mentioned daughter at the same time and in the same manner, and their shares to be subject to the like benefit of survivorship and accruer, and the interest thereof to be applied towards their maintenance in like manner as is hereinbefore mentioned, with respect to the sum of 800*l.* in trust for the benefit of my said daughter Ann Elizabeth Young."

After the death of the testator, which occurred in November 1820, the 2,700*l.* was set apart in the suit and the dividends were paid to the testator's widow, Sarah Swift, for her life, and she died in 1839.

Sarah Ann Vowles died on the 20th of September 1862, and 1,165*l.* was standing to the separate account of Sarah Ann Vowles and her children. Sarah Ann Vowles had nine children, but one, Elizabeth Swift, who had married John Brigden, died in her mother's lifetime. Under these circumstances a petition was presented in the suit for payment out of court of the 1,165*l.* to the eight surviving children; but on the petition coming on, the Vice Chancellor considered that Elizabeth Swift ought to be represented, as it might be doubtful, on the terms of the will, whether she was not entitled to a share of the fund, and the petition accordingly stood over, and now came on, in the presence of her representative, who appeared by counsel to argue the point on her behalf.

Mr. Osborne appeared for the petitioners, and contended that there was no doubt in the case of *Mrs. Young*, supposing she had died, that only those children who survived her would take. The testator, instead of repeating the words, had referred to them, expressing as clearly as possible his inten-

tion that the children of *Mrs. Vowles* should take in the same way, and, therefore, one of the children of *Mrs. Vowles* having predeceased her, took no share in the fund—*Gibbs v. Tait* (1).

Mr. Prendergast, for the representative of Elizabeth Swift Brigden, submitted that, although she had predeceased her mother, she was still entitled to a share. The words were not words of limitation, but were descriptive of a class of legatees, and it would be necessary to insert words to make the gifts to the two daughters correspond, which the Court would not do. It was impossible that the words "at the same time" could refer to the deaths of both daughters; as they must happen at two different times—*Wilson v. Eden* (2).

Mr. Osborne was not called upon to reply.

KINDERSLEY, V.C.—In this case the testator has declared the trusts of a sum of 1,200*l.*, by reference to a previous trust of another sum of 800*l.*, using terms of reference, in doing which there is always a risk of inappropriate language. With regard to the first gift, which is of 800*l.* to his daughter *Mrs. Young*, there is no doubt that after her death such of her children only as survived her were to take; but there was to be benefit of survivorship in the event of any of them dying under the age of twenty-one; and there was a direction as to maintenance very much in the usual form. Then follows a gift of 1,200*l.* to another daughter, *Mrs. Vowles*, for life, and after her death to her children, and the question is, whether the same class are meant to take as in the other case of the gift to *Mrs. Young*. *Prima facie*, and *a priori*, no doubt, a father having only two daughters would make the same general limitation and disposition with respect to both; but that consideration is not entitled to much weight, if the terms used import a different disposition. Here, the testator, using language by no means inappropriate, although perhaps not very carefully framed, but still with clearness sufficient to make his meaning plain, has, by terms of reference, made the limitation to one daughter

(1) 8 Sim. 132; s. c. 5 Law J. Rep. (N.S.) Chanc. 344.

(2) 7 H.L. Cas. 76.

the same as the limitation to the other. Both the gifts begin and proceed up to a certain point in the same words, that is, there is a gift of the dividends of a sum of stock to such persons as his daughter should by writing appoint, but not by anticipation, in default to her for her separate use, and after her decease to assign the capital to all and every the child and children of his said daughter. Stopping there, all the children living at the time of his decease would take; but he has modified that by fixing a time at which the children who are to take, are to be ascertained; and uses in the second gift the words "at the same time," that is, at the time pointed out in the gift of the 800*l*. It has been observed, and no doubt there is some justice in the observation, that the words, "the same time," could not refer to the deaths of both his daughters, because it would be next to impossible that they should both die at the same moment; but the fact is, he uses the words in the sense of "similar," or "analogous," having regard to the circumstances, and refers to the death of the parent, meaning that the children of Mrs. Vowles should take at the same time, as in the case of Mrs. Young, her children were meant to take. He then goes on to express the manner, and using words which are certainly sufficiently appropriate, evidently intended, as in the case of Mrs. Young, that they should take as tenants in common. The consequence is, that those only who survived the parent took; and the fund will be divisible into eight, and not into nine, shares, Elizabeth Swift Vowles not taking any share.

LORDS JUSTICES. }
 Dec. 12, 19. } *In re CROFT.*

Lunacy—Allowance out of Lunatic's Estate to his Relations.

Under special circumstances the Court made an allowance out of a lunatic's estate to one of the two next-of-kin (a first cousin) of the lunatic, the other next-of-kin consenting.

This was a petition of a gentleman residing out of the jurisdiction of the Court, the first cousin and one of the two only

NEW SERIES, 32.—CHANC.

next-of-kin of the lunatic, praying that an allowance might be made to him for his support, he being in urgent distress. It appeared that the lunatic had a clear annual income of between 1,200*l*. and 1,300*l*., and was of the age of seventy-six, and had been lunatic ever since he was seventeen years of age; that he had an allowance of 604*l*. per annum, quite sufficient for his wants; there was no hope of his recovery; and that the accumulations from his property were not less than 4,000*l*. since the year 1856. It also appeared that the petitioner was seventy-four years of age, and from misfortune was in want of both food and clothing, and subsisted upon the charity of friends, his own and his wife's property having been lost, and that only one other person was next-of-kin.

Mr. Osborne argued that although there was no evidence to shew what terms, if any, of intimacy there existed between the petitioner and the lunatic, his first cousin, the Court would be justified in doing what it might be presumed the lunatic would do for so near a relative, and that it was, in fact, for the benefit of the lunatic that so near a relative should not be left in a state of utter penury and destitution. There was no public provision for the poor in the kingdom of Wirtemberg, where the petitioner and his wife were residing. The principle had been acted on in the cases of *Ex parte Whitbread* (1) and in *Re Blair* (2), though not in *Re Windsor* (3).

Mr. Bacon, for the other next-of-kin and for the committee, said they both wished the allowance to be made if the Court thought it had jurisdiction.

LORD JUSTICE KNIGHT BRUCE.—I think the cases cited by Mr. Osborne shew that the principle is one on which the Court is warranted in making a grant. I am therefore, under the very peculiar and pressing circumstances of this case, inclined to make the order asked for.

LORD JUSTICE TURNER.—I agree that under the special circumstances of this case, and on the principle of the cases in *Meri-*

(1) 2 Mer. 99.

(2) 1 Myl. & Cr. 300; s. c. 5 Law J. Rep. (N.S.) Chanc. 150.

(3) Shelford on Lunacy, pp. 208, 209.

sale and Mylne & Craig, the Court has authority to make the allowance, though I am of opinion that this case ought not to be drawn into a precedent. All that the applicant shall receive under our order must be brought into account against his expectant share in the estate of the lunatic.

An order was ultimately made for the payment to the petitioner out of the lunatic's estate of a sum of 100*l.*, and of an annual sum of 100*l.*, payable quarterly, till further order; the costs to be paid out of the lunatic's estate.

ROMILLY, M.R. }
Jan. 24. } EDWARDS v. HARVEY.

Practice—Payment out of Court.

When a fund in Court has not been dealt with for a considerable time, payment to the bare legal representative of the person who became absolutely entitled, will not be made in the absence of the parties beneficially interested.

In the year 1810 a fund in Court was carried over to the separate account of an infant tenant in tail. Nothing had since been done. A petition was now presented by his legal personal representative asking that the fund might be paid out to him.

Mr. Murray, for the petition.

THE MASTER OF THE ROLLS.—Whenever a fund has been in Court for a length of time without any application being made respecting it, the practice is to require the presence in court of the parties beneficially entitled, instead of ordering it to be paid to the legal personal representative. The petition, in that respect, must therefore be amended.

STUART, V.C. }
March 19. } THE ATTORNEY GENERAL
LORDS JUSTICES. } v. THE TEWKESBURY AND
April 16. } MALVERN RAILWAY COM-
PANY.

Railway Company—Bridge over Turnpike-Road—Deposited Plans—Sections 13, 14. and 49. of Railways Clauses Consolidation Act, 1845, (8 Vict. c. 20).

By section 13. of the Railways Clauses Consolidation Act, 1845 it is enacted, that where it is intended to carry a railway on an arch or other viaduct as marked on the plans deposited with the clerk of the peace the same shall be made "accordingly"; by section 14. "it is enacted that it shall not be lawful for the company to deviate from, or alter the gradients, curves, tunnels or other engineering works described in the plans, except within certain limits and under certain conditions not applicable to viaducts; and by section 49. it is enacted, that every bridge for carrying a railway over a road shall (except where otherwise provided by the special act) be built in conformity with certain regulations, amongst which is one that the width of the arch, if it be over a turnpike-road, shall be such as to leave thereunder a clear space of not less than 35 feet.

By the plans deposited by a railway company with the clerk of the peace it appeared that the company intended to carry its railway over a turnpike-road by a bridge, the width of the arch of which was such as to leave thereunder a clear space of 45 feet. Subsequently the company proceeded to erect the bridge so as to leave a clear space of 35 feet only:—Held, by one of the Vice Chancellors, and on appeal, by the Lords Justices, that the company were bound, by the 14th section, to construct the bridge according to the deposited plans, and that the 49th section did not free them from this obligation; and an injunction was therefore granted restraining the company from erecting a bridge otherwise than in accordance with the deposited plans, or so as to leave thereunder a less width than 45 feet.

A bridge, forming part of the line of railway itself, is an "engineering work" within the 14th section.

This was a motion for an injunction to restrain the defendant company from erect-

ing or building a bridge across the turnpike-road leading from Tewkesbury to Bredon and Pershore otherwise than in accordance with the plans and sections deposited by the company with the clerk of the peace for the county of Worcester, or whereby the width of the said road might be contracted, diminished or interfered with.

The company was incorporated by the act 23 Vict. c. lxxii., by the 28th section of which it is enacted that, "subject to the powers and provisions in this and the acts incorporated herewith contained (the acts so incorporated being the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845), the company may make and maintain the railway and works on the line and upon the lands delineated on the plans and described in the books of reference deposited as aforesaid."

In order to construct the railway the company had to carry its line over the turnpike-road leading from Tewkesbury to Bredon and Pershore. The road at the place at which the company proposed to cross it consisted of a carriage-way 37 feet in width and of a footpath 6 feet in width, making together 43 feet. The plans and sections deposited by the company with the clerk of the peace shewed that the bridge upon which the line of railway was to be carried over the turnpike-road was to consist of an arch of such a width as to leave thereunder a clear space of 45 feet in width.

The company, however, subsequently proposed to construct the bridge so that the arch thereof should leave thereunder a clear space of 35 feet only in width.

This information was therefore filed at the relation of one of the trustees of the above turnpike-road, and it prayed for an injunction in the terms before stated.

By section 13. of the Railways Clauses Consolidation Act, it is enacted that "where in any place it is intended to carry the railway on an arch or arches, or other viaduct as marked on the plan or section, the same shall be made accordingly"; and by section 14. of the same act, it is enacted that "It shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels or other engineering works described in the plan or section except within the

limits and under the conditions therein mentioned" (which limits and conditions do not apply to viaducts); and by section 49. of the same act it is enacted that every bridge for carrying a railway over a road shall (except where otherwise provided by the special act) be built in conformity with certain regulations, amongst which is one that the width of the arch, if it be over a turnpike-road, shall be such as to leave thereunder a clear space of not less than 35 feet.

Mr. Mulins and Mr. F. C. J. Millar, for the plaintiff, referred to the 13th and 14th sections of the Railways Clauses Consolidation Act, 1845, and to—

Little v. the Newport, Abergavenny and Hereford Railway Company, 12 Com.

B. Rep. 752, 761; s. c. 22 Law J. Rep. (N.S.) C.P. 39.

Ware v. the Regent's Canal Company, 3 De Gex & J. 212; s. c. 28 Law J.

Rep. (N.S.) Chanc. 153.

Mr. Bacon and Mr. Dryden, for the company, referred to section 49. of the Act, and contended that the requirements of the case would be met by an arch leaving thereunder a clear space of 35 feet only. They also referred to

The Queen v. Rigby, 14 Q.B. Rep. 687; s. c. 19 Law J. Rep. (N.S.) Q.B. 153.

STUART, V.C.—It has been repeatedly said in cases of this kind, that the power given by the act of parliament founded on the deposited plans and sections, which describe what the works proposed to be erected are, form together a contract with the public. The terms of the contract, no doubt, are to be found in the act of parliament; but in construing the act of parliament, the deposited plans and sections to which the act refers must also be looked to. In the present case the railway company in their deposited plans and sections describe the breadth of the bridge to be 45 feet. The 13th section of the Railways Clauses Act says, "That where in any place it is intended to carry the railway on an arch or arches, or other viaduct as marked on the plan or section, the same shall be made accordingly." Now, I understand the word "accordingly" to mean according to the plans and sections, and I cannot say, upon the construction of those words, that if the

plans and sections state that a bridge is to be of the width of 45 feet, the work is made according to those plans and sections if it be made only 35 feet in width. If I had any doubt about that, I think it would be removed by the 14th section, which immediately follows, and which gives power to the company to alter or deviate from what is described in the plans and sections. The 14th section says, "It shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels or other engineering works described in the plan or section." It is impossible to say that a bridge is not an engineering work as described in the plans and sections, and unless under this power to alter what is described in the plans and sections, a power is found to alter the dimensions of the arch from 45 feet to 35 feet, there is no power to make an alteration in the mode of construction that is pointed out in the plans and sections at all. It is said, however, that the 49th section applies directly and explicitly to this case, for it says what shall be the breadth of every bridge to be erected for carrying a railway over any road, and that in that section it is provided that the breadth shall be not less than 35 feet. Now the language of that section seems to me to be very plain. If the deposited plans and sections had said that the breadth should be 35 feet, the defendants' case would then have been within the provisions of the act of parliament; but when the deposited plans and sections state that it shall be more than 35 feet, that is, that it shall be 45 feet, it has been gravely argued that saying that it shall not be less than 35 feet means that it shall not be more, although the deposited plans and sections say that it shall be more. It is needless to discuss an argument of that kind, because it is contradictory of the plain language of the act. In my opinion, the railway company are not allowed to do that. The case is one in which the information is filed by the Attorney General as a matter that concerns the public. The proper breadth and the proper dimensions with regard to a turnpike-road are matters of great public concern, and I think the railway company when they deposited their plans and sections shewed a very just regard for the public interest, by stating that the breadth should be 45 feet, and they have no

power, in my opinion, according to the construction of the act of parliament, to deviate from that. I must therefore by the injunction of this Court restrain them from so doing.

The order for an injunction restrained the company from erecting or building any bridge otherwise than in accordance with the deposited plans or sections, or so as to leave a less width than 45 feet.

From the above order the company appealed; and the appeal was heard on the 16th of April, when their Lordships delivered the following opinions, dismissing the appeal with costs, as at once groundless, frivolous and vexatious.

The same counsel appeared on the appeal as argued the case in the Court below, and for the appellants the following additional cases were cited—

North British Railway Company v. Tod, 12 Cl. & F. 722.

Beardmer v. the London and North-Western Railway Company, 1 Mac. & G. 112; s. c. 1 Hall & Tw. 161; 18 Law J. Rep. (N.S.) Chanc. 432.

The Queen v. the Caledonian Railway Company, 16 Q.B. Rep. 19; s. c. 20 Law J. Rep. (N.S.) Q.B. 147.

LORD JUSTICE KNIGHT BRUCE.—We think that as much consideration as properly belongs to this case has been given to it, and that it is not necessary to defer our decision. We do occasionally defer the decision of cases which do not appear to have any difficulty about them; but, however, this is not one of those cases. The deposited plan in the present case contains these words, "Turnpike-road to Cheltenham, and arch 45 feet span 16 feet high, level unaltered." Now, it is impossible to contest that these are material statements, important representations with a view to those persons interested in the road who might have occasion to consult this plan, and who were in effect, for their own protection, required to do so. The 13th and 14th sections of the Railways Clauses Act, which are incorporated in the particular act in this case, enact that "where in any place it is intended to carry the railway on an arch or arches, or other viaduct, as marked on the said plan or section, the

same shall be made accordingly." The latter part of the section is not material now to be read. The 14th section says, "It shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels, or other engineering works described in the said plan or section, except within the following limits and under the following conditions"—limits and conditions which do not extend to the present case. Then the 49th enacts that "every bridge to be erected for the purpose of carrying the railway over any road shall (except where otherwise provided by the special act) be built in conformity with the following regulations." Now, the special act here incorporates the 13th and 14th sections, and the proper rational construction of the word "accordingly," as used in the 13th section, beyond all question, extends it to the limit that I have read from the deposited plan, namely, "the turnpike-road to Cheltenham, and arch 45 feet span, 16 feet high." Now, what the company are desirous of doing is to make that arch of 35 feet span, which is there required to be of 45 feet span. In my opinion it is a direct breach and infringement of the contract and enactment under which the bridge was to be made. I never saw a clearer or a plainer case. I should have been very much surprised,—of course speaking with great respect to the Vice Chancellor,—if he had come to a different conclusion. He has come to the only conclusion to which, in my opinion, he could reasonably have come. I think the appeal frivolous and vexatious, and one fit only to be dismissed with costs.

LORD JUSTICE TURNER.—I should have been unwilling to dispose of this case without looking at the authorities which were cited in the course of the argument, and it was indeed for that reason that I desired to hear the respondents upon this motion. Having looked at those authorities, I am perfectly satisfied that the order made by the Vice Chancellor in this case is perfectly right. The case does not, as it seems to me, at all depend upon the special act. By the special act powers are given to the company subject to the powers and provisions of the special act and the incorporated acts, "to make and maintain the railway and works in the line and upon the lands delineated on the plans

and described in the books of reference so deposited as aforesaid;" leaving the particular mode in which the railway is to be made to be operated upon by the provisions of the general acts. The special act merely giving the power to make the railway upon the line and according to the levels, leaves the general act to take effect as to the mode in which the railway is to be made. I lay out of the case, therefore, the consideration of *The North British Railway Company v. Tod* and other cases of that description, so far as the special act is concerned; because it certainly might have admitted of a great deal of argument upon the special act whether, consistently with those cases, the plan and the books of reference could be incorporated into the special act.

Then, how does the case stand? not upon the special act, but upon the general act according to which this railway is to be made. Undoubtedly, under the general act the plans deposited are referred to, because the whole scheme of the general act does refer to the particular plans which have been deposited, and, therefore, those cases of *The North British Railway Company v. Tod* and *Beardmer v. the London and North-Western Railway Company* really have no application to this case, considered as resting on the general act.

Now, the general act says this, that "where in any place it is intended to carry the railway on an arch or arches, or other viaduct, as marked on the said plan or section," referring, of course, to the plan or section, "the same shall be made accordingly; and where a tunnel is marked on the plan or section as intended to be made at any place, the same shall be made accordingly, unless the owners, lessees and occupiers of the land in which the tunnel is intended to be made shall consent that the same shall not be so made." Now, a question is raised upon the meaning of the word "accordingly" in that 13th section, and it is said that the case of *Little v. the Newport Railway Company* (1) has put a construction upon the word "accordingly"—that it means it is to be made in the place in which by the plan it is described as intended to be made; and, no doubt, the Court in that case has so construed the

(1) 2 Com. B. Rep. 752, 761.

section before it; but it has not construed the section that it is not to be made in other respects according to the plan which is deposited. It has said, and, of course, it would be a necessary consequence, it being laid down upon the plan as being made at a particular place, that at that particular place it must be made; but it has not said that if it be laid down upon the plan that it is to be made in a particular manner or of particular dimensions, that the particular manner of making it or the particular dimensions are not to be observed. On the contrary, the inclination of opinion rather seems to be the other way, which was expressed in that case of *Little v. the Newport Railway Company*; and it is to be observed that really if the argument which is brought forward on the part of the appellant in this case is to be maintained, the effect will be an almost absolute rejection of the words, "as marked on the said plan or section," because nobody can doubt what the construction of the act would have been if those words had been omitted. Then the act would have stood, "where in any place it is intended to carry the railway on an arch or arches, or other viaduct, the same shall be made accordingly." Therefore the introduction of the words, "as marked on the said plan or section," cannot refer merely and exclusively to the place, for the words are not required for that purpose; but they must, as I conceive, refer not only to the place, but to the manner in which the arch or arches, or viaduct, are to be made.

The case does not even rest there, because upon the 14th section of the act it is said, "it shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels or other engineering works described in the said plan or section," referring again to the plan or section incorporated in the act of parliament by necessary reference. Then it is said, it was held, by Lord Campbell, C.J. that those engineering works did not apply to bridges; but when you look to the case it was directly the other way; for the ground on which Lord Campbell, C.J. puts the case of *The Queen v. the Caledonian Railway Company* (2) is, that it does not apply, because

the works were not works upon the line of the railway; and he clearly expresses his opinion that it does apply to works upon the line of the railways. What he says is this, "Now, in the present case, the prosecutors seem at first to have thought that an obligation to make this bridge and road without deviation from the plans, except within certain limits, was imposed by section 14. of stat. 8 & 9 Vict. c. 20, which is the section which contains these words, 'or other engineering works,' because it was supposed to be an engineering work within that section. But it is quite clear that section 14. is applicable only to works on the line of railway itself;" clearly importing that in his opinion the words "engineering works" were applicable to all works on the line of railway and to bridges upon the line of railway. Then he says that that section "does not apply to collateral works, such as cross-roads, or bridges for carrying them over the line."

The ground, therefore, of the decision in *The Queen v. the Caledonian Railway Company* was, that "the engineering works" including the bridges in the engineering works, were not upon the line of railway, but were collateral to the line of railway for carrying other roads across the line of railway. It seems to me, therefore, that so far from that case supporting the construction contended for, on the part of the appellant, as to the 14th section of the act of parliament, it is in direct opposition to it. Therefore, considering the 13th and 14th sections, and more particularly the 14th section, as clearly applicable to this case, nothing is left for argument, but the reference to the 49th section. It is perfectly clear that the 49th section does not apply to cases where by the 13th and 14th sections the particular modes are pointed out. It is merely this, that where bridges are to be made without any special provisions or any special direction contained in the earlier provisions of the act of parliament, there the bridges shall not be made of less than 35 feet width. I, therefore, quite agree in the opinion to which the Vice Chancellor has come in this case, and I think that this motion must be refused, and refused with costs.

(2) 16 Q.B. Rep. 19.

WOOD, V.C. }
June 30. } HUGHES v. JONES.

Will—Construction—Residuary Devise—Wills Act, Section 24.—Covenant to settle after-acquired Property.

By marriage settlement, dated in 1838, real estate was conveyed to such uses as M. B. N. (the intended wife) should by deed or will appoint, and in default of appointment to certain uses for the benefit of the children of the marriage, with an ultimate remainder to the use of M. B. N. in fee; and it was provided that all property which during the coverture should come to or vest in the husband in right of the said M. B. N. or in the said M. B. N. by descent, devise, limitation, gift or otherwise, should be settled to the same uses. M. B. N. by her will, made shortly after the settlement, devised and bequeathed all the residue of her property, "except such real and personal estate as might remain subject to the trusts of her marriage settlement, by reason of no specific disposition thereof having been made by her under the power therein contained." In 1854 M. B. N. purchased real estate out of the savings of her separate property, and it was conveyed to the same uses and trusts as those declared by the settlement of 1838, omitting only the uses in favour of children:—Held, that the exception in the will referred only to the property subject to the trusts of the marriage settlement at the date of the will, and that the real estate subsequently purchased by M. B. N. passed under her will.

Quære, whether section 24. of the Wills Act would apply to an exception out of a devise.

Semble, that a covenant to settle after-acquired property would not affect property purchased by a married woman out of the savings of her separate estate.

By an indenture dated the 17th of April 1838, being the settlement made on the marriage of Margaretta Bowen Davies with David Fryer Nichol, certain freehold and leasehold property was settled, subject to a term of ninety-nine years, to such uses as M. B. Davies should by deed or will appoint, and, until or in default of such appointment, to the use of trustees during the life of M. B. Davies, upon trust to pay the rents and profits to her separate use; and from and after her decease, and subject to a term of

500 years, for raising portions for younger children, to the use of the first and other sons of the intended marriage successively in tail male, with remainder to the use of all and every the daughter or daughters as tenants in common in tail, with cross-remainders, with remainder to the use of M. B. Davies, her heirs, executors, administrators and assigns; and the settlement contained a proviso that in case, at any time during the intended coverture, any real estates, or other property, whether real or personal, should come to or vest in the said D. F. Nichol, in right of his said intended wife, or in her the said M. B. Davies, by descent, devise, limitation, gift or otherwise, then the same should be conveyed and assured unto and to the use of trustees, to the same uses, trusts, intents and purposes as were thereinbefore declared and expressed concerning the hereditaments thereby settled.

The marriage was solemnized on the 9th of May 1838, and on the 18th of August 1838 Mrs. Nichol made a will, and thereby, after various bequests, appointments and devises, she gave, devised and bequeathed the residue of her real and personal estate, whatsoever and wheresoever (except such real and personal estate as might remain subject to the trusts of her said marriage settlement, by reason of no specific disposition of any part thereof having been made by her under the power for that purpose therein contained, and of which that general devise and bequest was not to be taken as an execution), for the benefit of her own children; and in case she should have no child who should survive her, then to other persons.

In 1854 Mrs. Nichol, being more than sixty years of age and having no children, purchased certain hereditaments with the savings of her separate property; and by an indenture dated the 29th of December 1854 such last-mentioned hereditaments were conveyed to trustees, to uses and trusts expressed in the same words as the uses and trusts declared by the settlement of the 17th of April 1838, except that the uses and trusts for the benefit of the children of the marriage were omitted.

Mrs. Nichol died on the 17th of October 1858, without issue.

Under these circumstances a bill was filed by the heiress-at-law of Mrs. Nichol

against the devisees under her will, asking that it might be declared that the residuary gift contained in the will of Mrs. Nichol did not operate as an exercise of the powers of appointment vested in her by her marriage settlement, or the indenture of the 29th of December 1854; but that the inheritable estates vested in her at the time of her death had descended to her heir-at-law.

Sir Hugh Cairns, Mr. Hobhouse and Mr. C. T. Swanston, for the heiress-at-law, contended that the property purchased by Mrs. Nichol in 1854 did not pass under the residuary devise in her will. The will must be construed as if made immediately before her death. The limitations in the deed of 1854 were practically the same as the limitations contained in the settlement, and the estate so purchased by Mrs. Nichol was bound by the covenant to settle after-acquired property.

The Solicitor General, Mr. Giffard and Mr. W. Pearson, for the devisees, argued that there was nothing in the 24th section of the Wills Act to alter the plain meaning of the words. The words used by the testatrix clearly referred to the time at which the will was made—*Cole v. Scott* (1). The question was whether this property was subject to the trusts of the settlement at the time the will was made. That question must be answered in the negative, because at that time this property was not even purchased. When purchased, it was, in fact, settled upon different trusts (because the trusts in favour of the children were omitted); and to argue that the power given by the deed of 1854 was the same as that given by the settlement, because they were expressed in the same words, was to be guilty of a gross legal inaccuracy—*Walker v. Armstrong* (2). Besides, as this property was purchased by Mrs. Nichol out of the savings of her separate estate, the covenant to settle after-acquired property did not apply.

Mr. Hobhouse, in reply, said that the only question was this, what property was comprised in the will? And to answer that question the plaintiff was entitled to place

herself in the position of the testatrix at the time of her death.

Wood, V.C. said that section 24. was introduced into the Wills Act in order that a residuary gift should include all the property of a testator not otherwise disposed of at the time of his death, unless a contrary intention should be expressed in the will. In the present case a contrary intention was expressed: the testatrix had plainly pointed out in her will what she intended to except, and the ambiguity had been introduced by the force of external circumstances. He would not express an opinion on the question whether or not, in a will framed like this, the 24th section of the Wills Act applied to the exception. It would be a nice point, but was not now before him. He should read the will as if written on the night before the testatrix died. She had excepted from the operation of her will all the property which might remain subject to the trusts of her marriage settlement by reason of no disposition thereof having been made by her under the power for that purpose "therein contained." Those words must refer to a specific instrument and to the power contained in that instrument. After the date of the settlement the testatrix purchased other property and settled it to uses similar to those declared by the settlement; and it was argued that therefore this property must be included in the exception. But he could not hold that the testatrix intended to exclude from the residuary devise property which was not hers at the date of the will and was not included in the settlement. There might be a lurking suspicion of a reason why the testatrix should intend this property to descend to her heir-at-law, but that was not sufficient; the intention must be apparent on the will, which was not the case here. He must, therefore, hold that the property purchased by the testatrix in 1854 passed under the residuary devise contained in her will.

It was not necessary to decide the question, but His Honour thought that property purchased by a married woman out of the savings of her separate estate was not affected by a covenant to settle after-acquired property.

(1) 1 Mac. & G. 518; s. c. 17 Law J. Rep. (N.S.) Chanc. 423.

(2) 21 Beav. 284; s. c. 25 Law J. Rep. (N.S.) Chanc. 402, 738.

WOOD, V.C.
May 6, 7, 27;
June 5.

HODGSON v. THE EARL
OF BECTIVE.

Will — Executory Gift of Residue of Realty — of particular Portion of Personality — of residuary Personality — Intermediate Rents and Income.

A devise of the residue of real estate upon contingent or future trusts, does not carry with it the intermediate income; but such income results to the testator's heir-at-law; and the 1 Vict. c. 26. has made no difference in the law in this respect.

A similar rule applies to a contingent or future bequest of any particular portion of the personal estate, as chattels real.

Secus, as to a bequest of the residue of personal estate, which, though contingent or future, carries with it all the intermediate income.

W. T., by his will, dated 1853, devised real estates at L. and M. to trustees, to the use of his widow for her life, with remainder to the use of the trustees during the life of his daughter, in trust for his daughter, with remainder to the use of the sons of his daughter born in the testator's lifetime (except Lord K., or the eldest son for the time being of his daughter, being the heir or heir apparent of the Earl of B.), successively for life, with remainder to their first and other sons successively in tail male, with other remainders, and an ultimate remainder to the testator's right heirs.

And the testator devised and bequeathed the residue of his real estate and chattels real to trustees, upon the same uses and trusts as were thereinbefore expressed or declared to take effect, on the determination of the estate limited to the trustees during the life of the testator's daughter, concerning the estates at L. and M. And the testator bequeathed the residue of his personal estate to trustees, upon trust to sell and convert, and until the proceeds should be invested in real estates to invest and pay the income, in such manner as the rents of the real estates to be purchased would be payable. And he directed his trustees to invest two equal third parts of the residuary personal estate in real estates, and to settle the estates so purchased upon the same uses and trusts as were thereinbefore expressed or declared to take effect, on the

determination of the estate limited to the trustees during the life of the testator's daughter, concerning the estates at L. and M. And the testator directed the remaining third part to be laid out in real estate to be settled upon Lord K. for life, with remainder to his first and other sons in tail male, with remainder to the same uses as were declared of the real estate to be purchased with the other two-thirds.

At the time of the testator's death and thenceforward to the hearing his daughter had had only one son, Lord K.:—Held, that until the birth of other issue of the daughter the rents and profits of the residue of the real estate resulted to the heir-at-law, and that the intermediate income of the chattels real fell into the general residue of the personal estate; but, that the intermediate income of the two-thirds of the personal estate was subject to the same trusts for investment as the two-thirds themselves.

William Thompson, by his will, dated the 2nd of March 1853, gave and devised to trustees and their heirs all his lands, tenements and hereditaments in the township of Kirkby-Lonsdale and Mansergh, to hold the same to the use of his wife, Amelia Thompson, during her life, with remainder to the use of the said trustees during the life of his daughter Amelia, the Countess of Bective, upon trust to pay the rents and profits to the said Countess of Bective to her separate use, without power of anticipation; and the testator directed that if the Earl of Bective should become Marquis of Headfort in the lifetime of the testator's said daughter, or in case the said Countess of Bective or Earl of Bective should demise or let the testator's mansion-house at Underley, or should not actually reside in and occupy his said mansion-house during three months at least in every year, then that the trusts thereinbefore declared in favour of the said Countess of Bective should absolutely cease and determine. And from and after the determination of the estate so limited to the said trustees and their heirs during the life of and in trust for the said Countess of Bective as aforesaid, to the use of each of the sons who should be born in the testator's lifetime of the said Countess of Bective (except the testator's grandson Lord Kenlis,

the first and only son of the said Countess of Bective, or the eldest son for the time being of the said Countess of Bective, being heir or heir apparent of the said Earl of Bective), successively for life, with remainder to the use of the first and other sons of each such son (except as aforesaid) successively in tail male, with remainder to the use of each of the sons of the said Countess of Bective who should be born after the testator's decease successively in tail male, with remainder to the use of the said Thomas Lord Kenlis during his life, with remainder to the use of his first and other sons successively in tail male, with remainder to the use of the said Lord Kenlis in tail general, with remainder to the use of the second and every other son of the said Countess of Bective successively in tail general, with remainder to the use of the first and every other daughter of the said Countess of Bective successively in tail general, with remainder to uses in strict settlement in favour of the younger sons of the testator's late brother, James Thompson, with an ultimate remainder to the use of the testator's own right heirs.

And the testator declared that if any person or persons who would, if the now-stating declaration had not been therein inserted, have been entitled to the possession or the receipt of the rents and profits of the said real estates, should be under the age of twenty-one years, the said trustees should during the minority or the respective minorities of such person or persons receive the rents and profits of and manage the said real estates respectively, with full powers for the due management of the said estates respectively, and should, after deducting thereout the expenses of management and other outgoings, pay such sum and sums respectively from time to time, as the said trustees should think proper, for or towards the maintenance or education of such minor or minors respectively, and accumulate the residue of the said rents and profits in the way of compound interest by investing the same and the resulting income thereof, and should stand possessed of the residue of the said rents and profits and the stocks, funds or securities in or upon which the same might be respectively invested, and the annual income thereof respectively, upon and for such trusts, intents and pur-

poses as the same respectively would be held upon if the same were respectively monies arising from sales under the powers of sale and exchange in his said will contained.

And as to all the rest and residue of the testator's real estates and all his chattels real, whatsoever and wheresoever, not thereinbefore devised or bequeathed, he gave, devised and bequeathed the same unto the said trustees, their heirs, executors and administrators, nevertheless, to, for and upon the uses, trusts, intents and purposes, and with, under and subject to the powers, provisoes, directions and declarations thereinbefore limited, expressed, directed and declared to take effect, from and after the decease of the testator's said wife and his said daughter, the Countess of Bective, or the sooner determination of the said estate so limited in use to his said trustees during the life of the said Countess as aforesaid, of and concerning his said estates at Kirkby-Lonsdale and Mansergh, but so, nevertheless, as not to increase or multiply charges under the powers of jointuring or charging with portions; and it was thereby provided that no person who should take an estate tail by purchase in any chattels real thereby devised or bequeathed should be entitled to the absolute property therein until he or she should attain the age of twenty-one years, or should leave issue of his or her body inheritable to such entail at his or her decease.

And the testator bequeathed the residue of his personal estate to his said trustees, in trust to sell and convert, and until the proceeds should be laid out in real estate as thereafter directed, to invest the monies to arise from such sale, and to pay the interest and dividends in the same manner as the rents of the real estate in the purchase of which the said residue of his personal estate was thereafter directed to be invested would be payable if such investment had been actually made; and the testator directed his said trustees to lay out or invest two equal third parts of the said residue of his said personal estate in the purchase of freehold or copyhold hereditaments in England or Wales, and to settle the estates so purchased to, for and upon the same uses, trusts, intents and purposes, and with, under and subject to the same

powers, provisoes, directions and declarations as were thereinbefore limited, expressed, directed or declared to take effect from and after the decease of the testator's said wife and of his said daughter, Amelia, Countess of Bective, or the sooner determination of the said estate so limited to the said trustees during her life as aforesaid, of and concerning the said hereditaments at Kirkby-Lonsdale and Mansergh, but so as not to increase or multiply charges under the power of jointuring or charging with portions; and the testator directed the remaining third part to be laid out in the purchase of lands to be settled on Lord Kenlis for life, with remainder to the use of his first and other sons successively in tail male, with remainder to uses declared in the same words as the uses of the lands to be purchased with the other two-thirds of the residuary personal estate. And the testator appointed his said trustees executors of his will.

By a codicil, dated the 18th of January 1854, the testator devised an estate, called Barneacre, which he had contracted to purchase, to his said trustees and their heirs, to uses declared in the same words as the uses of the lands to be purchased with the two-thirds of the residuary personal estate.

The testator died on the 10th of March 1854. The Countess of Bective was his only child, and sole heiress-at-law at the time of his death.

The Countess of Bective had one son only at the date of the testator's will and death, viz. Lord Kenlis, who was the heir apparent of the Earl of Bective. The Countess of Bective had had no son since the testator's death.

The testator's widow, Amelia Thompson, and the Countess of Bective were the only persons entitled to share in the testator's undisposed of personal estate as next-of-kin.

The widow died on the 7th of September 1861, having, by her will, appointed the Earl and Countess of Bective her executor and executrix, and her will was proved by the Earl of Bective.

A question had arisen as to who were the persons entitled to the rents and profits of the residuary real estate, and the interest and dividends of the two-thirds of the resi-

duary personal estate which were undisposed of until the Countess of Bective should have a second son, or should die without having had such second son.

A bill was filed by the trustees against the Earl and Countess of Bective and Lord Kenlis, asking that the rights and interests of the several persons claiming to be interested in, or to be entitled to, the benefit of the trusts of the residuary real and personal estate of the testator, and the accumulations of the annual income thereof, respectively, might be ascertained and declared.

Mr. Wickens (with him *Mr. Rolt*), for the trustees.

The Solicitor General, Mr. Hobhouse and *Mr. F. Hawkins*, for the Earl and Countess of Bective, contended that the interim rents and profits of the residuary real estate clearly belonged to the heir-at-law, according to the authority of *Hopkins v. Hopkins* (1). In that case there was a general devise of all the testator's real estates (as appeared from a copy of the decree which had been obtained from the registrar's book), which was the same thing as a devise of residuary real estates, a residuary devise being (before the Wills Act, and still for many purposes) specific. *Hopkins v. Hopkins* had been followed in *Duffield v. Duffield* (2) and *Wills v. Wills* (3). There was a class of cases, of which *Genery v. Fitzgerald* (4) was an example, where the real and personal estates being given as one fund, it was presumed that the testator intended the rents and profits of the real estate to go in the same manner as the dividends and interest of the personal estate, the gift being absolute; but in the present case it was evident that the testator intended no one to take until the period pointed out. The words "rest and residue" were sufficient to vest the whole interest in the trustees, but left the resulting trusts to the construction of law. In fact, this case was the exact converse of *Genery v. Fitzgerald*, as the testator had directed that the income of the personal estate should be

(1) Ca. t. Talb. 44; s. c. 1 Atk. 581; 1 Ves. sen. 268; and in *Mr. Hargrave's* note to Co. Lit. 271 b.

(2) 1 Dow, & Cl. 268.

(3) 1 Dru. & W. 439.

(4) Jacob, 468.

applied in the same manner as the rents and profits of the real estate—

Gibson v. Lord Montfort, 1 Ves. sen. 485; s. c. Amb. 93.

Stephens v. Stephens, Ca. t. Talb. 228.

Fullerton v. Martin, 1 Dr. & Sm. 31; s. c. 29 Law J. Rep. (N.S.) Chanc. 469.

The rule as to personal estate differed from the rule as to real estate—

Bullock v. Stones, 2 Ves. sen. 521.

Wyndham v. Wyndham, 3 Bro. C.C. 58.

Studholme v. Hodgson, 3 P. Wms. 300.

But the general rule, as laid down in *Green v. Ekins* (5), was only applied subject to evidence of a contrary intention. In *Hopkins v. Hopkins* the intermediate income of the personalty was held to be undisposed of. Even where there was a residuary devise and bequest there might be a partial intestacy—

Humble v. Shore, 7 Hare, 247.

Skrymsher v. Northcote, 1 Swanst. 566.

It would be impossible to apply the rule in *Green v. Ekins* to the present case, as the residue was divided into thirds.

Sir H. Cairns, Mr. Giffard and Mr. Erskine, for Lord Kenlis, submitted that the case as to the personalty was governed by the authority of *Green v. Ekins*. *Hopkins v. Hopkins*, though a leading case on Executory Devises, could have no bearing on that point. The point was not touched upon in any report of that case, and certainly was not argued; and, except for the diligence of the other side, who had disinterred the decree, it would never have been known that any such question was involved. The decision in *Hopkins v. Hopkins* was founded on the erroneous view of the law prevailing before *Ackroyd v. Smithson* (6). As to the real estate, the case came within the authority of *Genery v. Fitzgerald*, because the trusts of the residuary real and two-thirds of the residuary personal estate were declared in the very same words, and it could make no difference that these words occurred in separate clauses of the will; the testator's intention must have been the same—

Ackers v. Phipps, 3 Cl. & F. 665.

Phipps v. Ackers, Ibid. 702.

The case of *Skrymsher v. Northcote* was

(5) 2 Atk. 473.

(6) 1 Bro. C.C. 503.

not in point, because there the question was, whether a gift of residue could lapse and again fall into the residue. There would be no difficulty in applying the doctrine laid down in *Green v. Ekins*; the rule as to the income of the whole was applicable to the income of a part. The case of *Turton v. Lambarde* (7) was also an authority in their favour.

[Wood, V.C. having intimated that as to the real estate he must follow the authority of *Hopkins v. Hopkins*,]

The Solicitor General replied as to the personal estate.

WOOD, V.C. (May 27).—A question of very considerable importance has been raised in the discussion on this case with regard to the residuary real estate and two-thirds of the residuary personal estate given by the will of the late Mr. Alderman Thompson; and the question, although it is one of considerable importance in point of amount and was argued with great ability, really did appear to me at the hearing, and I have seen no reason to change my opinion, to be entirely covered by authority on both the points which were raised in the discussion.

The first question which arises is this: the testator devised certain estates called his Kirkby-Lonsdale and Mansergh estates to the trustees of his will, on certain trusts, conveying clearly, so far as they are concerned, the legal estate to the trustees during the life of his widow, who is now dead, and during the life of his daughter, the Countess of Bective, his only child, and upon certain trusts for her; and after that there is a series of limitations of this description, namely, to the first and other sons of his daughter, exclusive of her eldest son, Lord Kenlis; and both Lord Kenlis and this lady being alive, and there being at this moment no other son, those limitations which followed after the limitations of the life interest would, standing alone, be executory devises. The residuary devise is made in this form: "As to, for and concerning all the rest and residue of my real estates, and all my chattels real whatsoever and wheresoever not hereinbefore devised or bequeathed, I give, devise and bequeath

(7) 1 De Gex, F. & J. 495; s. c. 29 Law J. Rep. (N.S.) Chanc. 361.

the same unto the trustees, their heirs, executors and administrators, nevertheless, to, for and upon the uses, trusts, interests and purposes, and with, under and subject to the powers, provisos, directions and declarations hereinbefore limited, expressed, directed and declared, to take effect from and after the decease of my said wife and my said daughter Amelia, Countess of Bective, or the sooner determination of the said estate so limited in use to my said trustees during the life of my said daughter as aforesaid, of and concerning my said hereditaments and estates hereinbefore devised, situate in the said township of Kirkby-Lonsdale and Mansergh, but so nevertheless as not to increase or multiply charges under the powers of jointuring or charging with portions." Therefore, in effect, there is as to all this residuary real estate a clear executory devise to the second and other sons, none of whom have yet come into *esse*, and any estate which Lord Kenlis may take must be expectant upon the time when that contingency shall determine. The point which I have to consider is this—there being no disposition in words of the intermediate rents and profits during the suspense of that executory devise, is there any disposition in point of construction? Now it appears to be quite settled by authority ever since the case of *Hopkins v. Hopkins*, that in the simple case of an executory devise, where nothing is said of rents and profits, the devise of the estate will not carry the intermediate rents and profits, but they are undisposed of, and go to the heir-at-law of the testator, who in this case is the Countess of Bective, she being the testator's only child. The case of *Hopkins v. Hopkins* went even to the full extent, I may say, of this case, because there the devise was not merely of certain specified estates, but, as appears from the note taken from the registrar's book, included "all other his estates and effects;" being an entire and complete devise, as much as if there had been a gift of all his residuary real estates. In such a state of circumstances, recognized as that case has been from that time to the time of *Duffield v. Duffield*, in the House of Lords, and *Wills v. Wills*, before Lord St. Leonards in Ireland, and standing as it does as a case of the highest authority, it is impossible to contend, unless there be

something clearly leading to what the Court considers judicially a gift by implication of the intermediate rents and profits, that any such gift can take effect, or can be supposed to be contained in the testator's will in favour of any persons—either the persons waiting until the executory devise shall take effect, or the person who shall first come into *esse* when the executory devise has taken effect, or for all the persons who may be interested under the series of devises following that executory devise, by way of accumulation and investment of the rents for the benefit of the persons who may so take in succession—all those persons are clearly excluded unless one can find that there is enough on the face of the will to lead to the inference that such a disposition of rents and profits was intended. If this had been a simple devise of Blackacre and not a residuary devise, there would be every ingredient here that there was in *Hopkins v. Hopkins*; there is the fact of the accumulation being directed in certain instances, and not being directed during the period whilst the executory devise was in suspense, and there is in truth not a shadow of distinction, as it appeared to me throughout, between *Hopkins v. Hopkins* and this case, unless it be in the circumstance that this is a devise of all the *residue* of the testator's estates.

Now as regards the question of intermediate rents and profits not directly dealt with by the will, there have been two classes of cases. The leading case in one class, (in fact it involved both, but it is the leading authority as regards the first branch of the case which I am about to allude to,) was the case of *Stephens v. Stephens*, where it was held that if there is a series of executory devises which, according to *Hopkins v. Hopkins*, do not pass the intermediate rents, but leave them undisposed of, and that series of limitations is followed by a general residuary devise of all the testator's real estate, the undisposed of rents and profits mentioned in the first part of the will pass to those who take beneficially the interest under the general residuary devise of all the testator's interest in his real estates. There is another class of cases, of which *Duffield v. Duffield* is an instance; but *Genery v. Fitzgerald* is a case more frequently referred to as settling this second

class of cases, namely, where there is a general devise of all a testator's real and personal estate as one fund—where they are intended to go obviously as one fund, and are limited as one fund under a series of limitations which may be commenced by an executory devise. There, from the circumstances of the two funds being united together, and it being settled that the gift of the personal estate does in all cases carry the intermediate profits up to the time of the bequest operating in possession, the Court has held itself at liberty to infer that which it would not as against the heir infer from the mere gift of the estate; viz., an intention that the whole should go in one course of devolution, and that the intermediate rents of the real estate should pass in the same manner as the interest, dividends and produce of the personal estate for the purpose of the executory devise. The whole doctrine is clearly laid down by Lord Eldon in *Genery v. Fitzgerald*.

There are some dicta of Lord St Leonards in the case of *Wills v. Wills*, which at first would seem to lead to the conclusion that the simple gift of the residuary real estate would carry intermediate rents and profits, but when one looks at them a little more narrowly, I think that is not the meaning to be attributed to that learned Judge. Speaking of *Gibson v. Lord Montfort*, which was a gift of a mixed fund, and in which case there had been a great deal of discussion and consideration before Lord Hardwicke came finally to the conclusion that that would pass the intermediate rents and profits, he says this:—"Notwithstanding this, the decision was still considered not to be quite conclusive." Then he says, "for I find that in 1793 the heir-at-law received a sum of 1,500*l.* for relinquishing all his right to the property, and executing a deed in confirmation of the will. The point now however admits of no doubt; it is clearly settled by *Genery v. Fitzgerald*." That is the class of authorities he refers to, and *Glanvill v. Glanvill* (8), a case of exactly the same character, "that a gift of the rest and residue of my estate does not by force of the words include the intermediate rents;" "the rest and residue of my estate" being there the estates real and personal, the

two mixed; at first it might seem as if it was the residue of the estate, simply referring to real estate; but when you look to the authority you find it is relating to a mixed fund, and a mixed fund only. The question is whether any authority is to be found. I have looked in vain for any such in which the Court has held that where after the devise of particular estates on a series of limitations, there is a devise of the residue of the real estate on the same uses and trusts, a different rule can be inferred to the disadvantage of the heir-at-law, and it can be supposed that the intermediate rents and profits are intended to be applied as those who oppose the claim of the heiress-at-law in this case contend. I apprehend that looking at the nature of a residuary devise of real estate the answer is obvious, that the mere fact of its being a residuary devise of real estate could not operate in the manner described, because up to the time of the Wills Act a residuary devise of real estate was no more than a devise of Blackacre. A residuary devise of real estate was always held to be specific, because a person could only devise the actual property he possessed at the date of his will; when therefore a testator made a residuary devise it was as if he said, I may have forgotten some particular estates which I have and which I can dispose of, and those estates I intend to dispose of; there would seem therefore to be no reason why a simple residuary devise of real estate should have the operation contended for. The Wills Act cannot on this point of construction make any difference; because the intended operation of that act was simply to sweep in everything which the testator might have at the time of his decease, but not to alter that rule of construction which has been adopted in favour of the heir-at-law, namely, that you must find (for that is the rule) express words, or I should rather say a manifest intention, necessary implication it has been sometimes called, on the face of the will to exclude him from that benefit which the rule of law has conferred upon him. The simple fact of a devise of residuary real estate seems to me clearly not to affect the operation of any such rule, nor can I find any authority which would authorize me to say so.

There remains to be considered the

point as to the mixed fund of real and personal estate. There is a subsequent gift of all the testator's personal estate, I may shortly state it thus, for the purpose of being laid out as to two-thirds of it in land to be settled in effect to the same uses as are prescribed with regard to the real estate: Now it is said, and no doubt there is a great deal of force in the observation, that it seems singular that a gift of all a testator's real and personal estate to certain uses, intents and purposes is to have the effect of manifesting an intention that the rents and profits of the real estate are to pass exactly in the same manner as the income of the personal estate, and thereby is to deprive the heir-at-law of the benefit of the rule laid down in the cases I have referred to, but that the circumstance of the testator dividing his will into two parts, and disposing of the real estate in one part and of the personal estate in another, is to lead to a different conclusion; but I do not think that the reasoning is sound upon that point. The doctrine which in this country favours the heir-at-law is to a great extent artificial, and although the Courts have considered that where a testator has distinctly and clearly in his will mixed up the real and personal estate and carried it over in one fund he has thereby indicated an intention that they should go in the same way, yet that reasoning does not apply to a case where he has carefully and deliberately isolated the two properties, there being precise limitations as to the one in one part of his will and precise limitations as to the other in another part. In this case the testator did not contemplate any such complete mixture at all, because the first operation for the trustees would be to divide the personal estate into three several parts, and give two-thirds to the one party and the one-third to the other, and there is nothing on the face of the will which in the least can justify me in saying that the testator has mixed up the whole in one mass, passing it as one fund in his contemplation at the time of making his will, or that would authorize me to say that the rule in *Genery v. Fitzgerald* must apply. I think therefore, it is impossible to exempt this case from the authority of the case of *Hopkins v. Hopkins*, and that I am bound to declare that as regards the interim rents of the real estate they are undisposed of.

Now, as regards the personal estate, the case seems to me to be equally conclusive the other way against this lady, as next-of-kin, upon the authorities. It seems to me that from the time of *Green v. Ekins*, followed as that case has been by numerous authorities, the rule as regards personal estate is exactly the opposite to the rule as regards real estate; when you give personal estate, that estate and the whole of its produce goes to the purpose indicated in the will, and the gift of the personal estate *ex vi termini* carries with it all the intermediate profits which may arise in respect of that estate, and I see no difficulty whatever on the face of this will in applying the rule. The testator gives all his personal estate, and directs it to be laid out in the purchase of real estate to be settled to the same uses. If *Hopkins v. Hopkins* had been good law as to that second branch of the case, it would have been an authority on this point in favour of the heir-at-law if the two happened to be different persons, but it is clear that the latter point of that decision, as to the personal estate directed in the will to be invested in the purchase of real estate, was wrong. The decision there effected the will of the testator to a certain extent, by converting his personal estate into real estate; and then a confusion arose which seems now to be very singular, by which the will was held to operate for the purpose of converting the personal estate into real estate, not for the object of the will, but for the benefit of a person not in the contemplation of the testator, namely, the heir-at-law. The proposition now seems to us to be a truism; the heir-at-law claiming in default of disposition cannot claim anything under the will, and the only mode in which the heir could possibly claim personal estate would be by a gift contained in his favour in the will. If it is given by the will, well and good; but the notion of the heir-at-law taking by intestacy any portion of the personal estate is, of course, a solecism when the proposition is reduced to clear terms. That part of the case of *Hopkins v. Hopkins* can, therefore, present no authority with reference to the decision of the present case. Here there is a direction to take the whole personal estate, and taking the whole personal estate would, of course, include all its income, but the first process will be to divide it into thirds, and

when that has been done, two-thirds are just as much given, with all their produce, as the whole residue if it was given in an entirety would be, and these two-thirds, with all their produce, will have to be invested in the manner described; and the circumstance that part of it may have been already invested, and that long before the executory limitations take effect, has nothing to do with the question; it is still personal estate: supposing the executory limitations all fail, it would remain personal estate; it is personal estate until the will has had the effect of handing it over, in some other shape, to some of the persons interested; and being personal estate, the rents and profits of it are the produce of personal estate just as much as before the money was invested; and those words which I have referred to, which say that in the interim the produce shall be disposed of in the same manner as the rents and profits, carry the case no further. It would be a *petitio principii* to say that that can guide me as to what is to be done with the interim interest; it only says that is to be treated as rents and profits, and the question is, what is to be done with the rents and profits of that which is in reality personal estate until, for the purpose of the will, some person takes it in the form of real estate? Those rents and profits are part of the produce of the personal estate as much after it was invested as before, and will go in the same manner. It was said that some difficulty arose, as to which at first I could not exactly follow the argument, upon a question stated to be similar to the case of *Skrymsher v. Northcote*. That case has not the slightest bearing on the matter; it was one of the simplest cases that one can conceive. A portion of residuary personal estate was given to the extent of 500*l.*, which, like the case of *Page v. Leapingwell* (9) and that class of cases, was held to be a portion of the residuary estate. The gift of a portion of the residuary estate failing, of course it goes to the next-of-kin. Is there anything here analogous to that? It was suggested, and although I called it ingenious, I could scarcely follow the argument, that these two-thirds must be invested in the purchase of real estate, and then, when the rents of that

real estate are found to be undisposed of, because there is no person *in esse* capable of taking an interest, it will go back in thirds; that is, one-third must go over to the person entitled to the third, and two-thirds are to be disposed of for the purposes of the will; and that would be altogether an absurd and inconsistent construction. But that is not the mode in which the rule will operate. If I give the whole of my personal estate to be invested on trusts similar to these all the interim income will have to be applied exactly in the same manner—applied as capital in doing that which the will directs the personal estate to be applied to, namely, buying real estate—both the principal and interest will be so applied. What difference can it make if, instead of giving the whole, I say I give two-thirds of it? All you have to do is to divide the whole fund into three parts: take two-thirds and deal with that two-thirds in the manner I have described. And, in reality, it seems to me the circumstance of its being divided into thirds can have no effect in leading me to a different conclusion from that to which the authorities would lead me if the whole property were given as one.

The Solicitor General also threw out an observation as to whether or not one could not infer, from the nature and mode of the gift, a sort of converse rule to *Genery v. Fitzgerald*, the answer to which is simply this: the rule in *Genery v. Fitzgerald* is applied in order to effectuate the supposed intention of the testator, which, according to the general rule of *Hopkins v. Hopkins*, is not held to extend to the rents and profits of real estate. Having, therefore, ascertained the intention by inference, the rule is applied to carry out what is considered to be the necessary implication of the testator's intention to oust the right of the heir; but what the Solicitor General suggests is, that when there are what on the authorities are plain words of gift, I am to infer something to destroy that gift. I hold that there is a plain gift to be applied in a particular manner, and I cannot raise an inference against that plain gift from anything contained in the former limitations in the will; there being, in truth, nothing to lead to such inference, or which ought to destroy the gift so made. As to chattels real, I did not

(9) 18 Ves. 463.

hear a single argument, and I do not know whether there are any, and, therefore, I have made no declaration as to them.

The Solicitor General mentioned to the Court (June 5), that there were some leaseholds included in the gift of the personalty, and submitted, that, on the authority of *Wyndham v. Wyndham*, the interim income of these leaseholds would fall into the general residue.

The same counsel as before appeared for the different parties.

Wood, V.C.—As this point had not been mentioned during the argument of the case, I did not think it was right to decide it without attention being called to it. I think it is clear that the interim income of the chattels real falls into the general residue of the personal estate.

KINDERSLEY, V.C. { REEVE v. WHITMORE.
Jan. 29. { MARTIN v. WHITMORE.

Bill of Sale—Assignment of after-acquired Chattels—Licence to seize—Priority—Notice.

After-acquired chattels may be assigned in equity, and words of agreement to assign, or of licence to seize, may, in equity, operate as an actual assignment; but if according to the proper construction of the words used, a mere licence to seize is intended, they will have no effect until actual seizure.

*The lessee of a brick-field executed to G. a bill of sale of the bricks, plant, &c. then in and upon the premises, to secure 3,000*l.*, with interest, to be repaid on a specified day, with a proviso that the lessee should have the use and enjoyment until default, or the expiration of one day after notice in writing by G. requiring possession, when possession should be given, with a power of entry and sale. And the lessee gave and granted to G, his executors, administrators and assigns, or his or their agents or servants, licence at all times during the continuance of the security to enter on the premises and there remain, and seize and hold possession of the property then on the premises, as if the same formed part of the chattels thereby assigned. The lessee subsequently*

executed other bills of sale to R. in a similar form. G, who assisted the lessee in the management of his business, deposited his bill of sale and the papers relating to the brick-field with his private bankers by way of equitable mortgage. Subsequently, the lessee fell into difficulties and R. took possession, and shortly afterwards G. having become bankrupt, the assignee in bankruptcy of G. also took possession by the messenger, and refused to withdraw. The bankers had omitted to give notice to the lessee, who swore that he was not, until G.'s bankruptcy, aware of the deposit having been made:—Held, that the bill of sale to G. operated as an assignment only of the property then on the brick-field, with a licence to seize future property. Also, that the bankers could only claim what was due from the lessee to G. at the date of his bankruptcy, the business relations between the lessee and G. not being sufficiently intimate to warrant the Court in inferring that the former had notice of the deposit.

Quære—whether the entry by the messenger was an exercise of the right of seizure conferred by G.'s security.

These suits came on at the hearing. The bill in the first suit was filed by John Reeve, as the mortgagee, under a bill of sale, of a brick-field, with the prepared clay, bricks, plant and machinery, at Crayford, in Kent; and it contained the following statements. By a bill of sale, bearing date the 12th of January 1858, William David Simpson conveyed and assigned to Thomas Hendrick, his executors, administrators and assigns, the stock of bricks then being, or at any time thereafter to be in or upon the said brick-field, with the steam-engine, machinery, plant, trucks, waggons, barrows, iron tramways and other property used by the said William David Simpson in his business, with the horses, carts and ropes in the use and enjoyment of the said William David Simpson, and set forth in the schedule thereunto annexed; the said indenture to be made void upon the investment by the said William David Simpson of the sum of 1,300*l.*, in the joint names of him, the said William David Simpson, and Thomas Hendrick, on or before the 31st of March 1858; the said sum of 1,300*l.* to be held by them on certain trusts therein

mentioned; and the said bill of sale contained power to the said Thomas Hendrick to sell in case of default by the said William David Simpson, or in the event of his death, or in case a distress for rent should be put in by the landlord of the premises; and the said William David Simpson did thereby covenant with the said Thomas Hendrick that it should and might be lawful for him, the said Thomas Hendrick, his executors, administrators or assigns, agents or servants, forthwith to enter upon the said brick-field, chattels and premises, and hold possession thereof until such investment was made as aforesaid. The said William David Simpson made default, but Thomas Hendrick never took possession of the brick-field and premises, nor exercised this power of sale given to him under the bill of sale.

On the 26th of May 1859 William David Simpson executed another bill of sale to Daniel Green, in which Thomas Hendrick joined, and thereby agreed to postpone his security to that of Daniel Green. By this instrument William David Simpson assigned to Daniel Green all the prepared clay, bricks, &c. described in the bill of sale to Thomas Hendrick, which were then in and upon the said brick-field, in consideration of the sum of 3,000*l.* advanced and lent to the said William David Simpson by the said Daniel Green, with interest for the same at the rate of 7*l.* 10*s.* per cent.; such sum of 3,000*l.*, with interest, to be paid to the said Daniel Green on the 26th of November then next. And it was thereby provided, that the said William David Simpson* should have the use and enjoyment of the said brick-field, chattels and premises, as well until default should be made by him, the said William David Simpson, in payment of the said sum of 3,000*l.* and interest as until the expiration of one day after such time as the said Daniel Green should, by notice in writing under his hand to the said William David Simpson, require possession of the said brick-field, chattels and premises, when the said William David Simpson should deliver up the same. There was also power to Daniel Green to take possession after default and to sell. And the said William David Simpson gave and granted to Daniel Green, his executors, administrators and assigns,

or his or their agents or servants, full licence, power and authority at all times during the continuance of that security to enter into or upon the said brick-field and the messuages, workshops and other erections there, and then to remain, and to seize and hold possession of all and every the clay, bricks, machinery, plant, stock, goods, chattels, effects and property which might then be in, upon or about the said premises, in such and the like manner as if the same formed part of the chattels and effects thereby expressed to be assigned. Upon this security the whole sum of 3,000*l.* was not advanced, but 2,250*l.* only, and Daniel Green never exercised any of the powers given him by his bill of sale; but continued to be connected with William David Simpson in the management of the business which was carried on, but in what character was in dispute, the stock, by reason of its fluctuating character, varying in quantity and identity from time to time.

The bill then alleged that Daniel Green received monies on William David Simpson's account, so as materially to reduce his claim on account of the 2,250*l.* advanced. In the year 1858 the plaintiff lent to Daniel Green 600*l.* on condition of repayment in 1859; when that time arrived Daniel Green represented to the plaintiff that he was William David Simpson's manager; and that, in fact, the 600*l.* so lent to him had been employed in the brick business, and applied to the plaintiff to advance to him 400*l.* in addition to the 600*l.* still owing, which the plaintiff agreed to do, and the whole sum of 1,000*l.* was secured by the joint promissory note to Daniel Green and William David Simpson, made payable on demand and by a bill of sale, whereby William David Simpson assigned to the plaintiff the prepared clay, bricks and chattels then on the brick-field, (subject to the charges of Thomas Hendrick and Daniel Green), and the bill of sale contained powers of entry and sale on notice after default, in the same form as those contained in the security to Daniel Green. A variety of money transactions then took place between the plaintiff and William David Simpson and Daniel Green, by way of discount and otherwise, until the month of September 1860, when a considerable sum being owing to the plaintiff he brought an

action for 800*l*., and recovered judgment for that sum. On the 18th of October 1860, 2,159*l*. 8*s*. 9*d*. being due to the plaintiff, William David Simpson executed to him another bill of sale of the bricks, prepared clay, chattels, &c. then on the premises, and the plaintiff got that security registered; and on the same 18th of October he took possession of the brick-field and stock then upon it, as he alleged, with the knowledge and consent of William David Simpson and Daniel Green. Upon taking possession of the premises, the plaintiff found thereon large quantities of bricks, which he sold, and entered into contracts for the sale of 250,000 bricks in addition, but had received 1*l*. 4*s*. only, and paid upwards of 80*l*. under executions for creek dues, for rates and wages. Shortly after the plaintiff had taken possession of the brick-field, &c., Daniel Green became bankrupt, and the defendant William Whitmore was appointed official assignee, and Samuel Goddard and Nathaniel S. Dodge creditors' assignees; and William Whitmore, by the messenger of the Court of Bankruptcy, took possession of the bricks, chattels, &c., and on the plaintiff remonstrating with the creditors' assignees they refused to withdraw the messenger and, as the bill alleged, gave notice to the parties with whom the plaintiff had had dealings not to make any payments to him, and thereby prevented the performance of the obligations he had put himself under. The bill stated these facts, and charged that a very trifling sum was owing to Daniel Green, he having received various sums on account of and as the agent of William David Simpson, and praying that it might be declared that he (the plaintiff) was entitled in priority to William Whitmore, Samuel Goddard and Nathaniel S. Dodge and to Thomas Hendrick, and that an account might be taken in the usual way; that the defendants might be restrained from interfering with the bricks, &c. or the brick-field, or continuing in possession of the same, and that some proper person might be appointed to receive the proceeds in the ordinary form. Shortly after the filing of this bill, namely, on the 18th of December 1860, the plaintiff's solicitor received notice from Messrs. Martin the bankers that the benefit of the indenture of the 26th of May 1859 was, by a

memorandum of deposit on equitable mortgage, comprising such bills of sale and the deeds relating to the brick-fields, bearing date the 13th of June 1859, transferred to them, and they claimed to be entitled to the benefit of such indenture, but they did not give any notice of their claim to William David Simpson until March 1861, he having in the mean time become bankrupt, and Edmund Redden being appointed his assignee. The fact of Messrs. Martin's claim was introduced by amendment in the plaintiff's bill, and he charged that he never had any notice or knowledge of such alleged deposit either when his security was granted, or when he entered into possession, or until the end of December 1860, and that their security was never registered, and the Messrs. Martin were made defendants by amendment.

In March 1861 the second bill of *Martin v. Whitmore* was filed, stating in substance the above facts, setting out the memorandum of deposit, upon the form of which no question turned, alleging that upwards of 2,000*l*. was due and owing to them upon their security, and asking a declaration that they were equitable mortgagees of the whole of the prepared clay, earth and other materials, bricks, engines, machinery, plant, stock, property and effects of which the plaintiff in the first suit (John Reeve) had possessed himself, and which were on the field at the date of the bankruptcy of Daniel Green. And the bill prayed for a sale and payment of what should be found due to the plaintiffs upon their security.

Evidence was entered into upon the various points arising from these facts. William David Simpson, by his affidavit, swore that he had no knowledge whatever of Messrs. Martin's deposit until after the bankruptcy of Daniel Green; and the plaintiff swore that he entered with the knowledge and consent of William David Simpson and Daniel Green. A contest arose in chambers with respect to the person to be appointed receiver. An order which had been made for such appointment and a summons taken out by the plaintiff, was adjourned into court and argued upon that question, when William Halloway was appointed such receiver, and he, under the powers vested in him, received monies for

bricks and sold plant and machinery, and paid the proceeds, amounting to upwards of 3,000*l.*, into court. Edmund Redden, the assignee of William David Simpson, had entered a disclaimer in the suit of *Martin v. Whitmore*, but not in the suit of *Reeve v. Whitmore*.

Mr. Glasse and *Mr. W. Pearson* appeared for the plaintiff, and contended that he having obtained possession of the property in question with the knowledge and consent of Simpson and Green, and without notice of the equitable deposit of Messrs. Martin, he was entitled in priority to the assignees of Green and to Hendrick and to the Messrs. Martin, who could claim nothing up to the date of their notice to Simpson. The assignees had clearly no right to have entered, and could have no claim until after what was owing to the plaintiff was satisfied. The bill of sale to Green operated only as to property on the premises at that time, and the licence to seize was inoperative.

Mr. Bailly and *Mr. Fry*, for Thomas Hendrick, argued that the plaintiff's security must, at all events, be postponed to his, Green only having any priority, and his claim, whatever it was, having been long satisfied by his receipts on Simpson's behalf.

Mr. J. H. Palmer and *Mr. T. Stevens*, for the Messrs. Martin, submitted that Simpson must be taken to have had constructive notice of the deposit by Green, inasmuch as Green was so intimately connected with him in all the transactions which took place that it was impossible that he could have transacted such a matter without his cognizance. Simpson did actually know that the Messrs. Martin accommodated Green, and how could he have made the deposit of the papers relating to Simpson's own property, and keep him in ignorance of the fact? The Messrs. Martin were therefore entitled to whatever was due to Green from Simpson.

Mr. E. Bury, for Edmund Redden, asked for his costs.

Cases cited :

- Congreve v. Evetts*, 10 Exch. Rep. 298 ;
s. c. 23 Law J. Rep. (N.S.) Exch. 273.
Gale v. Burnell, 7 Q.B. Rep. 850 ; s. c.
14 Law J. Rep. (N.S.) Q.B. 340.

Holroyd v. Marshall, 11 W. Rep. 171.
Wood v. Leadbitter, 13 Mee. & W. 838 ;
s. c. 14 Law J. Rep. (N.S.) Exch. 161.

KINDERSLEY, V.C.—Two questions have been suggested for decision, and which I shall proceed to deal with: the rest of the matter must be the subject of inquiry and account. First, on the true construction of the bill of sale of the 26th of May 1859, having reference to property not on the premises at that date, but which afterwards was upon it, how far that subsequent property is affected by Green's security? The Messrs. Martin, standing in Green's shoes, contended that that instrument operated, at least in equity, as an absolute and present assignment, not only of the property then on the premises, but which should thereafter come upon the premises, on the principle that in equity, though not in law, you may make a valid assignment by contract of property which may thereafter come into a certain position. On the other hand, it was contended that that was not the true construction and intention. It is not disputed, that in equity such an assignment can be made of future property which may operate if such property comes into existence, but it is contended that that is not the true construction. This first question I shall proceed to consider. The language in the body of the deed, purporting, in terms, to be an assignment, it will be found applies only to property which was upon the premises at the date of the instrument.—(His Honour read the clause.)—On that question, I think, no doubt can be entertained that it was only intended to assign that property. Then we come, in the latter part of the deed, to another operative clause, on which I may say the question entirely turns. After all the other clauses as to redemption and entering upon and selling the property which was the actual subject of the assignment, we come at the end to this clause—(His Honour read the licence to seize).—It is not only a grant of this licence to Green, his executors, administrators and assigns, but his or their agents or servants. If the words had been words of assignment, it would not have been made to the agents or servants, but to the party, his executors, administrators and assigns. But whatever the intention is, which I shall consider presently, in terms this is

only a licence to seize, not a present assignment or agreement to assign, but a licence to the party for whose benefit the instrument is made to do a certain act, and, by doing that act, to possess himself of the property upon the premises at the date of the assignment; and not only so, but this will undoubtedly apply to property on the premises at the time when Green should enter and seize. Does this licence operate in equity as an assignment of the future property? It is clear that at law a bill of sale of property at the time upon certain premises, and purporting to include also property which at any future time may come upon the premises, though it operates to convey the legal title in the property upon the premises, operates nothing at law, as to property not then upon the premises, although property might afterwards come upon the premises. It is equally clear that in equity that rule is not adhered to; but if a party, Simpson for instance, having property upon the brick-field, and anticipating that he should thereafter have other property there, makes an assignment to Green of all the property then on the brick-field, including all the property which should thereafter come upon it, that assignment, though inoperative as to the future property at law, will in equity pass the equitable interest to Green or the person to whom it is made. So with regard to a contract or agreement to assign, whatever the words were, and it signifies not whether they are words of assignment or agreement, or licence, if on the context of the instrument the intention of the parties is to make an assignment and to pass the equitable interest *instantly*, independently of any act to be done by the parties in equity that will operate. This Court does not confine itself to the rules of law, and that is all that was decided in the case of *Holroyd v. Marshall*; there there were words purporting to be an assignment, and Lord Campbell, who was more accustomed to the principles of law than the principles of equity, determined that at law it did not apply to future property, and that was reversed by the House of Lords. There the clear, perspicuous judgment of the present Lord Chancellor, in which he points out what the principles of law and equity upon the subject are, is a clear enunciation, not of any law which was then in doubt, or which came for the

first time for positive adjudication, but laying down principles about which there has never been any controversy in this Court, ever since I have been in the profession, that the intention of the parties is to govern, and that the words used are not regarded, if you find from the whole context that the intention was to do so and so. The question therefore is, not what is the effect *per se* of an instrument purporting to be a licence to seize, but upon the whole context, what the parties intended by it? That depends on the whole instrument, and what light does it afford to come to that conclusion? Did the parties mean by this clause, in form a licence to seize, to make an assignment immediately operative whenever there should be any future property to answer the description upon the premises? If it was intended to assign not only present but future property, it is a very strange way of doing it; because if, as is undoubtedly the case, a present assignment of future property will in equity pass the interest, when they were assigning, why did they not assign present and future property? That is not conclusive, but it is something. If they meant to assign both present and future, I cannot understand why, when they had one clause assigning present property, when they came to talk of future property they should make it only a licence to seize it. There is this little additional circumstance, not conclusive in itself, but tending to the conclusion. Actually reciting Hendrick's security, which was in terms an assignment of present and future property, having that precedent before them and acting upon it, they designedly altered the form, making it an assignment of present and a licence to seize future property. But let us see what are the recitals, because, if there be a doubt upon the operative part, that may help to solve it.—(His Honour read the recitals.)—There is a recital of the property upon the premises, the intention to make the security to Green upon that property, and then comes the actual assignment of the property then upon the premises. There is no recital of any intention whatever, nor any reference in the operative part to future property, the only reference being in the licence to seize.—(His Honour again referred to that clause and the proviso that Simpson should have the use of the prepared clay, &c.)—The meaning of that is this,

as to the property assigned upon the premises at the time, Green may at any time give notice to some person of his intention to take possession within one day of the expiration of the notice,—not to enter and seize,—but Simpson is simply to deliver possession to him of the property. Then comes the clause in case of default,—still confined to property the subject of the assignment in the first instance, and also to sell and dispose of the same or any part thereof at such price and so forth, so that he might sell to Simpson. Having referred to the other portions of the instrument, what is the meaning of the licence to seize? “I have assigned and I intend to assign certain property. This, *quoad* the right to seize when there shall be a seizure, may be dealt with in the same manner as that property which I have assigned or intended to assign.” Therefore it appears to me the intention of the parties was to assign the present property and give and grant a licence to seize as to future property.

The next question is of a very different character. It is this: the Messrs. Martin took their deposit in June 1859, the very next month after the instrument had been executed, Green's security being dated the 26th of May 1859. The deposit was by way of security for money owing by Green. Unfortunately Messrs Martin (it must have been by some great oversight) did not think fit, or omitted to give any notice of this deposit to Simpson. If they had done so, of course Simpson would not have gone on paying Green, and Green would have no right to go on receiving from Simpson, to the prejudice of Messrs. Martin, any of the monies due from Simpson to Green on that security, but inasmuch as they omitted to give that notice (and it is not contended that they gave any such actual notice) to Simpson, he went on paying money to Green, or Green received money on his behalf, which he was liable to pay to Simpson, thereby, by right of set-off, if not entirely paying off, at all events reducing, the debts which Simpson owed to Green; and the question is, whether Messrs. Martin are affected by those payments, and whether they have a right to say that they must stand as having the benefit of the security of Green for the full amount that was due from Green at the time of the deposit with

them; or whether, as it was contended on the other side, they can only claim the benefit of Green's security to the extent of what, if anything, was actually due from Simpson to Green at the time when notice was given, or rather, I should say, at the time of the bankruptcy of Green, because after Green became bankrupt Green neither received monies from Simpson nor on his account. It is not suggested that any formal notice was given by Messrs. Martin to Simpson; and the question then is, did Simpson know it, because it might be that *aliunde* he became aware of the fact of the deposit, and he could not with propriety go on making payments afterwards even though he had no formal notice. In his affidavit he swore most positively, not only that he had no formal notice, but that he was not, until the bankruptcy of Green, aware that there had been any such deposit, and there was no evidence on Messrs. Martin's part of it; but it was contended that there was constructive notice, and the argument in support of that contention appeared to me at the time, and now appears to me, to be in fact an argument that under the circumstances actual notice must be presumed upon circumstantial evidence; the grounds being that Simpson was the lessee and owner, and Green his agent, and assisting him, as it was expressed in the pleadings, in the management of the business; but that does not appear to me to be the fact. Green was himself a potter, a man of credit and who could get money, and who sold bricks upon commission for Simpson: and no doubt it was an object to him that Simpson's brick-field should go on working, and was so far interested in lending him money. Green and Simpson prepared bills of exchange, and Green got them discounted at Messrs. Martin's, and it was contended that you must therefore infer that Simpson was aware of all the dealings between Green and Messrs. Martin, and that he was in fact cognizant of it, that it was his doing: but in the face of Simpson's evidence and the absence of any other, it is impossible to draw such a conclusion, for Simpson swears he did not know that these bills were discounted by Messrs. Martin. He knew that they were his bankers, and had reason to suppose that they accommodated him, but nothing more. Upon these grounds,

it seems to me that Messrs. Martin stand on this simple footing: having an equitable deposit of Green's security, having given no notice to Simpson the mortgagor of any such deposit, Simpson having no knowledge whatever until after Green's bankruptcy that any such deposit had ever been made, it appears to me that Messrs. Martin stand in the simple position which affects all persons who take equitable interests without having given notice to proper parties of the fact of their having got that interest, that they remain liable to all the equities as between the party who made the deposit with them and Simpson with whom he was dealing; and they are affected by all the payments; that is to say, the amount of the debt to Green, which is their security, and not the amount that was due when they took their deposit, but only the reduced amount, if any (assuming there was something), which was due upon Green's security at the time when notice was first given to Simpson upon that subject. It is immaterial the precise day; it is sufficient to bring it down to the bankruptcy of Green, although it may have been some days later. Upon these two questions I have expressed my opinion, and there must be declarations to that effect.

With respect to the questions as to the entry of the messenger in bankruptcy, whether it was an exercise of the licence to seize, and if so, how the parties stood between the Messrs. Martin, the assignees of the plaintiff, as to the property contracted to be sold, delivered and not delivered, and neither delivered nor contracted to be sold; also as to the question whether the plaintiff entered with the assent of Simpson, as to the payments made by the plaintiff, and as to the costs of Martin's suit: upon all these questions I must direct inquiries. As to the costs of Edmund Redden, the assignee of Simpson, having given no disclaimer in this suit, as in the suit of *Martin v. Whitmore*, he must be left in the ordinary position of assignee in bankruptcy.

His Honour then directed inquiries upon those questions and accounts.

LORDS JUSTICES. }
 April 22; }
 June 11. } SWAINSTON v. CLAY.

Bankruptcy—Lien on unfinished Ship in Building-yard of Bankrupts—Order and Disposition.

By agreement dated the 11th of April 1862, B. & B, shipbuilders at Sunderland, contracted to build a vessel for F, who agreed to pay for the same upon certain terms therein mentioned. On the 12th of April 1862, B. & B, by deed, assigned the contract to S, to secure an antecedent debt, and an advance then made (amounting together to 500*l.*), and also future advances; and by the assignment it was declared that, subject to F's right, S. should be entitled to a lien on the vessel for the above sums. On the 19th of May 1862 the agreement of the 11th of April 1862 was cancelled, and by memorandum of agreement, dated the 20th of May 1862 B. & B. contracted to complete the vessel for, and to sell it to, S. for 1,150*l.*, of which the 500*l.* already advanced was to be taken in part payment. Neither the deed of the 12th of April 1862 nor the agreement of the 20th of May 1862 was registered under the Bills of Sale Registration Act (17 & 18 Vict. c. 36). On the 2nd of June B. & B. became bankrupt; and the vessel was then incomplete. Upon a bill filed by S. against the assignees in bankruptcy of B. & B, for the purpose of obtaining a declaration that S. was entitled to a lien or charge on the vessel, or for specific performance of the agreement of the 20th of May 1862, one of the Vice Chancellors decided that S. was entitled, under the deed of the 12th of April 1862, to a lien or charge upon the vessel, and a sale thereof was ordered. Upon appeal, the Lords Justices held that the lien under the deed of the 12th of April was destroyed, either by the cancellation of the agreement with F, or by the fact that the 500*l.* thereby secured was merged into and taken as part payment of the purchase-money under the agreement of the 20th of May; but that under the latter instrument the plaintiff was entitled to a lien on the unfinished ship for the 500*l.* actually advanced. Their Lordships also held, that no registration of the instrument of the 20th of May was necessary, under the Bills of

Sale Act; and that the vessel was not in the order and disposition of the builders as reputed owners at the time of their bankruptcy within the meaning of the Bankrupt Act.

This was an appeal, by the defendants, against a decision of Vice Chancellor Stuart, reported *ante*, p. 388, where the facts of the case are very fully set forth.

These facts are also so largely stated by Lord Justice Turner in his judgment, in which his Lordship also copiously details the scope of the arguments adduced in support of the appellants' case, that it will be needless to do more in this place than give a short outline of them.

By an agreement, dated the 11th of April 1862, Brown & Briggs, shipbuilders, agreed to build a schooner for one Fisher. By an indenture, dated the 12th of April the agreement was assigned to the plaintiff to secure 500*l.*, then already advanced to Brown and Briggs, for the purpose of enabling them to complete the vessel, and future advances up to a certain amount, and the vessel herself was assigned, to be held by him as a lien for such advances and interest. On the 19th of May the agreement between the builders and Fisher was put an end to, and on the 20th of May they entered into a new contract with the plaintiff to complete and sell the vessel to him for 1,160*l.*, of which the advanced 500*l.* was to be taken as part payment. Neither the indenture of the 12th of April 1862, nor the agreement of the 20th of May 1862 was registered under the Bills of Sale Registration Act (17 & 18 Vict. c. 36). No registration of the vessel under the Merchant Shipping Act and 17 & 18 Vict. c. 36. ever took place; but on the 20th of May the builders certified, according to the provisions of that Act, that they had built the schooner for the plaintiff. The advances did not appear to have been laid out exclusively upon the vessel, and before the 20th of May the builders had discharged their workmen, and were virtually insolvent, though this was not proved to have been brought to Mr. Swainston's knowledge. The vessel was still unfinished on the 2nd of June, when the builders were adjudicated bankrupt; and on the 19th

Mr. Clay and another were chosen to be their assignees. On a bill filed by Mr. Swainston against those assignees to support and enforce the lien, praying, first, for an account, secondly, a declaration that the plaintiff was entitled to a lien or charge on the vessel for what should be found due to him, thirdly, that if the plaintiff should be held not entitled to such lien or charge, then for specific performance of the agreement of the 20th of May 1862, the Vice Chancellor decided in favour of the lien, and ordered a sale of the ship, and from that judgment the defendants appealed.

Mr. Bacon and *Mr. Waller*, in support of the judgment, argued for the plaintiff (the respondent) that a lien in his favour was created by Messrs. Brown & Briggs, by the deed dated the 12th of April 1862, which could not be displaced by what subsequently took place between Messrs. Brown & Briggs and Mr. Fisher. At all events, his title under the agreement of the 20th of May could not be defeated. He had paid sums on account which sufficiently appropriated the ship to him. No registration was necessary, as the 7th section of the Bills of Sale Act, 17 & 18 Vict. c. 36, expressly excepted ships; and *Holderness v. Rankin* (1) was conclusive authority against the contention that the vessel was in the order and disposition of Brown & Briggs at the time of their bankruptcy. They cited *Atkinson v. Bell* (2); and, in reply, they cited

Ex parte Watts, re Attwater, post, Bankr. 35.

The Thames Iron Works Company v. the Patent Derrick Company, 1 Jo. & H. 93; s.c. 29 Law J. Rep. (N.S.) Chanc. 714.

Mr. Malins and *Mr. T. Stevens*, for the appellant, addressed to the Court the argument set forth in the judgment, and cited

Mucklow v. Mangles, 1 Taunt. 318.

Woods v. Russell, 5 B. & Ald. 942.

Clarke v. Spence, 4 Ad. & E. 448; s.c. 6 Nev. & M. 399; 5 Law J. Rep. (N.S.) K.B. 161.

(1) 28 Beav. 180; s.c. 2 De Gex, F. & J. 258; 29 Law J. Rep. (N.S.) Chanc. 753.

(2) 8 B. & C. 277; s.c. 2 Moo. & R. 292; 6 Law J. Rep. K.B. 258.

Tarling v. Baister, 6 B. & C. 360 ; s. c. 5 Law J. Rep. K.B. 164.

Holroyd v. Marshall, 2 Giff. 382 ; s. c. 29 Law J. Rep. (N.S.) Chanc. 655 ; 2 De Gex, F. & J. 596 ; 30 Law J. Rep. (N.S.) Chanc. 385.

LORD JUSTICE TURNER (June 11).—This is an appeal, on the part of the defendants, from a decree of Vice Chancellor Sir John Stuart, by which he declared that the plaintiff was, under an indenture of the 12th of April 1862, entitled to a lien or charge upon a certain ship or vessel in the pleadings mentioned, and directed an account of what was due to him in respect of advances made by him to the builders of that vessel, and decreed payment of what on taking such account should be found due to him, and ordered the defendants specifically to perform the agreement of the 20th of May 1862, in the pleadings mentioned, by completing the said vessel themselves, or permitting the plaintiff to do so ; and that the defendants should be restrained from selling, mortgaging or otherwise dealing with the vessel. By an agreement, dated the 11th of April 1862, made between Brown & Briggs of the one part, and James Fisher of the other part, Brown & Briggs agreed to build and sell, and Fisher agreed to purchase, a new schooner or vessel, to be built in the yard of Brown & Briggs, of dimensions and tonnage as per specification and inventory annexed thereto. The vessel was to be built under special survey of Lloyd's, and classed by the builders A 1 at Lloyd's ; and Fisher agreed to pay Brown & Briggs 9*l.* 5*s.* per ton, builders' measurement, as per tide-surveyor's certificate ; 100*l.* being paid when the keel was laid, and 200*l.* when fully timbered, and 250*l.* when planked, the remainder when launched. It was also agreed that from and after the payment of the first instalment, the said vessel and outfit, or so much thereof as might then be constructed, and all materials or other things which might then or at any time thereafter be appropriated, or intended to be appropriated or used in the construction thereof, should become the absolute property of Fisher, his executors, administrators or assigns, and was only to be held in lien by Brown & Briggs for his account ; provided that the value thereof should not

exceed the amount of payment made by Fisher. This agreement was duly executed and signed ; and pending the negotiations for the agreement, Brown & Briggs began building the vessel, the plaintiff advancing them a sum of 400*l.*, upon the understanding that the repayment of the same, with interest, was to be secured, as well by an assignment of the agreement when duly signed as by a lien on the vessel itself. On the next day, namely, the 12th of April 1862, an indenture was executed between Brown & Briggs of the one part, and the plaintiffs of the other part, whereby, after reciting the agreement of the 11th of April, and that Brown & Briggs had in order to enable them to proceed with the building of the said vessel and for their other necessities, requested the plaintiff to lend them the sum of 500*l.*, which he had agreed to upon having the repayment thereof, as well as of all other sums which the plaintiff, his executors, administrators or assigns, might thereafter advance and pay to or on account of Brown & Briggs secured as thereafter mentioned ; it was witnessed that Brown & Briggs assigned unto the plaintiff, his executors, administrators and assigns, all that the thereinbefore-stated memorandum of agreement or contract for building a vessel, and all the estate, right and interest of Brown & Briggs respectively of and in the same, and all advantage and benefit thereof. And it was further agreed that, subject to the lien mentioned and given in and by the said recited agreement, the said vessel and the outfit thereof, and all materials, stores, goods and chattels then being, or which might from time to time, or at any time during the continuance of that security might be upon the said building-yard, should be the absolute property of the plaintiff, his executors, administrators or assigns, to be held by him or them in lien to the extent of all such sums as might be due from Brown & Briggs, their executors or administrators, to the plaintiff, his executors, administrators or assigns, with interest ; provided that the aggregate of monies to be secured by virtue thereof should not exceed 500*l.* Upon the execution of the indenture the plaintiff advanced to Brown & Briggs a further sum of 100*l.*, which made up the sum of 500*l.* referred to in the indenture. Soon afterwards differences

arose between Brown & Briggs and Fisher, and the agreement of the 11th of April was, on the 19th of May, cancelled and put an end to. In this state of things Brown & Briggs, to secure the plaintiff from any loss by reason of the said agreement being cancelled, proposed to him to become absolute owner of the vessel; and accordingly, on the 20th of May, a memorandum of agreement was drawn up, whereby Brown & Briggs agreed to sell, and the plaintiff agreed to purchase, the hull of a new vessel then in course of building in Brown & Briggs's yard, for the price of 1,150*l.*; that the sum of 500*l.* then already advanced by the plaintiff to Brown & Briggs should be deemed and taken as part payment of the purchase-money, and that in case Brown & Briggs should not complete and launch the vessel by the 21st of June, or if they should at any time before the vessel should be finished cease working at it, it should be lawful for the plaintiff, his agents, servants and workmen to enter into the building-yard and use the materials, stores and tools of Brown & Briggs for the purpose of completing the vessel. Brown & Briggs made no further progress with the vessel, and on the 2nd of June 1862 were adjudicated bankrupt, and on the 19th of June the defendants were elected creditors' assignees. The bill states these facts, and that shortly after the bankruptcy the plaintiff requested the defendants to complete the vessel according to the terms of the agreement of the 20th of May, or else to authorize the plaintiff himself to enter the building-yard of Brown & Briggs and complete the same, but that the defendants have neither finished the vessel themselves nor allowed the plaintiff to do so. The vessel was advertised to be sold by auction, whereupon the plaintiff filed his bill, praying that an account might be taken of what was due to him by virtue of the said indenture of the 12th of April 1862, and the lien or charge thereby created or otherwise in respect of the advances made by him; that the plaintiff might be declared entitled to a lien or charge on the said vessel for what on taking such account should be so found due; that if the plaintiff should be held not entitled to such lien or charge as aforesaid then that the defendants might be decreed spe-

cifically to perform the said agreement of the 20th of May 1862 either by themselves completing or allowing the plaintiff to complete the said vessel according to the terms of the said agreement, and by doing all necessary acts for conferring upon the plaintiff an absolute interest in the said vessel and completing his title thereto (the plaintiff being ready and willing and offering to complete the said agreement on his part); and that the defendants might be restrained by injunction from selling, mortgaging or otherwise dealing with the said vessel to the prejudice of the plaintiff's rights and interests therein.

The defendants by their answer stated that on the 16th of May Brown & Briggs paid off and discharged all their workmen except the foreman and apprentices, owing to the inability of the said Brown & Briggs to pay the workmen's wages, and that, on the 22nd of May, having been served with a notice in bankruptcy, at the instance of Mr. Thomas Bolton, a creditor for 115*l.* 6*s.* 10*d.*, they on that day suspended payment, and that substantially the bankrupts ceased to carry on their business from the 16th of May, or at all events from the 22nd of that month. The defendants also said that they believed that the sum of 400*l.* was not laid out or expended upon the vessel either before or after the date of the indenture of the 12th of April, and that the whole of the sum was expended by them, partly for their own private purposes, and as to the residue in satisfaction of debts or liabilities which had been incurred by the bankrupts unconnected with the vessel; and that the indenture or any memorandum of it was never registered under the provisions of the Bills of Sales Act; and that the agreement of the 20th of May was signed at a time when the bankrupts were in a hopeless state of insolvency, and not likely to have the means of completing the vessel, and that the same was well known to the plaintiff, who, under the circumstances, had no right whatever as against the defendants, the assignees, and no interest in the vessel further than as a general creditor of the bankrupts. It appears also that the agreement of the 20th of May was not registered, and that the vessel itself was not registered under the provisions of the Merchant Shipping Act, but that Brown &

Briggs granted under the provisions of the Merchant Shipping Act, 1854, the usual builders' certificate, whereby they certified that they had built the said vessel in the said certificate called the *Spartan* for and on behalf of the plaintiff.

From a careful consideration of the evidence, I have come to the conclusion that the monies advanced by the plaintiff were not expended in the building of the vessel, but for their general business, and that Brown & Briggs were insolvent on the 20th of May, and probably on the 12th of April. Before the 20th of May there were rumours current in the town of Sunderland that Brown & Briggs had suspended payment; and there can be no doubt that these rumours were well founded; but I cannot find that these rumours were so general that they ought to be assumed to be known by the plaintiff on the 20th of May, especially as the plaintiff has stated in his affidavit that he believed Brown & Briggs to be solvent at that time. The case is one of considerable difficulty; but I have come to the conclusion that the decree under appeal is substantially right. The case does not depend solely on the agreement of the 12th of April, but the agreement of the 20th of May must also be considered as determining that of the 12th of April. The plaintiff's title under the agreement of the 12th of April is disputed on three grounds. First, that at the date of the agreement there was no vessel which had been appropriated to Fisher, therefore there was no property to which the agreement could apply; secondly, that the agreement itself was null and void, not being registered under the Bills of Sales Act; thirdly, that the cancellation of the agreement of the 11th of April put an end to the agreement of the 12th of April which was under it, and determined plaintiff's title. Again, the plaintiff's title to relief under the memorandum of the 20th of May is disputed on three grounds: first, non-registration under the Bills of Sales Act of the agreement; secondly, the ship having been under the order and disposition of the bankrupts at the time of their bankruptcy; thirdly, being a fraudulent preference of the plaintiff to the other creditors of the bankrupts. With respect to the points insisted on by the appellants against the title of the plaintiff under the

agreement of the 12th of April, I think the third point is fatal to the plaintiff's case under that agreement; for whether that agreement could or not be kept alive as between the plaintiff and Brown & Briggs, notwithstanding it was cancelled as between Brown & Briggs and Fisher, it was not in fact so kept alive; but the agreement of the 12th of April was merged into and taken as part of the payment of the purchase-money under the agreement of the 20th of May. It is not necessary to give any opinion on the first and second of the points raised under the agreement of the 12th of April on the part of the appellants. It may be right to say that I am by no means convinced that these points can be maintained by the appellants; and that though no title passed in law there might not be a good title in equity, or that the Bills of Sales Act would destroy the title under the agreement. With respect to the points insisted on by the appellants under the agreement of the 20th of May, I am of opinion so far as this agreement is concerned, that the Bills of Sales Act had no effect upon the contract; and that the appellants have not successfully maintained that the property was in the order and disposition of the bankrupts. The sole remaining question on this part of the case is, whether there was a fraudulent preference. I think, in order to justify such a conclusion, it is incumbent on the appellants to shew that there was not a *bona fide* but a colourable conveyance; and that the evidence falls far short of justifying that conclusion. I am therefore of opinion that the agreement of the 20th of May was valid; and this being the case, and it being impossible to perform specifically the said agreement, the plaintiff has a lien for the money which he paid. Taking this view of the case, I think that the decree ought to be altered so as to strike out of the declaration the words referring to the contract of the 12th of April 1862, and to confine the account to the sum of 500*l.* and interest, not extending it to further advances. Subject to this alteration, I think the decree should stand, and, having regard to the alteration and the difficulties of the case, that there should be no costs.

LORD JUSTICE KNIGHT BRUCE.—I agree, subject only to some degree of doubt, which does not, however, amount to more than a

doubt, as to the right of the plaintiff with respect to his advances, if any, beyond the 500*l*. But this is the less material, as I understand that the advances have not exceeded that sum.

ROMILLY, M.R. }
Feb. 17, 19. } PALAIRET v. CAREW.

Trustee—Refusal to act or retire—Suit to remove—Costs.

A trustee for sale of real estate having refused either to carry out a proper sale effected by his cestuis que trust, or to concur in the appointment of a new trustee, except upon the terms of being supplied with information respecting matters unconnected with the trust, he was, upon a bill filed, removed from the trust, and ordered to pay the costs of the suit.

This bill was filed, by the Rev. Richard Palaret, as trustee of a settlement dated the 8th of August 1839, in conjunction with his *cestuis que trust*, against George Carew, his co-trustee, praying that the defendant might be removed from being a trustee of the settlement, for the appointment of some other person, and also asking that the trusts might be carried into execution, and that certain agreements which had been entered into for the sale of the trust property might be carried into effect, and that the defendant might pay the costs.

By a settlement, dated the 8th of August 1839, divers real estates in the county of Monmouth were conveyed to Messrs. Palaret and Carew, "upon trust to stand possessed of the whole of the freehold and copyhold or customaryhold messuages or tenements, buildings, farm lands, and other the premises thereby appointed and covenanted to be surrendered respectively, with the appurtenances, upon trust, at any time or times after the execution thereof, with the consent in writing of Jane Sarah Gardner Bateman, the wife of Colthurst Bateman, during her life, and after her decease of the sole authority of the trustees or trustee for the time being, absolutely to sell and dispose of the said several freehold and copyhold hereditaments and premises, either by public auction or private contract, or partly in each mode, and generally upon such terms

and under and subject to such stipulations and conditions in reference to the title, or the evidence of the title thereto, or otherwise as the trustees or trustee for the time being should think fit, and to receive the purchase-moneys for the same, and convey, surrender, assign and assure the same to the respective purchasers thereof, or as they respectively should direct, and for the purpose of completing such sales to enter into and execute all such contracts, stipulations and assurances as the trustees or trustee should think advisable." And the trustees, after payment of the costs of the deed, and all other deeds entered into for effecting certain arrangements therein mentioned, were to invest the clear residue of the purchase-moneys and pay the annual income to Mrs. Bateman for her life, and after her death to her husband, Colthurst Bateman, for his life, and after the decease of the survivor to divide the principal among their children in such shares and proportions as Mrs. Bateman, notwithstanding her coverture and whether covert or sole, by any deed or deeds should appoint, and in default of appointment, equally.

Mrs. Bateman executed several deeds-poll, dated respectively the 27th of April 1847, the 22nd of December 1848 and the 17th of March 1856, in pursuance of a power of revocation and new appointment contained in the settlement.

No step, however, was taken for executing the power of sale until July 1856, when Mr. White, as the plaintiffs' solicitor, with the consent of Mrs. Bateman, entered into negotiations with John Jeffries Stone for the sale to him of a portion of the estates comprised in the settlement. These lands were accordingly valued. Mrs. Bateman died on the 27th of January 1857, but the negotiations were continued, and the terms of the sale together with the valuation were forwarded to the defendant for his approval. The defendant in reply wrote to Mr. White saying that as the proposed sale might involve questions affecting his future liability he had placed the papers in the hands of Mr. J. Cridland, with directions to co-operate with him in the matter.

After some delay Mr. White wrote to Mr. Cridland requesting that the draft agreement which had been forwarded to him might be returned approved.

This was answered by the defendant on the 1st of July 1857, who said "although the circumstances under which the deeds of August 1839 were executed are fresh in my mind, yet there is much in connexion with the trust upon which before I take any active steps I should wish to refresh my memory. I am, if I mistake not, a trustee for some purpose or other under one or more of the settlements of 1809, and I shall therefore feel obliged by your letting me have for inspection copies, which no doubt exist, of the several settlements of 1809, and of the various deeds executed thereunder." The defendant then proceeded to ask for copies of numerous other deeds and documents not directly affecting the trust, and said that until he could see his way in so complicated a matter, he could not enter into any contracts.

On the 15th of July Mr. White wrote to the defendant, offering to produce certain of the documents for his inspection, and saying that as to the other deeds he had no interest in them.

On the 23rd of July the defendant wrote to Mr. White as follows: "The trusts of the deed of August 1839 may, as you allege, be simple and straightforward, and it may be true that I am not now asked to do any acts in any other trust, but being a trustee under other settlements for the Bateman family, I am not going to work in the dark, as Mr. Bateman unfortunately did, and the consequences of which were that he was compelled for the safety of himself and his family to create those trusts under which I am now so unreasonably called upon to act as it were blindfolded. In spite, however, of all your threats of Chancery, I will not do so, nor will I move until such documents as I have a right to the custody of are in my possession and I can see my way in safety;" and he concluded this letter with "No, no, carry out your threat; and if I am to have the terrors, let me have also the protection of the Court of Chancery."

Mr. Colthurst Bateman died on the 2nd of August 1859; the defendant was surprised of this, and again asked to carry out the contract, but again he wrote to Mr. White saying that "two years' reflection had not sufficed to alter his views or determination as expressed by the letter of July

1857," and after again referring to the withholding of the documents, the threat of Chancery, his desire not to frustrate the wishes of the family, which he was bound to respect, though equally bound to protect himself and learn a useful lesson from their father, whose neglect gave rise to the trust in which he was asked blindly to act, he said, "You will therefore try in vain, and your renewal of a correspondence on the subject with a view of inducing me to execute the trust while you withhold what ought to be in my possession is only waste of so much of my time as well as of your own, unless indeed you intend to make a charge for it, in which case it is a waste both of so much time and money."

On the 2nd of September Mr. White wrote: "After my letter of the 15th of July 1857 you cannot with truth say that I withhold from you any documents or information to which you are entitled, and I am still ready to produce to you or to furnish you with copies of any documents which, as a trustee, you are entitled to see or to have copies of on your specifying them. I do not see that you have any right to expect me to inform you what your trusts are, to do which might necessitate my looking through the numerous family settlements. You are bound to know what trusts you have accepted and what deeds you have executed as a trustee. . . . As it seems to me that you decline to execute your trust lest your acting therein may involve you in responsibilities which you seem to dread, I would suggest that you should retire from the trust, and appoint a new trustee in your place. You have, I believe, as yet done no act, and there is therefore no necessity for your having a release, but if you desire to have one I will advise the parties beneficially interested to give you one on your retiring."

Nothing further was done till the autumn of 1861, when all the *cestuis que trust*, being of age and *sui juris*, entered into an agreement with Mr. Stone to carry out the sale. Mr. White again applied to the defendant to concur in the sale, and on the 29th of October 1861 he wrote to the defendant as follows:

"There is not the slightest pretence for alleging that you are kept in ignorance of

any of the trusts you have accepted. You have a copy of your trust-deed of the 8th of August 1839, and I have offered the inspection of every other deed or document which you are in any way interested in or have any right to see, and which offer I now again repeat. You can also have, if you please, what I before offered and have long had made for you, copies of the appointments executed by Mrs. Bateman under the deed of 1839, and referred to in the contract I sent to you on the 12th inst. I am extremely unwilling (as my delay hitherto to do so shews) to enter into litigation with you on the subject; but if you persist in your refusal to carry out the wishes of your beneficiaries, and to carry into effect the contract entered into by them and your co-trustee for the sale to Mr. Stone, my clients will have no other alternative but to file a bill to compel you to perform your trust. It may perhaps alter your decision to know that the claim against Mr. Bateman alluded to in your former letters, on account of which he took the benefit of the Insolvent Debtors Act, has been satisfied, and that, on the 30th day of August last, an order of the Insolvent Court was made revesting all his property in him, his heirs, executors, administrators and assigns."

This was followed by other correspondence to the same effect between Mr. White and the defendant.

In consequence of the continued refusal of the defendant to join in the contract for sale, Mr. Reginald Bateman (one of the sons of Mr. and Mrs. Bateman) wrote to him to endeavour to induce him to comply with their wishes. On the 6th of November 1861 the defendant wrote in reply as follows :

"I am favoured with your letter of yesterday, and although there has been a correspondence for years between Mr. White and me in relation to the trusts in question, which perhaps you should have had an opportunity of seeing, yet, for the present purpose, I think it unnecessary to send you more than a copy of my last letter to him, under date of the 4th inst., in reply to his of the 1st, winding up with his oft-renewed threat of proceedings in Chancery. You are well aware, though probably not so fully as I am, of the iniquitous proceed-

ings against your late father, and of their unfortunate consequences, under the apprehensions of which he was led to execute the various deeds containing the complicated trusts settled and advised on by counsel. It is under several of these deeds that I am a trustee. . . . Your father's own unhappy case is, as it ought to be, a warning to me as a trustee, and points out to me most forcibly the necessity for avoiding, as regards my own family, those evil consequences which, without any fault on his part, have fallen on his family. . . . There is no necessity for instituting proceedings in Chancery for the purpose of carrying out the trusts if my co-trustee will co-operate with me in appointing a separate and independent solicitor to represent us, or if I have the documents and information to which as a trustee I am entitled. But I am resolved not to betray my trust nor prejudice those for whom I am a trustee, nor endanger my own and my family's safety (as your father did) by working in the dark."

To this letter Mr. Reginald Bateman wrote to the defendant, proposing that the matter should be referred to some conveyancer to determine. But the defendant would not accede to the terms of the suggestion. The whole of the *cestuis que trust* then signed and sent to the defendant a paper requesting him to retire from the trust, and offering to execute a release.

On the 7th of December 1861 the defendant replied as follows :

"So far from my not meeting the desire of the family I am most ready to do so; but whether I continue to execute, or whether I relinquish the trusts in favour of their nominee, it is equally expedient that I have for either purpose in my hands the documents and information for which I have hitherto applied in vain; and therefore it only now rests with the family to direct their delivery to me, in order, first, that I may ascertain what are the various trusts which are reposed in me; secondly, that I may take care that another trustee is properly appointed in my place; and thirdly, that I may be assured that the release and indemnity offered me be such as completely to exonerate me and my family from all responsibilities, which would not be the case if I should decline to com-

mit a breach of trust, but resign in order to enable my successor to do so."

The letter concluded by again asking for the documents and information relating to the trusts.

As the defendant persisted in refusing to concur in the sale this bill was filed, charging that the suit had been rendered necessary solely by the vexatious conduct of the defendant, and that he ought to pay the costs of the suit.

The documents of which the defendant required copies were very numerous and lengthy, and could not have been furnished except at a great expense, and had no reference to the trusts which the defendant was asked to carry out.

The defendant by his answer rested his defence upon the facts stated in the correspondence. He also alleged that the settlement of the 8th of August 1839 was one of a number of deeds executed by Mr. Reginald Bateman with a view to avert from the settled estates the consequence of certain proceedings which had been commenced to compel him to make good a breach of trust.

Mr. Baggallay and Mr. Cracknall, for the plaintiffs.

Mr. Selwyn and Mr. J. Dickinson, for the defendant.

The following cases were cited:

Ueddale v. Ettrick, 2 Ch. Cas. 130.

Jones v. Lewis, 1 Cox, 199.

Hampshire v. Bradley, 2 Coll. C.C. 34.

Price v. Loaden, 21 Beav. 508.

THE MASTER OF THE ROLLS.—I am sorry I cannot find any justification for the course of conduct which the defendant has thought it his duty to pursue. In the year 1839 he undertook to perform certain trusts; these appear to have been very plain and simple. If there was any irregularity in the trusts, making them void, by reason of the proceedings which had been commenced against Mr. Bateman, it was perfectly well known to the parties at the time they executed the deed, and therefore, when they accepted the trusts, they knew their nature. But, in fact the trusts are very simple: there is, first, a trust to sell the property, and then a trust to invest the proceeds for the benefit of the persons mentioned.

Nothing was done in the matter of the trusts until 1857. In that year, and while Mrs. Bateman was alive, it was thought that an eligible sale could be effected, and thereupon the parties applied to the defendant to consent to such sale. The course which he adopted in the first instance was as fit and proper as could be. He proposed to appoint a solicitor on his behalf to see if it was a proper sale, and to satisfy himself with respect to the valuation and the concurrence of the other parties beneficially interested. Nothing further was done for some time. The defendant got alarmed, apparently, from the circumstance of the injury which Mr. Bateman had sustained by not having performed certain trusts in his lifetime, and he believed that he could not safely act without further examination, not into this trust, but into another trust, which related to the marriage settlement of Mr. and Mrs. Bateman. But that trust was perfectly distinct from the present, and had nothing whatever to do with it.

The defendant had no justification for the course of conduct which he thought fit to pursue in requiring to have a full explanation of all the trusts, and of all deeds, documents and papers relating to the different descriptions of property and premises, for the purpose of determining what were the trusts which he had accepted, or which had devolved upon him by operation of law under the deed of 1839. Before he entered into this deed he knew what the trusts were. He had a copy of the deed; he knew therefore exactly what the trusts were. What were those trusts? Simply to sell and stand possessed of the proceeds for the benefit of the parties named. In no possible way that I have looked at the case am I able to find a satisfactory explanation, although I have been sedulous, as I always am when the conduct of a trustee is brought into question, to find out some reason that may fairly account for the conduct of the defendant.

The defendant declined to accede to their request during the life of Mrs. Bateman, who died in January 1857. Upon her death the matter was renewed, and the negotiations were continued until the death of Mr. Bateman, in 1859. The defendant still

insisted upon having copies of the deeds relating to the other trusts; otherwise he would not perform this trust. So matters continued down to the year 1861. Late in that year the *cestuis que trust* requested him to give up the trust and have some other person appointed; but he declined to do that without seeing all the documents and papers relating to the other trusts, upon the ground that if a trustee surrendered up a trust to a person who might commit a breach of trust, he would be made liable for the consequences which might arise from his so doing. That, no doubt, is correct in one sense of the term. It is true that if a trustee who is called upon to commit a breach of trust says, "I won't commit it, I won't sell out this stock and lend it to you"; and if thereupon they say, "Well, here is A. B, who will; will you resign? will you assign the stock to him, in order that he may do so?" and the trustee, knowing that, says, "I will," for the purpose of enabling the new trustee to commit a breach of trust; in that case the trustee would probably be visited severely by the Court. But this case is the very opposite; here the reason for which he was called upon to resign the trust was, that the trust should be performed which he had undertaken to perform; that is to say, the trust for sale. Now it is suggested that the proper mode would have been to have called upon him to perform the trust, leaving it to him to sell by auction or otherwise as he should think proper; but that is not the course of the Court; nor was it necessary to do so, nor indeed did he require that it should be done. The usual course is for the *cestuis que trust*, who are the persons most interested in the matter, and who have the strongest motive for obtaining the highest possible price, to enter into a provisional contract of sale; and the assent of the trustee is afterwards given, when he has satisfied himself, from the valuation of the property and the sum proposed to be given for it, that the sale is such as ought to be sanctioned by him, and that it is beneficial to the persons for whom he is trustee. That is all he is required to do, and all that the defendant ought to have done; but he continually resisted from that time down to the time of filing this bill, and he insisted upon mixing up this trust

with other trusts, which had nothing at all to do with it.

Now it was contended, that the plaintiffs having since the institution of the suit forwarded to the defendant copies of every deed which he required, they might have been furnished before. It is unnecessary to enter into the question whether the plaintiffs could have furnished copies of the deeds before; but whether they could or could not is a matter of perfect indifference. I am clearly of opinion that he had no right to ask for them; they did not and could not affect the trust he had to perform; they were in no way connected with it. It may well be that they might expect, after those were furnished, some other demand would be made which he would be as little justified in making, and which they would have been equally justified in refusing. It is not necessary for *cestuis que trust* to allow the matter to go on till one unreasonable demand after another is made, in order to say that. It is the duty of the trustee to perform the trust which he has undertaken; but if he will not do so, and if he compels his *cestuis que trust* to come to this Court to compel him to do that which he has undertaken to do, and which is strictly within the line of his duty, he must take the consequences of not having performed the duty which he undertook. It is obvious, in this case, that the plaintiffs have shewn very great forbearance. I have endeavoured to arrive at a conclusion which might relieve me from the necessity of making the defendant bear the costs of the suit; but, looking at it and examining it in every way, I am of opinion that the defendant has made this suit necessary, and the result is, that he must pay the costs.

I will direct a new trustee to be appointed in his place, and then stay all further proceedings against him in the matter. As soon as the new trustee is appointed, and the property conveyed to the new trustee, the plaintiffs may take an order for the sale, if they think fit, and have the money invested in the name of the new trustees, or in any way they think fit.

WOOD, V.C. { MAUNSELL v. THE MIDLAND
Feb. 27; { GREAT WESTERN (OF IRE-
June 3. { LAND) RAILWAY COMPANY.

Railway—Agreement ultra vires—Application to Parliament—Injunction—Arbitration.

The *M. Railway Company* entered into an agreement under their common seal with the *N. W. Company*, by which they covenanted that they would concur in and use their utmost reasonable endeavours to insure the success of any application to parliament by the *N. W. Company* for powers to extend their line, and to raise the additional capital necessary, and to authorize the *M. Company* to contribute one-third of such capital, and to raise additional capital of the *M. Company* for that purpose. On a bill for an injunction being filed by certain shareholders in the *M. Company*,—Held, that a company could not covenant not to oppose a bill which if passed would deprive the shareholders of the protection afforded by the Wharnccliffe order.

Semble—*Though a public company may apply for an act of parliament, it cannot legally covenant with a third party to do so, since it would thereby render its funds liable in the event of its not applying.*

Shareholders in a company, the directors of which have affixed the company's seal to an agreement, some of the provisions whereof are illegal, are entitled to have the agreement set aside so far as it is ultra vires, leaving the operation of the rest of the agreement to be adjusted by litigation or otherwise between the contracting parties.

The Court will deal with a reference to arbitration as with an action at law, and grant an injunction, restraining persons from proceeding with it.

This case, in which an interim injunction had been obtained, now came on on motion for decree. The plaintiffs were certain shareholders in the Midland Great Western (of Ireland) Railway Company, in the bill called the Midland Company; the defendants were the Midland Company, the directors of the Midland Company and the Great Northern and Western (of Ireland) Railway Company, in the bill called the North-Western Company.

NEW SERIES, 32.—CHANC.

On the 1st of August 1859 an agreement was sealed in duplicate by the Midland Company and the North-Western Company, the articles of which agreement, from 10 to 41, both inclusive, related to traffic arrangements which by acts of parliament, passed in 1857 and 1858, the North-Western Company was authorized to enter into with the Midland Company. The 44th, 45th, 46th, 47th, 48th and 49th articles were as follows:

Art. 44. "At any time or times before Midsummer 1862, the North-Western Company may apply to parliament for an act to authorize them to extend their now authorized line of railway to Boyle, Castlebar, Westport and Ballina respectively, or to any of those places, and to authorize them to raise the additional capital requisite for that purpose, and to authorize the Midland Company to contribute one-third of such additional capital, and to raise additional capital of the Midland Company for that purpose, and according to article 46. to nominate additional directors of the North-Western Company."

Art. 45. "The Midland Company will concur in and use their utmost reasonable endeavours to insure the success of any or every application to parliament made according to article 44, and in order thereto will in any or every such case provide the subscription contract, if any, to the extent of one-third of the requisite amount, and make the deposit of one-third of the money, if any, respectively required by parliament with reference to the application."

Art. 46. "If the North-Western Company succeed before the end of the year 1862 in obtaining from parliament authority to make those extensions or any of them, and authority for the Midland Company to contribute towards the additional capital of the North-Western Company to be raised for that purpose, then if the number of the directors of the North-Western Company be increased above nine, being the number prescribed by the North-Western Company's Act of 1858, the Midland Company shall, in respect of their contribution towards that additional capital, be entitled to nominate one-third of the additional number of directors of the North-Western Company."

Art. 47. "If the North-Western Com-

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pany succeed, before the end of the year 1862, in obtaining from Parliament authority to make these extensions, or any of them, then the several terms and conditions of articles 1. to 43, both inclusive, except articles 33. and 34, shall apply to and in respect of every such extension in like manner as they apply to and in respect of the North-Western Company's now authorized railway, and shall accordingly from time to time be read and have effect in like manner as if they were repeated in these presents with reference to every such extension, on and in every case with the modifications thereof requisite for making them applicable to the respective extension, and the payments to be made by the North-Western Company to the Midland Company in respect of the matters expressed in articles 33. and 34, and for the purposes as regards the respective extension of those articles shall be agreed on between the two companies, or failing agreement between them, shall be determined by the referee, who may award whatever payments he thinks proper."

Art. 48. "If and whenever any difference shall arise between the two companies as to the construction, intent, effect, incidents, consequences, performance or observance of any of these articles, or as to any breach or alleged breach thereof, or as to any claim in respect of any such breach or alleged breach, or as to the mode in which any such breach or the consequences thereof shall be obviated or compensated for, or otherwise touching the premises, every such difference shall be referred to and determined by arbitration, according to the provisions, 'with respect to the settlement of disputes by arbitration,' of 'The Companies Clauses Consolidation Act, 1845,' and both companies shall be deemed to have concurred in the appointment of the referee, who shall be the single arbitrator accordingly."

Art. 49. "Each of the two companies will in good faith use their respective utmost reasonable endeavours that full effect shall be given to these presents according to the true intent thereof; but if and whenever it shall be awarded by the referee that either of the two companies has wilfully failed in that behalf, the other company shall have the option of

declining to fulfil their part of this agreement."

The agreement so entered into was sanctioned by the Board of Trade.

By the 22 & 23 Vict. c. xlviii. and the 23 Vict. c. xlv. the North-Western Company were empowered to extend their railway to Castlebar, and to make a certain deviation in their line, and the Midland Company were authorized to subscribe to the proposed undertakings. In both of the last-mentioned acts the above-mentioned agreement was referred to.

In 1862, the North-Western Company introduced into parliament a bill for extending their railway to Ballina. The bill contained clauses authorizing the Midland Company to subscribe to the proposed undertaking, but disputes having arisen, the shareholders of the Midland Company, at a Wharnccliffe meeting, refused to consent to the proposed bill.

The North-Western Company thereupon served the Midland Company with a notice, stating that they had in various ways broken the above-mentioned agreement, and that the North-Western Company claimed 100,000*l.* damages, and required that the matter in dispute should be referred to the arbitration of Mr. Hawkshaw, the referee under the above-mentioned agreement.

The plaintiffs then filed their bill asking that it might be declared that the said agreement, so far as regarded the 44th, 45th, 46th, 47th and 48th clauses thereof, was beyond the powers of the Midland and North-Western Companies, and illegal and void, and that the Midland and North-Western Companies and the directors of the Midland Company might be restrained by injunction from in any way acting on the said agreement, so far as regarded the clauses aforesaid, and in particular from proceeding with the proposed reference to arbitration.

Sir Hugh Cairns and *Mr. G. L. Russell*, for the plaintiffs, contended that the company could not enter into an agreement as to the traffic on lines which were not in existence, and for the construction of which powers had not been yet obtained from parliament. This agreement was an attempt to escape from the restrictions imposed on railway companies by the legislature.

Railway Acts were always carefully so drawn that shareholders should only be bound to expend their funds from year to year according to the financial condition of the company, whereas this agreement was an attempt to bind future shareholders to expend their funds for several years to come, whether the condition of the company was prosperous or otherwise.

Mr. Rolt and Mr. Osborne Morgan, for directors of the Midland Company friendly to the plaintiffs.

The Solicitor General, Mr. Giffard and Mr. Martineau, for the other defendants, submitted that two questions arose: first, whether any of the provisions in the agreement were *ultra vires*; and, secondly, assuming that the agreement as regarded the clauses referred to was *ultra vires*, whether the Court would interfere to prevent the parties from proceeding to an arbitration for what it might be worth. It was clear that the Midland Company were at liberty to act as provided by the agreement, and the company, being at liberty to adopt this course, could bind itself to do so by covenant—

Ware v. the Grand Junction Waterworks Company, 2 Russ. & M. 470.

Stevens v. the South Devon Railway Company, 13 Beav. 48; s. c. 20 Law J. Rep. (N.S.) Chanc. 491.

Heathcote v. the North Staffordshire Railway Company, 2 Mac. & G. 100; s. c. 20 Law J. Rep. (N.S.) Chanc. 82.

Hattersley v. the Earl of Shelburne, 31 Law J. Rep. (N.S.) Chanc. 873.

The plaintiffs had enjoyed the benefit of this agreement since 1859, and now came forward to ask the Court to interfere in their favour, to relieve them from the onus of these clauses, and to leave the rest of the agreement valid and binding; but the agreement was one and indivisible, and the whole must stand or fall together. As regarded the award, there was no equity in the case; it was a purely legal question. The award, if invalid, would be simply waste paper, and could do no harm; it depended on the agreement, and could only be binding if the agreement was legal—*Gage v. the Newmarket Railway Company* (1). The agreement had been indi-

(1) 18 Q.B. Rep. 457; s. c. 21 Law J. Rep. (N.S.) Q.B. 398.

rectly sanctioned by parliament, as it was recited or referred to in both the acts of 1859 and of 1861. The plaintiffs' remedy was by an action at law. The contract was a legal contract; there were no equities to be determined, no equitable interests involved—

Simpson v. Lord Howden, 3 Myl. & Cr. 97; s. c. 6 Law J. Rep. (N.S.) Chanc. 315.

The London and North-Western Railway Company v. Smith, 1 Mac. & G. 216; s. c. 1 Hall & Tw. 364; 19 Law J. Rep. (N.S.) Chanc. 193.

East and West India Docks and Birmingham Junction Railway Company v. Gatlke, 3 Mac. & G. 155; s. c. 20 Law J. Rep. (N.S.) Chanc. 217.

Sir H. Cairns, in reply, submitted that the Court of Chancery was constantly called upon to decide as to what was *intra* or *ultra vires*. The plaintiffs had a right to come to this Court for a decision on the validity of this agreement; they had no remedy at common law, because there the shareholders could not be heard, but would be left entirely in the hands of their directors. It was true that the plaintiffs only asked to be released from the onus of these particular clauses. As to the rest of the agreement, they could make no offer because this agreement was entered into, not by the plaintiffs, but by the company. The plaintiffs only asked the Court to prevent their trustees from committing a breach of trust.

WOOD, V.C. (June 3).—With regard to the question which is now raised, and which has been so ably discussed, I must consider the exact position in which the plaintiffs stand. They are not the Midland Company coming here, as has been suggested in the course of the argument, seeking to set aside their own agreement, but they are certain shareholders who, finding the common seal of their company attached to a document by which they conceive that they are affected in a manner in which their directors are not authorized to affect them, come here for a very ordinary equity, namely, to be relieved from the consequences of such improper use of the common seal. That is an entirely different position, of

course, from that in which the company themselves would stand if they came here to be relieved from the consequences of their own act. In all cases where shareholders in a company feel that they have been injuriously affected by the wrongful act of their directors, the course has always been to ascertain whether or not there is contained in the act complained of any contract or engagement which goes beyond the authority and power of the directors—whether it be an act under seal, as in this case it is, or whether an act such as the payment of money or the application of funds to purposes to which the company have no power to apply them—in either case it is simply a precaution on the part of the shareholders that they may not be aggrieved by a wrongful act on the part of their directors. That takes the case out of the authority of *Guttko's case*. The question here is, not whether I ought to leave it to a Court of law to ascertain whether this agreement is or is not binding on the company, because that is a position in which the shareholders would find themselves without a voice. The Court of law might determine on the argument of the directors, who might then appear before them, that the engagement was legal or illegal. That would depend partly, no doubt, on the course of proceeding which the directors themselves might adopt. I apprehend it would be competent for the directors, unless restrained, to confess judgment, or to go before the arbitrator, unless restrained by the Court, and make such defence or omit making such defence as they might think fit; and consequently the shareholders now say, let us not be subjected to any of these inconveniences; we come here to have it ascertained whether or not the directors have exceeded their power; if they have, then, as *cestui que trust*, we wish to restrain an excess of action on the part of those authorized to conduct our affairs.

Looking at the engagement itself in that point of view, it appears to me beyond question that the two substantial articles, which are alleged by the plaintiffs to be in excess of the powers and authorities with which the directors are invested under the act of parliament are the 45th and 47th.

Under the 45th clause the engagement is twofold; the company has contracted under

its common seal by this covenant that it will actively support a bill by which, not only shall another company obtain power to make a railway or to extend its railway to some district which it has not yet reached, but a bill which shall authorize the Midland Company to contribute capital towards that undertaking, it being a measure which is not at all within the scope of the act of the Midland Company itself. Now, what is the result of such a stipulation? It appears to me there is no possible view by which you can escape this consequence; whereas parliament has taken care to shield the shareholders of this company from having their capital applied to any purpose for which they did not originally design it, by enacting that it shall not be done without their meeting (under what is called the Wharnccliffe order), and having an opportunity of discussing whether or not they are willing that their funds shall be so applied; stipulating moreover that three-fourths (not a simple majority but three-fourths) of the shareholders shall come in, before parliament will sanction any such application of their funds; if I were to hold that this is a legal covenant, it would amount to an entire destruction of the protection that parliament has held out to the shareholders; because a simple majority, not convened according to the exigencies of that order, not being according to the exigencies of that order a majority of three-fourths, but a simple majority of the company, might at any time affix their seal to a deed by which they might stipulate that they would support and uphold persons in obtaining an act of parliament to force the reluctant minority of one-fourth into a subscription to another undertaking. The consequence of course would be this, that if the reluctant subscribers attending a meeting did exceed one-fourth, and by virtue of the protection afforded them under the Wharnccliffe order they positively refused to sanction any bill of this description, that resolution would be in effect an act on the part of the company which prevented the legislature from taking any step towards carrying into effect the measure which was contemplated by the 44th article. Then those who have obtained this stipulation from the company would say, it may be all very well for you to say this bill shall not go forward, but

here we have the covenant of your company that it shall, and although we cannot make you hand over your funds for purposes which you did not contemplate, we will ask for 100,000*l.* damages, or whatever it may be, and we will take care and get those damages from you, notwithstanding parliament has intended you should have the full opportunity whenever the question arises of amply discussing or voting whether or not you will have your funds applied. I am not taking an exaggerated view of what the effect would be, because it is plain that that is the view taken by the Great Northern Company, from what they wish to submit to the consideration of their arbitrator. It was ingeniously asked by the Solicitor General, is there anything to prevent a company covenanting that it will apply for a bill? It has been decided that a company may apply for a bill, although a minority of its shareholders may be opposed to such application. That has been settled, and that was the reason of having the Wharnccliffe order; but further than that, can they covenant that they will apply? No doubt it is lawful for them to apply for a bill, but it is not lawful to expend one sixpence of the funds in procuring it. Those two points are settled by decisions. Is this Court to say, although you cannot expend a sixpence, you may covenant you will apply, and although you cannot pay a single farthing out of the funds of the company, you may fix the company with the debt due upon the covenant. That would be a singular proposition, and my present impression is that the Wharnccliffe order in itself is a sufficient answer to it. Although the company may apply for a bill, I should have great hesitation in saying, that they can affix the common seal to an agreement so as to render the other proprietors liable in the event of that not being applied for, which, if it was applied for, their funds could not be expended upon without the sanction of parliament. But by this 45th article the directors of the Midland Company put themselves under a covenant to do this. I hold the shareholders are not bound by any such covenant as that, and it is beyond the authority of the directors so to bind them.

Then it is agreed that the Midland Company will in any or every such case provide the subscription contract, if any, to the

extent of one-third of the requisite amount. I may pass that by for the present, though clearly if it were wanted I apprehend again the same objection applies; they covenant to do this, and it would not be enough to say they might procure persons to do it who would not be the company; and that it would not be done out of the funds of the company; because this question arises: suppose they could not find such a person, are the shareholders to be subjected to damages in respect of the inability of the directors to do that which it would be perfectly lawful for them to do if they were able to achieve it.

Then again, with respect to the one-third of the deposit; it is a clear answer to say that the principle that the funds of a company cannot be applied towards any purpose except the purposes of the company itself, will bear out the contention of the plaintiffs, that they are entitled to say, we will not have our money which we subscribed for making a particular work, and the earnings from our money applied to making a deposit, not for our own bill, but for the bill of another company, which bill is to contain a clause by which our directors are to be authorized to become subscribers to the undertaking. There is a twofold objection to it: first, it is not a deposit for their own bill at all, or any purposes of their extension, but it is a deposit to enable another company to make another line; secondly, it is a deposit to enable that company to carry into effect a measure which will enable them to coerce the minority into subscribing to another undertaking. That being so, it does not appear to me necessary to consider what question might arise or what might be the inference to be drawn from that clause in the several bills before parliament, almost a standing-order clause, which provides that it shall not be lawful for any given company to make its parliamentary deposit out of the capital that shall be provided for the purposes of the act in order to provide for any further act. Perhaps an inference may arise, that it may be lawful to make a temporary deposit out of the earnings, but that is not the case I have before me. It can only apply at the most to a company extending its own operations, and cannot apply to the case of one company undertaking to extend the operations of

another, such as I have described in the previous part of my judgment. I hold that the whole of that 45th article is beyond the power of the directors as against the complaining shareholders.

As regards the 46th article, it does not appear to me that is one which the plaintiffs can complain of. It is probably not of importance to either side to discuss it. It comes to this, that if the North-Western Company shall obtain such an act, then the plaintiffs' company shall have certain privileges. I do not think the plaintiffs can complain of having those privileges, and I do not think the plaintiffs can complain if the North-Western Company have entered into a contract *ultra vires* of the North-Western Company. They will be in no way damnified. Some advantages are given, and of those advantages they cannot in any possible way complain.

I should have noticed that part of the argument which followed afterwards, that parliament has already recognized and rectified in a certain sense this particular agreement on the part of this company in the two acts of 1859 and 1861, but it is only in this way, which very commonly occurs. Parliament looks very narrowly into those clauses which one company, which is not the company before them, gets inserted into the act of another company. It is very common to have provisional agreements, that if you obtain such and such a clause from parliament we agree to subscribe one-third of the capital, and such a provisional agreement I apprehend would be perfectly good, but it would be dependent on what parliament might think fit to do. Parliament is asked to give power to this company, but it guards the company by the Wharnccliffe order, and it guards it in another way by asking, "Have you an agreement shewing that the other company is desirous that this shall be done?" You answer, "We have; here it is," and produce it. Then parliament does not trouble itself to see whether the agreement can stand *per se*. What it is asked to do is to give effect to the agreement. It recites the agreement made; and the only effect of that recital in the preamble is, there is an agreement to which, if so minded, parliament can give effect. It takes that, and recites it to be a beneficial and proper agreement,

and being a beneficial and proper one, it takes steps to carry it into effect. I do not see that the subsequent clauses confirm it.

The vice of the 47th clause I think is very apparent. It is not necessary to have so extensive a traffic agreement as is there contained. I have not analyzed the clause. I did not think it requisite to go into it minutely, but it was thought necessary, and power was taken from parliament to make an agreement as to traffic; and that power not being thought large enough was extended by the act of 1858; that act must be taken as declaratory of what the powers are: resting, therefore, on the powers given by parliament, subject also to the consent of the Board of Trade, which was to sanction the agreement, which was to be carried also by a certain number of proprietors, and so on, this agreement of 1859 is entered into. How can that, without the authority of parliament, sanction an agreement up to 1862, which is to be identical with this in what event? In the event of the North-Western Company before 1862 obtaining from parliament authority to make extensions: that is to say, the North-Western may get power to make an extension railway; Parliament may not think fit to grant any of those traffic clauses that were obtained in 1857 and 1858; then we fall upon the agreement, and say this agreement shall extend to the whole of the extension line, although clearly as to the original line we could do nothing without parliament; we could do nothing without the sanction of the Board of Trade, but we will up to 1862 bind our shareholders for all extension lines, irrespective of any reference to the sanction of the Board of Trade, or the powers given by parliament. I am aware that the Board of Trade has sanctioned this agreement as it stands; but the question is, how far it is legal to have a prospective agreement that if parliament authorizes the extension of the line, a traffic arrangement similar to that authorized by the acts of 1857 and 1858 shall be carried into effect, whether authorized by parliament or not. That seems to have been the state of circumstances in the case before Vice Chancellor Kindersley (*Hattersley v. the Earl of Shelburne*), making it conditional upon the act of parliament giving the power. If parliament gives a power which,

without further application to parliament, extends to the traffic arrangement, that is quite a different question, and will be subject to totally different considerations.

Being of opinion that the 45th and 47th articles are clearly beyond the powers of the company, I then come to the consideration of the 48th and 49th, and I am clearly of opinion that I cannot deal with them in any way beyond saying they are not to be operative against the Midland Company.

There remains the 44th clause, which I purposely reserved to the last. The 44th article is a covenant that the North-Western Company may apply to parliament for an act to authorize them to extend their line. I do not think it important to consider that part of the clause, but it further covenants that the North-Western Company may apply for power for the Midland Company to contribute one-third of the additional capital. There again you are brought to this: this being a covenant by the Midland Company that the North-Western Company shall be at liberty to do a certain act, it amounts to a covenant that the Midland Company will not oppose their so doing. It would be simply futile to say, you may go to parliament; that is absurd, because every subject of the realm may go to parliament. That could not be the intent; but the covenant that you may go to parliament is a covenant that we will not oppose your going to parliament for a bill. Then I must consider that this is a covenant not to oppose a bill which, if passed, would compel the reluctant minority exceeding one-fourth (supposing that there was such a minority minded that the bill should not be passed) to pay their contribution of the capital. I apprehend that the shareholders would say, we are not to be bound by such a covenant. As regards the circumstance of interfering with the making of an award being novel, I should answer the case is the same as if this were an action at law; if an action was brought these shareholders would say we, the shareholders, cannot go before the Court of common law; we do not know what our directors will do; we must not leave our directors to defend or confess judgment; they are friendly now but may not be so to-morrow; we have a right to have it ascertained by this Court on our

behalf what they are going to do; do not let us be subjected to the inconvenience and possible damage that may occur; we cannot recover if proceedings be taken against us upon covenants that our directors have entered into.

Under these circumstances, it appears to me proper to make the following declaration. Declare, that the agreement of the 1st of August 1858, so far as it purports by any of the covenants therein contained to bind the defendants, the Midland Company, to the observance of any of the matters or things mentioned in the 44th, 45th and 47th articles, and so far also as by the 48th and 49th articles it purports to subject the said company to any arbitration or award, or to any damages in respect of the non-observance of the said 44th, 45th, and 47th articles, or any of them, or any part thereof respectively, is void as against the said Midland Company. Then there will be an injunction to restrain the directors of the two companies, their officers, servants and agents, from acting on the said agreement in respect of any of the said covenants which are hereby declared to be void against the company.

Then there is the remaining observation to be made upon what was said as to partly setting aside the agreement and letting it stand as to the rest. What I apprehend is this, that the two companies meet together and enter into an agreement under the common seal. The shareholders who come here have nothing to do with that; they have no voice. The shareholders do not ask me to pronounce any part of that agreement to be void to which their directors were competent to bind them under the common seal. All that the shareholders can do is to ask to be protected from anything the directors have not power to bind them by. The directors of the North-Western Company must be taken to have known the law and the existence of the act of the Midland Company, and must have known that the directors had no power to bind their company. Whatever consequences may follow from that is a proper matter for them to enter into in some other contest. These shareholders are not the company; they are persons who, being members of the company, complain of being bound by contracts

which ought not to affect them, and they are entitled to be relieved from the provisions of an instrument subjecting them to consequences which they ought not to be subject to, and over which they have no control. If anything does arise upon it, it will be a litigation between the two companies, and the shareholders will not be parties to the suit.

WOOD, V.C. }
May 7. } PARKER v. WHYTE.

Lease—Covenants—Sub-lessee—Notice.

P. demised a house and shop to the agents of a company; the lease contained a covenant not to use any part of the premises for the purpose of sales by auction. The agents of the company sublet to S, who made no inquiry as to the terms of the original lease. S. being about to hold sales by auction upon the premises, P. filed a bill to restrain him from so doing:—Held, that S. having neglected to inquire into the provisions of the original lease he did so at his own risk, and could not be treated as taking without notice.

The circumstance that a lessor has a right of re-entry for breach of a covenant does not preclude him from coming to a Court of equity to restrain the commission of the breach.

In this case an interim injunction had been obtained; the case now came on for hearing on motion for decree.

By an indenture, dated the 9th of June 1861, John Frederick Parker demised to William Thomas Whyte and John Adams the shop and premises, No. 373, Oxford Street, for the term of two years and a half, less seven days from thence next ensuing, and by the same indenture the said W. T. Whyte and J. Adams, for themselves, their executors, administrators and assigns, covenanted with the said J. F. Parker, his executors, administrators and assigns, that they would not permit or suffer any sale by auction to be had or made in or upon the said premises, or any part thereof, without the licence or consent in writing of the said J. F. Parker, his

executors, administrators or assigns, first had and obtained.

W. T. Whyte and J. Adams occupied the basement of the said house as the offices of the London General Coal Company.

On the 17th of September 1862, Frederick William Hammond, the secretary to the London General Coal Company, entered into an agreement in writing, whereby he agreed to let the shop and part of the said house to Alfred Sparks, for the term of three months, from the 29th of September then instant; and it was thereby agreed that the tenancy should continue for three months from the expiration of the then present tenancy, and so on from time to time until three months' notice of discontinuing the tenancy should be given. The agreement contained no clause forbidding sales by auction on the premises.

By a memorandum of agreement, dated the 10th of April 1863, A. Sparks agreed to let the front shop at 373, Oxford Street, to Samuel Atkinson for six months certain; and it was thereby agreed that the said S. Atkinson should use the said shop only for the sale of Birmingham and Sheffield goods, jewellery, clocks and cloth, and that no offensive business of any kind should be carried on in the said shop or on any part of the said premises, which the said S. Atkinson might be allowed to use.

J. F. Parker, on the 14th of April, discovered that a sale by public auction was about to be held on the said premises without his licence or consent; one J. J. Salmon being the auctioneer. J. F. Parker thereupon filed a bill against W. T. Whyte, J. Adams, A. Sparks, J. J. Salmon and S. Atkinson, asking for an injunction to restrain them from proceeding with the said sale or from holding any sale by auction, or other sale on the demised premises or any part thereof, during the remainder of the term granted by the indenture of the 9th of June 1861.

Mr. Giffard and Mr. Hetherington appeared for the plaintiff.

Mr. Everitt, for all the defendants except Whyte and Adams, contended that an under-lessee was not liable on the covenants in a lease unless he had notice of them at the time of the under-lease; and that notice

must be proved before an application for an injunction could be made, whether the covenant ran with the land or not—

Talk v. Mozley, 2 Ph. 774; s. c. 11 Beav. 571; 18 Law J. Rep. (N.S.) Chanc. 83; 1 Hall & Tw. 105.

Hodson v. Coppard, 29 Beav. 4; s. c. 30 Law J. Rep. (N.S.) Chanc. 20.

Coles v. Sims, 5 De Gex, M. & G. 1; s. c. 23 Law J. Rep. (N.S.) Chanc. 258.

Moore v. Greg, 2 Ph. 717; s. c. 18 Law J. Rep. (N.S.) Chanc. 15.

To hold that a sub-lessee was liable on the covenants in the original lease would be to do away with the distinction between an sub-lease and an assignment. The lessor's proper remedy was by re-entry—*Moses v. Taylor* (1).

Mr. Giffard, in reply.

WOOD, V.C. said the question before him was whether a person could take an under-lease of a house, enter into possession and neglect the covenants in the original lease because he had asked no questions and therefore had no notice of them. If that were permitted the tenant of a house in some fashionable square might under-let, and the under-lessee might open it as a public-house or carry on any noxious trade there.

On principle he could not hold that a person was entitled to enter into possession of a house or lands without asking questions. He was aware that in business it was not the custom to ask questions; and if they were asked possibly the lessor might decline to answer them or to permit his title to be investigated. On that state of circumstances very difficult questions might arise; but that was not the case here. If a person took a sub-lease without making any inquiries as to the title of the lessor he must take the consequences of his carelessness.

It had been contended that Sparks was a lessee without notice; but if a man asked no questions, and then refused to be bound by the covenants of the original lease, he could not be treated as taking without notice. Sparks was bound to make the requisite inquiries, and the fact that Hammond was dealing with the property as

agent of a company, as shewn by the agreement, was sufficient to warn Sparks that inquiry was necessary. A person who had made no inquiry where he had a legal right to inquire into the title would not be permitted to shield himself under a plea of no notice.

It had been argued that the lessor had a remedy by re-entry, but he was not bound to adopt that course. It might very well be that he had a desirable tenant, and did not wish to get rid of him. The mere power of re-entry did not deprive him of his remedy in this court.

The injunction must, therefore, be granted in the terms of the covenant in the lease.

STUART, V.C. }

Feb. 26. }

LORDS JUSTICES. }

March 5. }

Re M'VEAGH.

M'VEAGH v. CROALL.

Practice—Administration—Affidavit as to Documents by Executor at instance of Creditor.

Held, by the Lords Justices, overruling a decision of one of the Vice Chancellors, that a creditor of a testator, although not either a plaintiff or a defendant, may, after decree in an administration suit, with a view to establish his debt in equity against the testator's estate, obtain an order that the testator's executor may make an affidavit stating the documents in his possession relating to the claim of the creditor.

This was a motion on behalf of Francis Schwenk Gilbert, (who claimed to be a creditor of the late John M'Veagh, whose estate was in course of administration by this Court under an order made on the 21st of October 1862 on an administration summons,) that each of the defendants, the executor and executrix of the testator J. M'Veagh, might, within three days after service of the order to be made thereon upon him or her, make and file a full and sufficient affidavit, stating whether he or she had in his or her possession or power any, and if any, what documents relating to the matters in question in the matter and suit and the items of the claim of the

(1) 11 W. Rep. 81.

NEW SERIES, 32.—CHANC.

said F. S. Gilbert and accounting for the same, and that they should respectively within two days after the filing of such affidavit produce and leave with the Clerk of Records and Writs such of the said documents as by such affidavit should appear to be in their respective possession, custody or power, except such of the same, if any, as they respectively might by his or her affidavit object to produce, and that the said F. S. Gilbert, his solicitor or agent, might be at liberty to inspect and peruse the documents so produced and left, and take copies thereof and extracts therefrom as he should be advised, at his expense, and that the said Clerk of Records and Writs might be ordered to produce the same on any examination of witnesses in the matter and cause at the hearing thereof, as the said F. S. Gilbert might require, and that the said F. S. Gilbert might be at liberty to make such further application as to all or any of the documents mentioned in the said affidavit as he might be advised, or that the said F. S. Gilbert might be at liberty, notwithstanding the said order of the 21st of October 1862, to sue as he might be advised for the debt claimed by him to be due to him from the estate of the said J. M'Veagh.

A summons had been taken out by a legatee of the testator for the administration of his estate, and an order for such administration was made on the 21st of October 1862.

Mr. Gilbert had been apprenticed to the testator, who was a civil engineer, and after the expiration of his articles he had continued with him as an assistant in his business. He had gone in under the order of the 21st of October, and he claimed to be a creditor of the testator for the sum of 126*l.* 0*s.* 5*d.* upon an account and for services rendered to him in his profession of civil engineer; but he was unable, from the documents in his possession, to establish his claim, and he said that the executors had in their possession documents which would enable him to do so. An application by summons to the above effect had been made by Mr. Gilbert to the Vice Chancellor in chambers, but his Honour declined to make any other order thereon than that Mr. Gilbert should pay the costs thereof.

Upon appeal to the Lord Chancellor from this order, his Lordship refused to hear the appeal, considering that an order of the Vice Chancellor made at chambers respecting a matter of detail and discretion did not properly form the subject of an appeal, and the above motion was then made in open Court before the Vice Chancellor.

Mr. G. L. Russell, in support of the motion.—If Mr. Gilbert had been a party he would have had a right to the production he asked—15 & 16 *Vic. c.* 86. *ss.* 18, 19, 20. Then, was he not in substance a party? The decree under which all persons claiming to be creditors were directed to come in and prove their debts made him a party. If Mr. Gilbert could have brought an action, which in consequence of the decree he could not now do, he could, under section 50. of the Common Law Procedure Act (17 & 18 *Vic. c.* 124), have obtained what he now sought, and it was submitted that having regard to the improved method of procedure and the desire of the Court to shape its proceedings with a view to the administration of justice with as much speed and as little expense as possible, an order might be made.

He referred to

Paxton v. Douglas, 8 *Ves.* 520.

Whitaker v. Wright, 2 *Hare*, 310; *s.c.* 12 *Law J. Rep.* (N.S.) *Chanc.* 241.

Hyde v. Edwards, 12 *Beav.* 253; *s.c.* on appeal, 1 *Mac. & G.* 410.

Hart v. Montefiore, 30 *Beav.* 280; *s.c.* 31 *Law J. Rep.* (N.S.) *Chanc.* 333.

2 *Daniell's Chanc. Prac.* (edit. 1839), 7.

Mr. W. Morris, for the plaintiff; and

Mr. Swanston, for the defendants, the executor and executrix, were not called upon.

STUART, V.C.—I entirely accede to all that has been said by Mr. Russell as to the expediency of the Judges of this Court trying to mould the course of procedure, so that all proceedings taken in the court should be adjudicated upon with the least possible delay and expense. The question in the present case is, whether, under an administration decree, a creditor, having come in to prove a debt of a very peculiar and complicated description—being in the mere situation of a creditor seeking to

prove his debt—can call upon the executors to state upon oath all the accounts and documents in their possession not relating to the matters in the cause, but relating to this particular creditor's debt. Mr. Russell has argued that, after a decree in a creditors' suit, every creditor has the benefit of the decree; that he has a judgment in his favour, and therefore is, according to the course of the Court, restrained from suing the executors at law, and must, as Vice Chancellor Wigram very properly said, be considered as bringing with him into this court all his legal rights. Every creditor of every testator has a right to have his demand against the assets of the testator regularly brought forward and regularly adjudicated upon. Under the old system of practice, where the decree directed that all documents, writings and papers should be produced before the Master as he should direct, the records of this Court, for very good reasons, afford no instance of any creditor ever having been held entitled under the direction in the decree, which was a decree in his favour, to go before the Master and require the executors to produce all documents in their possession, in order to enable him to prove his debt. Under the old system of practice, the proceedings in the Masters' offices, under a decree in favour of creditors, were conducted upon principles which totally excluded that mode of proving a debt to which the present creditor seeks to resort. Under the old practice, the creditor being unable to obtain under the decree and in this Court the production of documents, might have had leave, if the Court permitted it, to bring an action at law, or to file a bill in this Court, to establish his individual claim. Under either of those modes of proceeding he could have obtained that investigation and discovery which the decree in his favour denied to him. The present application is made under that act of parliament which has been so beneficial to the suitor, and which redounds so much to the credit of the Court for the mode in which it enables business to be transacted. The act for the amendment of the practice and course of proceeding of the Court under the sections which have been referred to by Mr. Russell, gives a new and most beneficial power, that which enables one party to call

upon another party to the suit to produce all the documents in his possession relating to the matters in question in the cause. It is impossible to say that the present applicant, a creditor coming in under an administration decree obtained without the filing of a bill, under the short and beneficial course of procedure of this Court, is either a plaintiff or a defendant under the language of this act; and I may observe that one can imagine scarcely anything more embarrassing or likely to create greater difficulty in the administration of justice than that, upon an attempt on behalf of a particular creditor to obtain an adjustment not only of his claim under an unsettled account, but of a demand as upon an action of *quantum meruit* in respect of work and labour done, there should be an endeavour in chambers to obtain the production of documents to have justice done between the estate and that particular creditor only by whom the demand is made. Mr. Russell has very truly said, that if this creditor had brought an action he could have obtained upon affidavit at once the production he now seeks, because Courts of law have been enabled to adopt the beneficial course of procedure of permitting discovery to be made in this way. But, if he had sued at law, a question would have been raised as to the validity of the demand—a question of account, or a question of *quantum meruit* would have been raised as to how much the creditor could regularly and properly demand, and there would have been a production of documents to settle the question, not as between the estate and all the creditors, but as between this individual creditor and the executors. Now, the Court, under the act of last session (25 & 26 Vict. c. 42. s. 1), in the case of creditors, takes upon itself and is bound to decide every question of fact, and every question of law, as well as every question of equity which occurs in the case. But questions both of fact and of law must be decided in such a way as to give fair play both to plaintiff and to defendant, and under the peculiar nature of this creditor's debt, looking at its being a case of an unsettled account, arising out of transactions of a complicated kind, of his claiming, not only upon an unsettled account, but upon a demand of *quantum meruit*, of how much is due to him for work and labour done, it is

very plain that, in order to enable the executors fairly to resist this claim, there should be a special statement of the nature of the creditor's demand, which the affidavit by which this creditor affects to prove his debt does not contain. In order to have a proper decision, there must be statement of evidence on both sides. The case of the creditor is obviously one which, in order to have justice done between him and the estate, requires to be dealt with in this way. If he had brought in such a claim as this under the old system I should have had no objection to direct an action to be tried. There have been many instances, and the case of *The Duke of York's Estate* was one, in which creditors were allowed to bring actions, inasmuch as the nature of their claims was so extraordinary that it was felt they could not be dealt with in this court before the Master. It appears that there is nothing in the circumstances of this case which cannot be properly settled by a bill, and I believe with as little cost as those contested proceedings which have been carried on in chambers with the addition of this day's argument in court. If, instead of this course, the creditor had stated his case by bill and obtained an answer, much delay and expense would have been saved, and what he is now striving to obtain might have been gained much more expeditiously. The case is one in which the application is not, I think, warranted by the statutory jurisdiction of the Court; and I have already said the statute does not prevent a creditor from coming forward either as plaintiff or defendant for a discovery. All this has been already decided by me in chambers, and was brought before me there. I retain the same opinion as I then held, and regretting that this gentleman has persisted in this course, I think the motion must be refused, and with costs, and there will be liberty for the applicant to take any such proceedings as he may be advised to take.

From this order the creditor appealed, and his appeal was heard before the Lords Justices, on the 5th of March, when *Mr. W. M. James* and *Mr. G. L. Russell* appeared for *Mr. Gilbert*, *Mr. W. Morris* for the plaintiff, and *Mr. Swanston* for the defendants, the executor and executrix, who opposed the motion. The Lords Justices in

discharging the order of the Vice Chancellor gave the following judgments.

LORD JUSTICE KNIGHT BRUCE.—After a decree for administration, all creditors are entitled, and in one sense are even bound, to come in and prove their debts in this court, because no creditor is permitted to sue at law until he has come in and proved under the decree and obtained leave to proceed at law, which is only granted under special circumstances. In this case the claimant has gone into the Judge's chambers and made his claim, producing in support of it *prima facie* evidence of his debt. That evidence is not contradicted or displaced, though it seems that there is reason to doubt whether that evidence alone is sufficient to establish the debt, having regard to the evidence which the executors have produced, or may be supposed capable of producing. The creditor, therefore, desires that an affidavit may be made by the executors as to the documents in their possession or power relating to his claim or any part of it; not as to documents relating to the suit generally, but as to such of them as may throw light on his claim. I am convinced that he is entitled to this; considerable injustice would be done if the rule were not so. I think the creditor is entitled to an order, not precisely in the terms contained in the notice of motion, but according to the sense asked by his counsel. With regard to the costs, including those of the appeal, it seems to me that, the Lord Chancellor not having expressed any opinion on the motion before him as to the merits, the order as to costs made by the Vice Chancellor in chambers should be discharged; that the order as to costs made by the Vice Chancellor in court should be also discharged; and that the costs of the claimant up to the present time, with the possible exception of the costs of the application to the Lord Chancellor, but including the costs of the present appeal, should be added to the debt.

LORD JUSTICE TURNER.—I am of the same opinion. There has been a decree for administration of the estate. That decree, according to the old practice, would have contained directions for production before the Master of all necessary documents. It is said that the Master would not have ordered the production of documents on the

application of a creditor coming in under the decree to prove his debt. That may possibly have been so under the old practice; but, if so, the case is very different now, because the jurisdiction originally assigned to the Masters has been now transferred to the Judge himself. The Judge is to exercise his discretion (which I conceive he has) as to the orders to be made for production of documents. When it is said that the Judge must exercise his discretion, it must be considered that his discretion must be exercised according to the law as it stands. According to a recent decision of this Court—*Re Hooper* (1)—requiring the Court not to send parties to law, but to determine all questions of law and fact, this Court will be bound finally to determine on the rights of a creditor, without sending him to law at all. The position of the case before us is this: the creditor coming in under the decree, and the executors having documents which may prove the claim of the creditor, it is said that the executors are not bound to produce these documents, so that when the case comes before the Court, the Court will have to try the case without that evidence. No doubt the discretion of the Judge must be exercised with reference to the existing state of the law, but I confess that (although there may be cases in which it may be right to refuse an order for production by the executor) I apprehend that it must be a very strong case indeed which would induce the Court, having regard to the existing state of the law, to refuse such production. The claimant would be placed in a very disadvantageous position if he were compelled to come to the court, and yet could not have that discovery which alone could enable the Court to adjudicate finally on his claim. It is said that the summons before us goes too far, and asks for more than is necessary; but if that be the case, it is no reason why the order should not be made for the production of such documents as may be necessary. It is said that there is no proof that there are in the executors' possession any documents which will prove the claimant's case; but how is it possible that the creditor can know what documents the executors may have? It seems to me that the order ought to be

made on the executors, and I have only had doubts whether they should be compelled to make an affidavit on the subject; but, looking at the act of parliament, and the practice of the Court as to production of documents on oath, I think there is no objection to that course of proceeding. It seems to me that an order should be made confined to the production of documents relating to the claim, and any items contained therein. As to the costs, I think the claimant should add his costs to his debt, but that there should be no costs of the application to the Lord Chancellor.

WOOD, V.C. }
June 12, 23. } *Re CLARK'S TRUSTS.*

Will—Construction—Cross Limitations—Implication.

R. C. by will, directed that his residuary, real and personal estate should be sold and converted; and that his trustees should hold four-sixths of the proceeds upon trust for three reputed daughters and a lawful daughter (naming them) of his brother during their respective lives and after their respective deaths upon trust for their children respectively, as they should respectively appoint, and in default of appointment upon trust for the children of the four daughters respectively, in equal shares, with cross-executory trusts as between the children of the same parent as regards the shares of male children dying under twenty-one and female children dying under twenty-one and unmarried, with an ulterior trust in case the said four daughters should all die without leaving any child or children, or leaving such, if such children should all happen to die under twenty-one, and without having been married. One of the four legatees died without having been married:—Held, that as to her share cross-limitations must be implied between the other three legatees and their children, corresponding with the limitations contained in the will of the original shares.

Held, also, that no such cross-limitations could be implied as to the share of any daughter after once a child of that daughter had attained a vested interest, even though the daughter might subsequently die without leaving a child, the proper function of the

(1) *Ante*, p. 55.

cross-limitations being not to divest any estate once vested, but merely to supply the gap left by the testator.

This was a petition under the Trustee Relief Act.

Richard Clark, by his will, dated the 29th of June 1818, gave real and personal estate to trustees upon trust to sell and convert into money and thereout to make certain payments, and to invest the residue; and the testator directed that his trustees should stand possessed of and interested in the ultimate residue and money aforesaid, and the stocks, funds and securities in or upon which the same should be invested as to two full and equal sixth parts thereof upon certain trusts for Cornelius Clark and Richard Clark, the reputed natural children of his brother, Cornelius Clark, deceased. And as to the remaining four full and equal sixth parts of his said residuary personal estate and money aforesaid upon trust to lay out and invest the same, and to permit and suffer "Hannah Clark, Margaret Clark and Elizabeth Clark, the three reputed natural daughters, and Martha Clark, the lawful daughter, of his said brother Cornelius Clark, or such of them as should be of age or married at the time of the testator's death immediately on that event, and such of them as should not be of age or married at his death, when and as they should respectively attain the age of twenty-one years, or be married respectively, during the term of their natural lives respectively to receive and take the interest, dividends and annual proceeds of their shares respectively in the testator's said residuary personal estate and money aforesaid, to and for their own sole use and benefit. And from and after the death or respective deaths of them the said Hannah Clark, Margaret Clark, Elizabeth Clark and Martha Clark, upon trust for the child, if only one, or if more than one, all and every or such one or more of the children of them, the said Hannah Clark, Margaret Clark, Elizabeth Clark and Martha Clark respectively, in such proportions and for such interests, and with such substitutions in favour of any one or more of the other or others of the children of the same parent, and either by way of legacy, rent-charge or otherwise, and subject to such directions

and regulations for maintenance, education and advancement, and such contingencies and conditions as they, the said Hannah Clark, Margaret Clark, Elizabeth Clark and Martha Clark respectively, should from time to time by any deed or deeds appoint: and in default of such appointment, or so far as the same, if incomplete, should not extend, upon trust for the child if only one, and if more than one, all and every the children of them, the said Hannah Clark, Margaret Clark, Elizabeth Clark and Martha Clark respectively, to be equally divided between or amongst them if more than one share and share alike, and to the executors or administrators of the same child or children respectively. And in case any one or more of the males of the same children respectively should die under the age of twenty-one years, or any one or more of the females of the same children should die under that age without having been married, then as to the original share or shares of the child or children of each parent respectively so dying, and also as to the share or shares which should from time to time accrue to the child or children of each parent respectively under that limitation, in trust for the other or others of the same children respectively, by their respective parents, and the representatives of such of them as might be dead, having first acquired a vested interest, to be equally divided between or among them, if more than one share and share alike, and to the executors or administrators of the same child or children respectively. But in case the said Hannah Clark, Margaret Clark, Elizabeth Clark and Martha Clark should all happen to die without leaving any child or children lawfully begotten or leaving such, if such children should all happen to die under the age of twenty-one years and without having been married, then upon trust for the said Cornelius Clark and Richard Clark and the children of either of them lawfully begotten who might then be dead, in equal parts and proportions, such children taking *per stirpes* and not *per capita* respectively."

The testator died in 1822.

Hannah Clark attained twenty-one and died in 1861 without having been married.

Margaret Clark intermarried with James Rutherford, and died leaving one son, Cor-

nelius Clark Rutherford, who attained twenty-one.

Elizabeth Clark intermarried with George Henry Wakefield. She was still living, and had three children only, who had all attained twenty-one.

Martha Clark intermarried with William Cook Russell, and died leaving two children, viz., Maria Russell, who had attained twenty-one, and Cornelia Russell, who was an infant.

A question had arisen whether, under the circumstances, there was an intestacy as to Hannah's share, or whether cross-limitations between her sisters were to be implied.

The trustees had paid the fund into Court. A petition for payment out was presented by the testator's next-of-kin, and a cross-petition was presented by the children of Mrs. Wakefield.

Mr. Daniel and *Mr. Faber*, for the next-of-kin, contended that, under the circumstances, there was an intestacy as to Hannah's share: they cited

Turner v. Frederick, 5 Sim. 466; s.c. 2 Law J. Rep. (N.S.) Chanc. 2.

2 Jarman on Wills, 3rd edit. 528.

Mr. Bagshawe, for the administrator of the heiress-at-law.

Mr. Southgate and *Mr. Dickinson*, for the children of E. Wakefield, the petitioners in the second petition, submitted that there was no intestacy, but that cross-remainders must be implied between the survivors. It was clear that the testator intended his sisters and their children to take the whole benefit of these four-sixths of his residuary estate, such implication therefore would not defeat his intention.

They cited

Horsfield v. Ashton, 1 W. Rep. 259.

Scott v. Bargeman, 2 P. Wms. 68.

Skey v. Barnes, 3 Mer. 335.

Mackell v. Winter, 3 Ves. 236.

Beauman v. Stock, 2 Ball. & B. 406.

Davies v. Hopkins, 2 Beav. 276.

Currie v. Gould, 4 Beav. 117; s.c. 10 Law J. Rep. (N.S.) Chanc. 304.

Mr. J. W. Chitty, for Mrs. Wakefield, cited the following cases:

Ashley v. Ashley, 6 Sim. 358; s.c. 3

Law J. Rep. (N.S.) Chanc. 61.

Malcolm v. Martin, 3 Bro. C.C. 50.

Begley v. Cook, 3 Drew. 662.

Atkinson v. Barton, 31 Law J. Rep. (N.S.) Chanc. 410.

[*Wood*, V.C.—That case has been reversed in the House of Lords.]

Vanderplank v. King, 3 Hare, 1; s.c. 12 Law J. Rep. (N.S.) Chanc. 497.

Mr. Wickens, for other respondents.

Mr. Moore, for the trustees.

Mr. Daniel, in reply.

WOOD, V.C.—A question arises upon this petition as to the construction of the will of Richard Clark with reference to a gift of four-sixths of his residuary estate. Up to a certain point the limitations are very clear and distinct. These four-sixths are given in equal fourths to four designated persons for life, with remainder as they shall appoint among their children, and with remainder in default of appointment to the children with a gift over to the others in the event of any of them dying under twenty-one or (if a daughter) dying under twenty-one or unmarried, or to the executors or administrators of any of them acquiring (as the testator calls it) a vested interest. The gift over is this: "But in case the said Hannah Clark, Margaret Clark Elizabeth Clark and Martha Clark shall happen to die without leaving any child or children lawfully begotten, or leaving such, if such children shall all happen to die under the age of twenty-one years, and without having been married, then upon trust for the said Cornelius Clark and Richard Clark, and the children of either of them who may then be dead in equal parts and proportions, such children taking *per stirpes* and not *per capita*."

Now, I need not consider the gift over, because the event has not happened in which that gift takes place. These four persons have not all died without leaving any child. The event that has happened is this: Hannah has died, never having been married, and therefore never having had a child. Margaret has died, leaving one child, who has attained the age of twenty-one years. Elizabeth is still living; she is Mrs. Wakefield; and Martha is dead, having left two children, one an infant and one who has attained twenty-one. The gift over therefore never took effect.

The only question that could be argued before me was this: is there or is there not

to be implied in this state of things a series of cross-limitations between the four original devisees and their children *modo et formá* as their original shares were given. I cannot discover any case which goes quite to the length that is necessary here in order to imply cross-remainders of that description among the children; but it does appear to me that the principle has gone so far that cross-remainders must be implied. It is very singular to observe how gradually this doctrine of cross-remainders has arisen. The first, and no doubt the most legitimate, instance of its application originally occurred in circumstances of this kind where there was a gift to a class as tenants in common and then a gift over in default of children or issue, of that class; but it was held, to be absurd to suppose that the testator's intention was this, that when one of the class was *in esse* and took, of course, the whole fund until another of the class was let in, and another of that class was let in so as to divest a share or moiety (as the case might be) from the party who had so far taken the whole, yet that if the person who took that moiety died never having acquired an interest which would not be liable to be divested by the gift over, the share was to drop through, not for the benefit of the person who took under the gift over, because he could not take until all the issue failed, but simply for the purpose of allowing the heir or next-of-kin to take by way of intestacy, the share having obviously opened only for the benefit of a member of the class; therefore the Courts held, that they were justified in implying cross-remainders, so that other members of the class failing, the original member would be reinstated in the position which he or she first occupied. Lord Eldon comments upon that in *Green v. Stephens* (1), and considers it to be a reasonable application of the doctrine. He thought it a step considerably in advance when, there not being a class but persons designated as we have them here, by name, with definite shares conferred on them by the testator, the same doctrine of implied gift by way of cross-remainders is applied; for as against the heir-at-law (and it was done quite as much in respect of real estate as of personal

estate) and against the next-of-kin it operated, not for the purpose of saving whole the testator's original intention of giving the whole fund to the original class or the one member, if there was only one of that class, but for the purpose of adding to the shares of those who originally had definite proportions assigned to them by the testator.

That principle, however, became afterwards thoroughly established at law. It is very curious to observe how by degrees the doctrine was carried forward: first, there was the doctrine that there could not be implied cross-remainders between more than two—a doctrine so illogical that it could not stand and has now completely passed away. Then there came the doctrine (which I think has also completely passed away) in *Clache's case* (2), in which it was held, that where there are cross-remainders expressed in one part of the limitation, you cannot imply them in another part of it. That is certainly rather a more sensible reason than that you cannot imply cross-remainders between more than two; but that is considered now to be, if not expressly overruled, at all events greatly shaken by the doctrine laid down by Vice Chancellor Wigram in *Vanderplank v. King*.

The Master of the Rolls seems to have relied on the doctrine of *Clache's case* in the case of *Atkinson v. Barton*, and gave that as one of the grounds for a judgment, which was reversed by the Lords Justices, and afterwards supported by the House of Lords; but the learned Lords, in giving their judgment, declined resting their view upon *Clache's case* and the doctrine therein laid down that you cannot imply cross-remainders expressed in one part of the limitation to another part of it.

The doctrine is laid down in the case of *Vanderplank v. King*, and is so clearly expressed there, that I refer to it in preference to any other case, although the same doctrine was expressly laid down by Lord Justice Turner, and recognized in the House of Lords. The Vice Chancellor Wigram, in *Vanderplank v. King*, surveys all the difficulties, and gives the reasons for cross-remainders being implied in that case. He says cross-remainders must be implied, as if the testator had considered he had limited

(1) 17 Ves. 64.

(2) Dyer, 350, b.

the whole of his estate in the manner he has limited the share, and when he has limited the estate for life with remainder to the issue it will go in that case to the tenant for life of that share with remainder to his children in tail, which goes a long way to decide the case before me, where there is a limitation for life with remainder as the original donee shall appoint among the children, with a limitation over to those children, which may or may not vest before twenty-one (I do not think it material to determine that), and then a gift over in the event of their all dying without leaving issue. Lord Justice Turner puts it much in the same way in his observations in *Atkinson v. Barton*, in which he says, "I take the general principle to be that the Court upon examining the will finds that there has been some omission, and therefore it introduces by implication such estates as are necessary to supply the omission, having regard in doing so to the manifest intention of the testator appearing by his will." Then the House of Lords went exactly upon the same doctrine that there was a gap to be found in the limitation, that that gap would have to be supplied, and they thought that the Master of the Rolls had supplied it effectively, and that the Lords Justices had not, but had left a gap by their decision which the decision of the Master of the Rolls had not left. In the case which is now before me there is, no doubt, a considerable gap left, or else the question would not have arisen. The question now is, whether this gap is to be filled up or whether the property in the interval which is not so filled up will go as in case of intestacy? The difficulty that arises here and which makes this case different from other cases is this: there is undoubtedly a limitation to children vested at least at twenty-one; there might be, therefore, one of these legatees or devisees, Martha, for instance, who might have a child who should attain twenty-one in whom the share would become vested, and Martha might die having survived that child; well, there is no doubt that child's share would be completely vested and would not be divested, except in the event of all the children dying without leaving any issue them surviving, and would not pass over to the residuary legatees except that event

occurred; if that event occurred, of course I think it would pass over. Then it was said (and I confess I was struck with the reasoning) that I should be in some decree determining what was to be done from the course of the events, and that that would not be a logical method of construction with reference to the testator's will. I quite agree that you cannot construe a will by the events that have happened afterwards, and cannot vary it in point of construction by circumstances which may afterwards occur. But I am not going to imply anything that will at all defeat any estate that has already been expressly given, but simply to take care that such a course of limitation shall be inserted in the will by implication as will fill up the space that is left unoccupied. That space is filled up in this way: if you carry over the share of any one of the original donees in the event of such donee never having issue to take at all (which is the case of Hannah, whose share I am now considering), to each of the other legatees exactly according to the limitations contained in the will, namely, to the tenant for life, if there be one (there is one in this case, Mrs. Wakefield, with a power of appointment amongst the children, with remainder to children, exactly in the same way as in the original limitation, and so you would have to deal with the one other share that may fall in; whereas if Hannah happened to have a child who attained twenty-one, and who died in her lifetime, that share would not be so distributable, but would remain to the executors and administrators of such child. The will seems to foresee clearly enough that possible case, and the share will go over to those executors and administrators, subject to this, that if all the daughters had happened to die leaving no child surviving, then the devisee in remainder would have taken. The only way in which it struck me that an apparent absurdity might arise was this, that if one daughter died leaving a child, and two daughters died having had children who attained twenty-one and predeceased them, and then the fourth daughter died without ever having a child at all, a share of her share would have to go over, according to the view I am now entertaining, to the executors and administrators of the

children who predeceased their parent ; but that if the four legatees died without leaving any children, the whole interest would be divested and go to the devisee in remainder. It does at first sight seem a singular intention to impute to him, that if all died without leaving a child it was to go over, but if one died leaving children and others died having had children who predeceased them, that the executors and administrators of such children should be able to take. I think that is answered simply by this, that the whole limitation is a very peculiar one indeed ; the original limitation is exactly similar ; the absurdity is quite as great, if absurdity it be : it is a peculiar disposition, that is all one can say about it. The testator gives to each child who shall attain the age of twenty-one, although in the lifetime of the parent, the parent's share, but in the event of all dying without leaving a child, then he does not give the parent's share. I supply by implication exactly the same character of limitation which is limited by the previous gift. That is the whole doctrine of implication with regard to gifts over of this description. You apply to the first takers such a series of limitations of these interests as will make them correspond with the gift over and fill up the whole vacancy. I cannot say that a case of this kind is without difficulty ; but I think the doctrine of cross-remainders being applied is so well settled, that I cannot pause and say that it is not now to take effect.

Therefore, the decree I shall make is this : declare that according to the true construction of the testator's will and in the events which have happened, the part or share of Hannah Clark upon her decease without having had any issue became divisible in equal third parts, and that C. C. Rutherford, the only child of Margaret Clark, afterwards Margaret Rutherford, deceased, is entitled to one of such third parts ; and that E. Wakefield, formerly E. Clark, is entitled to one other such third part for her life, with remainder to her children in the same manner and subject to the same power of appointment as is directed and contained in the will of the said testator in respect of the original one-sixth share of the said E. Wakefield, then Clark, and that the remaining one-third part is divisible in equal shares

between the two children, Martha Russell, formerly Martha Clark, in the manner in the said testator's will mentioned, because there is one of them that is an infant, and that share may have to go over.

Of course the costs of all parties will come out of the estate, and there will be but one order upon the two petitions.

STUART, V.C.
Dec. 11, 12, 13, 15 ;
Feb. 11.
LORDS JUSTICES.
March 16, 17.

PRICE v. LEY.

Vendor and Purchaser — Mistake in Written Agreement—Parol Evidence.

Where a written agreement between a vendor and a purchaser did not express the intention of either of the parties thereto, the Court, upon a bill by the purchaser against the vendor to set aside the agreement, admitted parol evidence to shew that there was a mistake in the agreement as to the subject-matter of the purchase, and accordingly set the agreement aside.

The bill contained allegations to the following effect :

In the summer of 1861 the plaintiff was desirous of purchasing a dwelling-house, called the Hill, situate at Teignmouth, in Devonshire, of which the defendant, James Peard Ley, was lessee under an agreement dated the 13th of April 1860, and made between William Pearce Blake of the one part, and the defendant of the other part, whereby Blake agreed to let, and Ley agreed to take all that messuage or dwelling-house called the Hill, with the appurtenances, for the term of seven years from the 9th of May 1860, at the rent of 100*l.*, with an option on the part of Ley to purchase from Blake, or his heirs, for the sum of 2,000*l.* the freehold and inheritance in fee-simple expectant on the determination of that term.

On the 30th of July 1861 the clerk of Mr. Cotton, an auctioneer, and the agent of Ley gave to the agent of the plaintiff a proof copy of an advertisement which had been prepared and printed for insertion in, and which was a few days afterwards pub-

lished in, a local newspaper. In that advertisement the above house was described as freehold.

By an agreement, dated the 6th of August 1861, and made between the defendant of the one part and the plaintiff of the other part, the defendant agreed to sell and the plaintiff agreed to purchase for the sum of 2,500*l.* the benefit of the agreement of the 13th of April 1860.

Shortly after the agreement of the 6th of August 1861 had been signed the plaintiff sent it to his solicitors, and they upon reading it ascertained that it did not in terms express the intention of the parties as explained to them by the plaintiff, but that it appeared to them to be an agreement for the purchase merely of the defendant's interest under the agreement of the 13th of April 1860 at the price of 2,500*l.*, to be paid to the defendant; and they accordingly wrote to that effect to the plaintiff, and to the defendant's solicitors. The latter replied, that they had not seen the agreement.

On the 24th of August 1861 the defendant's solicitors furnished the plaintiff's solicitors with an abstract of title, and upon investigating it it was found that a freehold title could be made as to three-fourths only of the property, and that as to the remaining one-fourth a leasehold title for the residue of a term of 1,000 years only could be made. The defendant being unable to remedy the defect in the title, the plaintiff, on the 6th of December 1861, gave notice to the defendant that the contract of the 6th of August 1861 was rescinded.

On the 4th of January 1862 the defendant commenced an action against the plaintiff in respect of the agreement of the 6th of August 1861 for the sum of 600*l.*, and he furnished particulars amounting to 556*l.* 9*s.* 6*d.*, of which the sum of 500*l.* was for the "purchase-money for the sale of the benefit of the agreement relating to the Hill, Teignmouth." The remainder of the sum of 556*l.* 9*s.* 6*d.* was made up of 25*l.* for a quarter's rent, and a sum of 15*l.* 6*s.* by Ley paid to a gardener on Price's account, and 16*l.* 3*s.* 6*d.* for plants sold by Ley to Price. The following memorandum was added to the particulars: "And the plaintiff will seek also to recover these sums under the money counts. And take notice

that the purchase-money sought to be recovered under the first count is the sum of 500*l.* only, the sum of 2,500*l.* having been inserted in the agreement by mistake, instead of the said sum of 500*l.*"

The plaintiff appeared in the action and pleaded pleas as for a legal defence, and also an equitable plea. The defendant demurred to some of the pleas and replied to others of them; and on the 10th of June 1862 judgment was given in his favour upon the points of law at issue. The plaintiff then withdrew his equitable plea.

The plaintiff alleged that he entered into the agreement of the 6th of August 1861 only in order to obtain the fee of the before-mentioned lease for 2,500*l.*, and it was never intended, either by him or by the defendant, that the plaintiff should pay 2,500*l.*, or any other sum, for the defendant's equitable right to have a lease from Blake, or that the plaintiff should pay, either to the defendant or Blake, any money at all until a good title had been shewn and a valid conveyance made to him of the fee simple of the premises.

The bill prayed, first, that the agreement of the 6th of August 1861 might be declared null and void, and no longer binding on the plaintiff or the defendant, and that it might be delivered up to be cancelled.

Secondly, if the Court should be of opinion that the agreement of the 6th of August 1861 was not null and void, or ought not to be cancelled, then that it might be reformed in accordance with the true intent and meaning of the parties, and that it might thereby be made an agreement by the defendant to sell, and by the plaintiff to buy, the fee simple in possession of the said house and premises, at the price of 2,500*l.*, on a good title thereto and conveyance thereof being made, and that specific performance might be decreed of the agreement; and, thirdly, for an injunction to restrain the action at law.

The plaintiff had given the defendant judgment in the action at law, to be dealt with as the Court should direct.

It was the common case of the plaintiff and of the defendant that the contract made was not the contract intended. The plaintiff contended that the intention was, that he should pay 500*l.* to the defendant in the event only of Blake making a title to the

fee; and that in that event 2,000*l.* of the sum of 2,500*l.* was to go to Blake, and that if Blake could not make a title to the fee, the plaintiff was not to pay anything to the defendant.

The defendant, on the other hand, contended that the only error in the agreement was as to the amount of the purchase-money, and that it was intended that the plaintiff should, in any event, purchase his interest in the term of seven years, and pay him 500*l.* for such interest, and run the risk of obtaining a title to the fee from Blake, to whom the plaintiff was to pay 2,000*l.* for the same when obtained.

The material parts of the evidence are adverted to by the Vice Chancellor in his judgment.

Mr. Malins and *Mr. T. C. Wright*, for the plaintiff.—A man who has contracted to purchase a freehold cannot be compelled to take either a leasehold estate—*Fordyce v. Ford* (1), *Drewe v. Corp* (2)—or a copyhold estate in place of the freehold—*Ayles v. Cox* (3). Nor, where he has contracted for the entirety of an estate, can he be compelled to take undivided parts of it—*Dalby v. Pullen* (4), *Lord St. Leonards' Vendor and Purchaser*, 14th edit., 316, pl. 10. A party who makes a misrepresentation in order to induce others to act on it will be bound by it, although he make it in ignorance or mistake, if he might have known the truth—*West v. Jones* (5).

Mr. Bacon and *Mr. Southgate*, for the defendant, contended that in the absence of any allegation of fraud, the Court would not admit parol evidence on the part of a plaintiff, either to rescind or to rectify a written contract.

They referred to—

Marquis of Townshend v. Stangroom,
6 Ves. 328.

Woollam v. Hearn, 7 Ibid. 211.

The Attorney General v. Sitwell, 1 You.
& C. 559, 583; s. c. 5 Law J. Rep.
(N.S.) Ex. Eq. 86.

Davies v. Fitton, 2 Dru. & W. 225, 232.

(1) 4 Bro. C.C. 494.

(2) 9 Ves. 368.

(3) 16 Beav. 23.

(4) 3 Sim. 29: affirmed 1 Russ. & M. 296.

(5) 1 Sim. N.S. 205; s. c. 20 Law J. Rep. (N.S.)
Chanc. 362.

*The London and Birmingham Railway
Company v. Winter*, Cr. & Ph. 57.

Martin v. Pycroft, 2 De Gex, M. &
G. 785; s. c. 22 Law J. Rep. (N.S.)
Chanc. 94.

Bartlett v. Salmon, 6 De Gex, M. & G. 33.

STUART, V.C. (Feb. 11.)—In this case the bill prays that the agreement in writing of the 6th of August 1861 may be declared null and void.

The alternative in the prayer, which seeks to have the written agreement reformed, seems wholly unsustainable.

At the date of the agreement, it appears that the defendant had no other title to the house and grounds, which were the subject of it, than an agreement with a Mr. Blake for a lease, which was to contain a covenant by Blake to sell to the defendant, if he should desire it, the fee simple and inheritance for the sum of 2,000*l.* According to the written agreement between the plaintiff and the defendant, it is very clearly expressed that the plaintiff agrees to pay to the defendant the sum of 2,500*l.* for the mere benefit of the defendant's agreement with Blake. But the defendant does not now insist on a right to receive the whole 2,500*l.*, which, according to the clear language of the agreement, ought to be paid to him. He only demands 500*l.* as due to him under the agreement. On the other hand, the plaintiff says that what he agreed to purchase from the defendant, and what the defendant agreed to sell, was the fee simple and inheritance for the price of 2,500*l.* This, therefore, is a case in which both parties seek to depart from the exact terms of the written agreement.

For the defendant, it has been argued that parol evidence is not admissible in a suit to rescind a written agreement in any case except where relief is sought on the ground of fraud. But it is clearly established that where relief is sought on the ground of mistake or surprise, parol evidence is admissible to shew that the written agreement is contrary to the real terms of the contract, and therefore that the written agreement ought to be rescinded. In the case of *Calverley v. Williams* (6), Lord Thurlow held that if it were proved that

(6) 1 Ves. jun. 211.

one party thought he had purchased *bond fide* what the other thought he had not sold, it was a ground to set aside the contract, and Sir Thomas Plumer in the case of *Cloves v. Higginson* (7), speaking of Lord Thurlow's opinion on this point, states also as the view of Sir W. Grant that the consequence of such a mistake would be that in reality there was no agreement, but that the parties misunderstanding each other, the one proposing to buy one thing the other proposing to sell another, a contract so founded in mistake cannot consistently with justice be executed.

In the present case, the mistake is proved as clearly by the evidence of the defendant as by that of the plaintiff. There is set forth in the defendant's affidavit the contents of his own letter to the plaintiff, of the 27th of August 1861, in which he says, "Some time since, my brother wrote to me for the agreement, as he said there was a mistake in the one which your solicitors shewed, which I certainly did not remark until I heard from my brother, when I saw you had agreed to pay me 2,500*l.* for my interest immediately on the signing the agreement instead of 500*l.*, so I sent it up to be altered."

It therefore appears that the defendant himself admitted that there is a mistake in the written agreement.

On the part of the plaintiff, the evidence proves that the written agreement contains a mistake as to the subject-matter of the contract. By a letter of the 3rd of August from the plaintiff to Cotton, the auctioneer, the plaintiff distinctly offered to buy the freehold and inheritance from the defendant for 2,500*l.* The meeting of the 6th of August at which the written contract was signed took place on the acceptance of this offer.

There is no evidence on either side of any treaty or offer by the defendant to sell to the plaintiff for 500*l.* merely the benefit of his agreement with Blake. Throughout the whole negotiation the treaty was for the purchase and sale of the freehold and fee simple. The advertisement by the defendant's agent for the sale of the property described it as freehold.

This, therefore, is a case in which the

mistake in the written contract is proved by irrefragable evidence. By this mistake the contract is vitiated and ought to be set aside.

All the arguments for the defendant, founded on cases where the bill prayed for specific performance, are wholly inapplicable to the question in this cause.

In the case of *Martin v. Pycroft* there was a complete agreement in writing for granting a lease for a term certain, at a certain rent, and with certain covenants. The decision of the Court of appeal proceeded on the ground that an agreement by parol to pay 200*l.* as a premium for such a lease was no ground for refusing specific performance of the written agreement for the lease, where the plaintiff submitted by his bill to pay the 200*l.*

That case introduced no new principle as to the admissibility of parol evidence; and it has no application to the jurisdiction of this Court to set aside an agreement on the ground of mistake or fraud, or surprise. To sanction a right to set aside an agreement on any of these grounds, parol evidence is in most cases essential. But where specific performance is asked, the Court has a discretion, which is not permitted where it is called upon to set aside an instrument on the ground of mistake, fraud or surprise.

As the plaintiff has in this case proved by unquestionable evidence that there is a mistake in essential parts of the written agreement, he is entitled to a decree to have it set aside.

It is necessary that the decree should also deal with the judgment which, under the authority of this Court, was given by the plaintiff in the action at law. It is needless to inquire whether the plaintiff could or could not have sustained his equitable plea in the action at law. As the jurisdiction upon the equitable question was properly transferred to this Court; and the agreement is here set aside, the proper course seems to be to direct that satisfaction be entered on the judgment, and that the defendant pay to the plaintiff his costs of this suit and of the action, so far as the costs at law have not been already disposed of by the Court of law. The first part of the decree must declare that the memorandum of agreement of the 6th of August

1861 is not valid and binding and ought to be set aside, and decree accordingly.

From this decree the defendant appealed. The appeal was heard, by the Lords Justices, on the 16th and 17th of March, on which latter day their Lordships affirmed the decree, giving the plaintiff the costs in the Court below, but declining to give him the costs of the action at law, except so far as any rule or order at law prior to the judgment carried costs; but he was allowed to take the deposit as costs of the appeal.

Mr. Malins and *Mr. T. C. Wright* appeared for the plaintiff, and

Mr. Bacon and *Mr. Lake*, for the defendant.

KINDERSLEY, V.C. } BLACHFORD v.
Feb. 26. } WOOLLEY.

Separate Use—Power of Appointment by Will—Creditors.

Stock was settled to the separate use of a married woman for life and after her decease as she should appoint by will, and in default of appointment for her next-of-kin. The married woman died in her husband's lifetime, having exercised her power, and a suit being instituted in chambers to administer her estate, her separate creditors took out a summons and sought to prove under the decree:—Held, that the married woman did not by exercising her power of appointment constitute the property appointed separate estate.

Vaughan v. Vanderstegen (1) *adhered to.*

This case came on upon an adjourned summons taken out by persons claiming as creditors of Margaret Blachford, a married woman, and coming in under the decree made in the suit which was instituted to administer her estate. Upon the marriage of Margaret Blachford a sum of stock was vested in trustees in trust for her separate use for life, and after her decease to such persons as she should by will appoint in the usual form, and in default of appointment in trust for her next-of-kin. Margaret Blachford made a will in execution of the power, whereby she appointed the

(1) 2 Drew. 165, 363; s. c. 23 Law J. Rep. (N.S.) Chanc. 793.

stock in question to the plaintiff and the defendant upon certain trusts, one of these trusts being in favour of the plaintiff, who filed the present bill to administer her estate. Margaret Blachford died in her husband's lifetime, and a decree being made and a summons taken out by her creditors, the question raised was, whether the stock appointed by Margaret Blachford's will was constituted separate estate, so as to be assets for her debts.

Mr. Jones Bateman appeared in support of the summons, and contended that Mrs. Blachford, by the terms of her settlement, was constituted a *feme sole* of this stock, the principle being that whether it was separate property or whether it was not, where a married woman had power to alienate, independently of her husband, she had power, to some extent, to contract debts during her coverture. Upon equitable principles, a *feme sole* stood on the same footing as any other adult with respect to the general power of contracting debts, and the authorities drew no distinction.

Authorities cited:

Vaughan v. Vanderstegen, 2 Drew. 165, 363; s. c. 23 Law J. Rep. (N.S.) Chanc. 793.

Nail v. Punter, 5 Sim. 555.

Johnson v. Gallagher, 30 Law J. Rep. (N.S.) Chanc. 298.

Hughes v. Wells, 9 Hare, 749.

Heatley v. Thomas, 15 Ves. 596.

Jenney v. Andrews, 6 Madd. 264.

On the question of costs:

Hobday v. Peters, 28 Beav. 354; s. c. 29 Law J. Rep. (N.S.) Chanc. 780.

Mr. Baily and *Mr. Hanson*, for the plaintiffs.

Mr. Piggott, for the trustees.

Mr. W. W. Cooper, for H. W. Clarke, a mortgagee by bond, and a legatee under Mrs. Blachford's will, asked for his costs.

KINDERSLEY, V.C.—Although at law a married woman can have no separate estate, she may in equity, and may be placed in such a situation with regard to property that so far as relates to that and no further she is to be regarded in all respects as a *feme sole*, with the exception that her person cannot be touched, *quoad* property settled to her separate use; but I am quite aware that only in very modern times have

the Courts arrived at that point. Till very lately, at all events, it was considered that in order to make the engagements of a married woman affect her separate estate, there must be something in writing. It was formerly considered that there must be some specialty, as that the writing must be under seal, and Sir John Leach thought that every time a married woman contracted a debt, that was exercising her power; but the effect of that would be that so far so from her debts being paid *pari passu*, they would be paid in priority, which would be absurd. The principle is, that *quoad* that particular property she is a *feme sole*, and can be bound by any bond, covenant or agreement, or by a general engagement contracting a debt or mortgage, and that property settled to the separate use is liable for such debt. Then comes this question, which I have before decided, and which, I think, ought to be adhered to. Particular property as to *corpus* may be given in trust for a married woman, so that she may deal with the *corpus*, assuming the absence of a restriction on anticipation; but it is not so with respect to real estate in fee simple, which cannot be settled to her separate use; all that can be settled to her separate use being a life estate, and if it is attempted by a will to leave real estate in trust for the separate use of a married woman, that legacy or gift will be for life only, and she cannot deal with the *corpus* so as to give it away in her lifetime, under the statute. She cannot do that. It would go to her heir-at-law; under the statute, of course, by deed duly acknowledged, she may, but not her separate estate. If a married woman has a life interest for her separate use in realty or personalty, and in addition to that is armed with a power of appointment by deed or will, or by will only, that power is not separate estate, and does not stand on the same footing; but a Court of law recognizes the power: that is a legal, not an equitable doctrine, the separate use alone being the creation of a Court of equity. Thus there is a particular right, and not an estate recognized by a Court of law, and in equity the right to appoint by deed or will; and she may do so according to the terms of the power. Suppose there is a life interest for her separate use, and

after her death a power of appointment, trusts for children being interposed, and the power given in default of children, a power by will as to personal estate. If she exercises that power, the whole question upon which the right of creditors turns is this: if she exercises the power, does she exercise it so as to make it her separate estate? If so, the creditors could come upon it; if not, they could not. The question is, when she exercises a power of appointment by will, supposing she thereby makes the property her separate estate, does she do it so that the doctrine can be applied as in the case of a male, that if he had a general power of appointment, and if he exercised it, he made that property his assets, so far as to make it liable to pay his debts. If a married woman exercises a power, does she make the appointed property her separate estate, so that her debts bind the property after her death?

I am quite at a loss to understand how, consistent with any principle, such a conclusion can be arrived at. I took that view, after a careful consideration, in the case of *Vaughan v. Vanderstegen*, which appears to me to be precisely the same as this case; and I should be very glad if this important general question were carried to the House of Lords, in order that there might be a final decision on the point; but in the mean time, not finding that the case of *Vaughan v. Vanderstegen* has been overruled, I consider I am bound to adhere to it, especially as it appears to me to be the nearest approach to the principle applicable to such a case. Mr. Clarke must have his costs of this application.

WOOD, V.C. }
June 29, 30. }

TINSLEY v. LACY.

Copyright—Infringement—Dramatizing a Novel.

Certain novels, the copyright in which belonged to T, were dramatized and the dramas, containing some of the most important scenes and incidents of the novels, copied verbatim, were printed and published by L. On an application, by T, for an injunction to restrain the sale of the dramas,—Held, that printing and selling the dramas was an infringement of T's copyright.

If a plaintiff shews that his copyright has been infringed, the Court will grant an injunction without proof of actual damage.

Whittingham v. Wooler (1) explained.

In this case the plaintiff, Edward Tinsley, moved for an injunction to restrain the defendant, Thomas Hailes Lacy, from printing, publishing, or selling any copies of certain dramas under the following circumstances :

The plaintiff was the publisher and registered proprietor of the copyright of two works of fiction, known as 'Lady Audley's Secret' and 'Aurora Floyd,' of which Mary Elizabeth Braddon was the authoress. Both of these works had been very successful, having gone through many editions within a few months of their first publication.

The defendant, who was a bookseller, had published and was selling two books, the title of one of which was 'Lady Audley's Secret: a drama in two acts, adapted from Miss Braddon's popular work of the same title, by William E. Suter, Esq.,' and the title of the other was 'Aurora Floyd: a drama in two acts, adapted from Miss Braddon's popular work of the same title, by W. E. Suter, Esq.' The plaintiff alleged that the books so published and sold by the defendant contained respectively a large number of passages taken *verbatim* or with a merely colourable alteration from the said books, called 'Lady Audley's Secret' and 'Aurora Floyd,' respectively, and that the books so published and sold by the defendant were in fact an extraction of the principal scenes and situations in the books respectively so published by the plaintiff; and the plaintiff charged that the publication of these dramas by the defendant was an infringement of the plaintiff's copyright.

The main characters in the plays were the same as those in the novels. All the most stirring scenes in the novels had been copied word for word in the plays; what was description in the novels appearing *verbatim* as stage-directions in the plays.

The play of 'Lady Audley's Secret' consisted of thirty-eight pages, of which about eleven pages were extracted *verbatim* from the novel. The play of 'Aurora Floyd' consisted of thirty-nine pages, of which

about fourteen pages were extracted *verbatim* from the novel. Evidence was put in shewing that the profits of the sale of the dramas did not exceed a few shillings.

Mr. Rolt and *Mr. Martindale*, for the plaintiff, submitted that the publication of these plays was clearly an infringement of the plaintiff's copyright. It was quite possible that an abridgment of a work might be published without infringing the author's copyright, as in the case of scientific or historical works; but this doctrine was one which the Court would not be disposed to extend, and was inapplicable to a work of fiction the creation of the author's brain—*Dodsley v. Kinnersley* (1). If it were possible to make an abridgment of a work of fiction without infringing the author's rights, these plays in which the most striking incidents in the novels were extracted in the very words of the author, could not be treated as such an abridgment—

D'Almeida v. Boosey, 1 You. & C. 288; s.c. 4 Law J. Rep. (N.S.) Ex. Eq. 21.

Reade v. Lacy, 1 Jo. & H. 524; s.c. 30 Law J. Rep. (N.S.) Chanc. 655.

Reade v. Conquest, 9 Com. B. Rep. N.S. 755; 11 Com. B. Rep. N.S. 479; s.c. 30 Law J. Rep. (N.S.) C.P. 209.

Coleman v. Wathen, 5 Term Rep. 245.

Wilkins v. Aikin, 17 Ves. 422.

Bell v. Walker, 1 Bro. C.C. 451.

Carr v. Hood, 1 Camp. 355 n.

If the right to dramatize a novel existed at all, it depended solely on the custom of trade, and the custom was bad. It was not the quantity of the matter extracted that was material, but the value of it: in the present case, all the vital parts of the novels, the very pith of the stories, had been appropriated—

Bramwell v. Halcomb, 3 Myl. & Cr. 737.

Lewis v. Fullarton, 2 Beav. 6; s.c. 8 Law J. Rep. (N.S.) Chanc. 291.

Murray v. Bogue, 1 Drew. 353; s.c. 22 Law J. Rep. (N.S.) Chanc. 457.

Mr. Giffard and *Mr. Kay*, for the defendant, contended that the right to dramatize any work was clearly established; and the question was whether printing such a drama in the form of stage-books only, to enable the

(1) 2 Swanst. 428.

(1) Amb. 403.

actors to learn their parts, was an infringement of the author's rights. It was absurd to say, that the sale of these dramas would diminish the sale of the novels; the whole profits realized since these plays were first published did not amount to 20*l.*: and the plaintiff must prove substantial damage before he could ask for an injunction—*Whittingham v. Wooller* (2). This was an entirely novel application. The works of Sir W. Scott, and other eminent authors, had been dramatized and the dramas printed, but no steps had ever been taken to prevent the sale of such dramas.

Mr. Rolfe, in reply as to whether the bill could be sustained, no damage to the plaintiff having been proved, contended that as the plaintiff's right to prevent the multiplication of copies depended on the statute, the Court could not inquire into the amount of damage. The case of *Whittingham v. Wooller*, cited for the defendant, was not in point, as it was decided on the special circumstances.

Wood, V.C. (June 30.)—This case is in some respects new, but the principles on which it must be decided are very well established. The intent of the Copyright Act, no doubt, is to secure to authors the full and complete benefit of their labours. They are to have the sole right of multiplying copies of their works. The legislature has not thought it right to prevent any work being dramatized, and has not made any enactment upon the subject, yet it has been thought a grievance by many authors that their works, the benefit of which they thought they had secured, might be taken, and the very language might be used (by what is called dramatizing) upon the stage, without any possibility of the authors interfering to prevent that use being made of what in another shape was secured to them as their property. It has been held, that the right and security in the property is only that which is defined by statute, and that, therefore, any person might, if he pleased, read to any audience, however large, the whole of any work if it was thought desirable, and he would not fall within the provisions of the Copyright Act, which prohibits the multiplying of copies, and,

therefore, no doubt, it would be competent for any person to take the course which some authors have taken with their own works, namely, to read or recite scenes from them to an audience, and no Court would interfere. In the same way a work might be dramatized, and certain portions of the work might be read, and portions might be interwoven into a drama, and again the author could not complain. I suppose, if this lady wished to protect herself in the matter, as the law now stands, all she would have to do would be to take a pair of scissors and cut out certain scenes and publish a little drama of her own, because, if she first published a work like this in the shape of a drama, she would come within the protection of the Dramatic Authors' Copyright Act. It is true that an author might find that the whole of his publication, if it happened to be a small one—a poem or the like, might be read or acted in half-a-dozen rooms in London without the possibility of his interference; but it cannot be said, that because persons had read it, they could dispose of copies of the author's work at the doors. If that is done, the person so distributing it at the doors falls within the scope of the Copyright Act. It would be no answer for him to say, I introduced it to a large audience by reading the poem: I gave it with considerable effect and declamation, and many persons, as probably would be the case, were desirous of having the words put into their hands, as an opera-book is put into the hands of persons who frequent the Opera: he would not be allowed to print that which, under the Copyright Act, the author acquired the sole and exclusive right of printing.

Now what has been done here is similar to that, though not in the extreme form I have put it. What has been done is this: an attractive and interesting work of fiction (as is proved by its going through eight or nine editions), has been published, and Mr. Suter has thought it worth while to extract a large portion of it, in the very language in which the events are narrated. He does not take the work and read it through in the manner I have described; but, professing to make a work of his own, he has taken one quarter at least of his matter bodily out of the plaintiff's publication. That, for the purpose of narration, for the purpose of

(2) 2 Swansd. 428.

NEW SERIES, 32.—CHANC.

dramatizing, or anything else, except printing, he is at liberty to do; but if he chooses to put into print that one quarter, which is bodily taken out of some publication which is protected by copyright, he cannot escape from the consequences of so doing. He reprints in a book which he calls his own (I have the book alone to deal with, I have nothing to do with the drama),—he reprints in that book to the extent of one quarter of the work, the most stirring passages, what Lord Cottenham describes as “the vital parts,” of this novel in the identical language in which the original author composed it. No doubt that is an infringement of the Copyright Act, and he cannot protect himself by saying other people have done so before. Other authors may not have thought it necessary to take steps to prevent their novels being reprinted in this form. But it is to be observed, that the state of the law is altered very much since Sir W. Scott’s works were published. At that time authors themselves had no copyright in dramatic publications; and it is not a thing that I should lose sight of in this case, that this lady, having acquired by her genius for novel-writing a copyright in a work of fiction in which there are stirring events described in stirring language, has a right to the property herself for all purposes whatever; she has a right herself to construct a drama upon it; and although, as she has not done so, I cannot upon the present application bring that in legitimately by saying that the defendant has interfered with any drama of hers, as I thought in the case of *Reade v. Lacy*, yet at the same time it is a portion of her property, and it is a justification for her coming here, and a reason why she should come here, when she is interfered with, although if I may be allowed not ungalantly to say so, authors of more eminence, such as Sir Walter Scott, may not have thought it necessary to take the same course. In *Campbell v. Scott* (3), which is very similar to the present case, this remark was justly made by the plaintiff’s counsel: “If the plaintiff had acquiesced in the defendant’s taking a portion of his poem, he would have lost his right to call on this Court to interfere against other persons infringing his copyright.” That is a point of

(3) 11 Sim. 81; s.c. 11 Law J. Rep. (N.S.) Chanc. 166.

very considerable importance; and if this lady had waited when some persons had printed a quarter of that which is here until some other persons had taken a half or three quarters before she complained, the Court would have said, You have acquiesced in it; persons have taken a quarter or a half of your work and published it as theirs, and you did not object to that, therefore now you cannot interfere in any way. That shews the extreme importance of authors coming at the earliest possible moment to ask the Court to prevent the violation of their property.

It is said that this is a play, and not a novel, and therefore the story being repeated *verbatim* out of the novel is not to be dealt with as if it were any other case of copying. It is one thing to dramatise these novels and act them on the stage, but here even when stage-directions are given, it is curious enough that they are in the words of the novel; that which is narrative in the novel becomes stage-directions in the drama, and with the stage-directions the whole passage becomes identical. The defendant has given all the most stirring incidents which he has picked out in the identical words of the novel. Then I come to the question of quantity. Questions of quantity, as Lord Cottenham said, are always exceedingly difficult to deal with. Here the question is rather quality than quantity: more than one-half of the work is original; I think the defendant has not taken more than one quarter, but they are the choicest passages undoubtedly which he has taken. In *Campbell v. Scott* the case was this: Mr. Moxon, the poet’s publisher, had published all the poet’s works, and the poet’s works consisted, as published by Mr. Moxon, of nearly 7,000 lines. Then what the defendants Scott and Geary did was this, they published a work entitled *Book of the Poets, the Modern Poets of the Nineteenth Century*. The defendant Scott (like the defendant in this case) stated that it had been done before; that it had always been the custom of the trade to publish works of a similar nature, consisting of collections of pieces and extracts from various authors under various well-known titles; amongst others, *Elegant Extracts in Poetry*, selected by Vicesimus Knox, D.D.,—*Poems for Young Ladies*, selected by Dr. Goldsmith; that since the

bill was filed he had made inquiry as to the custom of the trade in cases such as that complained of, and had been assured by one of the oldest and most experienced members of the trade that it had always been considered an admitted right to publish *bona fide* selections from the writings of living authors whose works were copyright, and that it had been constantly practised by various publishers of the greatest respectability. In that case a very much less proportion of the work had been pirated than in the case before me. The defendant would not in 'Aurora Floyd' have selected those passages from the plaintiff's work unless he thought they were the parts which were most attractive and striking.

There can be no doubt, on comparing these novels with the dramas, that the stirring parts have been extracted from the novels and printed, and the defendant is using the property of this lady to improve his own property, that is what the case results in. As long as he does it for the purpose of dramatizing the law does not interfere, but the moment he chooses to put it into print, he brings himself within the law, and the lady became entitled to protection. I cannot say that the cases relating to abridgment, although they go quite far enough, have any bearing on this case; because in the case of abridgment, the author tells you he is abridging another author, and you are aware of that fact. I cannot acquiesce in some of the reasons given by the Judges upon this subject: it is said that he is a public benefactor who lets the public have at a cheap rate what the author sells dear. I think that is contrary to the principles of the Copyright Act; but a better reason given by other Judges is this: that he who assists in diffusing an outline of that knowledge which the author gives in full is so far to be considered as a sort of assistant to the author. I very much doubt the soundness of that reasoning, in fact, although it may be sound enough in logic; but the defendant, without attempting to assist this lady, by abridging her work, publishes it in his own way: he is the author of the plays; he calls himself the author of 'Aurora Floyd' and the author of 'Lady Audley's Secret.' I need hardly pause to point out the enormous distinction which exists in the case which has been suggested of Shaks-

peare writing a selection from the 'Tales of Beccaccio,' and other authors, for he—

— "gave to airy nothings
A local habitation and a name,"—

whereas the defendant's process seems only to inform the public of all the best pieces contained in this lady's work, which she would rather communicate to the public through the medium of her own publication; and she has an undoubted right so to do.

The only doubt I entertained in this case was caused by the decision in the case of *Whittingham v. Wooler*, which is a singular case; it reads as if the Court had dismissed the bill because no damage was proved, but it does not appear to be so, when the whole case is considered. The Court was impressed with the persistency of the plaintiff in going on when he had got everything that he could reasonably want. The Court thought that the case was so trifling that he should have been satisfied without asking the further interference of the Court, and therefore, being somewhat disposed to look unfavourably on the plaintiff's case, the Court came to the conclusion that it was a fair abridgment. The Court dismissed the bill because it was a fair abridgment; but it is impossible not to see that other ingredients probably weighed with the Court in arriving at that conclusion. If this be an infringement of the Copyright Act, it does not appear to me that I ought to send it to a jury to consider whether any damage has been incurred. I am now bound by the statute to deal with the question myself. Formerly these cases were sent to be tried at law, because this Court could not grant an injunction without the assistance of a Court of law. It appears to me that an infringement has taken place; and that as to damage, the view taken by Shadwell, V.C. in *Campbell v. Scott* is correct, that when once the Court has found that there is "*injuria*," the plaintiff ought to be allowed to judge of the "*damnum*:" who can tell to what extent she may be prejudiced by the best portions of her work being printed and sold without her consent? It would be very difficult for any jury to arrive at an exact conclusion upon that subject.

I think, therefore, the right course will be to grant an injunction in the terms of the first and second paragraphs of the prayer

of the bill. I do not proceed at all upon the ground of its being unlawful for the defendant to take incidents—what I proceed upon is this: that he has bodily taken the words. In the case of *Mawman v. Tegg* (4), Lord Eldon, remarked that a person who copies part of a work, however small, with an "*animus furandi*," takes the work of another; and the defendant, in concocting his play in this manner, cannot pretend to deny that he does it with such an intent. It is well enough for the defendant to say that he had no intention to sell, but only wanted to dramatize. Why did he not do it as Shakespeare did, and clothe the tale in his own language, instead of taking the author's words, and suggesting that they were his own? I can only say that in doing so he is using another person's property, and I shall grant an injunction to restrain him from so doing.

ROMILLY, M.R. }	CROSSKILL v. BOWER.
Jan. 26;	BOWER v. TURNER.
Feb. 11.	

Bankers—Trustees—Mercantile Account—Mortgage—Compound Interest.

In 1847 the customer of a bank gave a mortgage to the bankers to secure, with interest at 5l. per cent., money due and to become due to them upon a running account, on which it had been usual to make annual rests, and charge compound interest on the balances. In 1855 the customer assigned his property to trustees for the benefit of creditors:—Held, that the bankers had no right to make rests after the relation of banker and customer had ceased, and that the mortgage was a security only for the balance due at the date of the assignment, with simple interest from that time at 5l. per cent. per annum.

By an assignment for benefit of creditors, full powers of borrowing money at interest from bankers and others were conferred upon the trustees of the deed. Two of the trustees carried on business as bankers in partnership with other persons, and the third was a clerk in the bank. An account was opened by the trustees with the bank, and

advances were made upon this account, in respect of which the banking firm claimed to make annual rests and to charge interest on the balances according to their usual practice as bankers:—Held, that having regard to the fiduciary position of the trustee partners, only simple interest could be allowed.

William Crosskill, the plaintiff in the first suit, previous to 1847, carried on at Beverley, in the county of York, the business of an iron-founder; and from the year 1852 to the year 1855 he carried on separately the business of a miller, at a corn-mill and premises which belonged to him.

Robert Bower and James Hall, in 1847, carried on business as bankers, at Beverley, with Henry William Hutton and Edward Thomas Hutton. The Messrs. Hutton both died shortly afterwards, and subsequently other partners were admitted, and in 1855, the banking firm consisted of Robert Bower, James Hall, Harold Barkworth and James Smith. James Smith retired from the partnership at the end of the year 1861, and John Hall and Robert Hartley Bower became partners as from the 1st of January 1862, and the banking business was thenceforward continued by Robert Bower, James Hall, Harold Barkworth, John Hall and Robert Hartley Bower.

In 1847 Mr. Crosskill kept two accounts with the bank: one was his own account as an iron-founder, then called "Crosskill's Account," and another an account of the firm of Malama, Crosskill & Co., (in which Mr. Crosskill was a partner, who carried on business at Hamburg). Both these accounts were overdrawn, and on the 15th of December 1847 Mr. Crosskill executed a mortgage of certain gas-works, the mill, and the iron-foundry at Beverley, to secure to the bank such sum or sums of money as then were or thereafter should be due from W. Crosskill on his separate account, and in the next place for such sum or sums as then were or thereafter should be due from Messrs. Malama, Crosskill & Co. on their co-partnership account, with interest for the same after the rate of 5l. per cent. per annum. This last account was subsequently satisfied. By the death of the Messrs. Hutton and under arrangements made when James Smith and Harold Barkworth joined

the banking firm, the only partners interested in the monies secured by this mortgage were Robert Bower and James Hall.

From 1852 to 1855 Mr. Crosskill kept two distinct accounts with the bank: the old account, which was opened in 1828, in respect of the foundry business, which, instead of "Crosskill's," was called "The General Account," and a new account, opened in 1852, which related to the business of a miller, was called "The Mill Account." Both these accounts were overdrawn on the 24th of January 1855, and upon each there was a large balance due, which the bank had for some time pressed him to reduce. Time however was asked for payment, on the often-repeated ground that Mr. Crosskill's property principally consisted of stock-in-trade, real property, patent rights, and of his share and interest in a company or partnership called the Hamburg Gas Company, none of which could be immediately realized, except at a great sacrifice. The balances however increased.

On the 24th of January 1855 Mr. Crosskill, on request, attended the banking firm at their half-yearly meeting. Two deeds were then placed before him, which he on the evening of that day executed.

The first of these deeds was dated the 23rd of January 1855, by which Mr. Crosskill conveyed certain freehold property, with the appurtenances and machinery, and all other his real estates (subject to certain mortgages), and also a leasehold field, unto Robert Bower, James Hall and Thomas Ellery Turner absolutely, upon trust to sell or mortgage the same, and after paying the incumbrances on the premises, to pay the surplus to Mr. Crosskill.

The second deed was dated the 24th of January 1855; it was made between Mr. Crosskill of the first part, R. Bower, J. Hall and T. E. Turner of the second part, and the scheduled creditors of Mr. Crosskill of the third part. It recited the intention that all Mr. Crosskill's real and personal estate should be conveyed and assigned to and vested in the trustees on the trusts afterwards declared. It recited the previous conveyance, the right of Mr. Crosskill to certain letters patent which, together with all the rest of Mr. Crosskill's property, were assigned by this indenture to the parties of the second part. The

indenture then declared that the trustees, the parties thereto of the second part, should stand possessed of the property, upon trust to pay the expenses and the debts; and after payment and satisfaction of the same, then upon trust that the said trustees or trustee for the time being should apply all the money which should be received under or by virtue of the trusts thereinbefore declared in payment of all the debts and sums of money owing by the plaintiff to such of the creditors as should have executed the indenture, or signified their consent thereto within six calendar months from the day of the date thereof, rateably, and then to pay the residue, if any, to the plaintiff. And it was declared that the trustees might in their or his uncontrolled discretion continue to carry on for any length of time, either in their own names or in the name of the said plaintiff, or in the name or names of any other person or persons, so far as they lawfully might, as they should think best, all or any of the businesses or trades which he, the plaintiff, had theretofore carried on, either at Beverley or elsewhere, and might lay out any trust monies in erecting on part of the lands thereby granted any buildings or workshops for more conveniently carrying on any of the businesses or trades then exercised or carried on by him, and might buy any goods on credit or for ready money, and might give cheques and drafts. And it was further provided, that the trustees "might from time to time pay all expenses incident to carrying on such trades and businesses out of the trust-monies and premises, or from time to time borrow at interest, and with or without any security, from any bankers or other persons, any sums of money which the said trustees or trustee might think proper for the purpose of carrying on the said businesses, or paying creditors in part or in full, or for any of the purposes of the trusts or powers therein contained, and without the said trustees or trustee being in any manner liable or accountable for or by reason of any pecuniary or other loss or injury which might happen to the plaintiff or any of his creditors thereby." It was also provided that it should be lawful for the trustees to make arrangements and to enter into covenants and make payments for the purpose of

managing the business and giving security, and that all these things should effectually bind the plaintiff as much as if they were given by him.

Thomas Ellery Turner was the cashier of the banking firm.

Both businesses were carried on under the trust deed until the year 1860, when the corn-mill was burnt down, and, in consequence, the business of a miller was discontinued; but the business of a founder and agricultural implement-maker was still continued. No accounts seem to have been required by Crosskill until June 1860, after which a long correspondence ensued between the solicitors of Crosskill and the solicitor of the trustees, and various accounts were from time to time furnished by the latter of their dealings and transactions under the trust deeds. Ultimately it appeared by an account rendered in October 1861 that the trustees had kept their account with the banking firm, and had borrowed money of them for the purposes of the trust, and that the banking firm had charged the trust estate with interest at 5*l.* per cent. per annum, with annual rests. It also appeared that Bower and Hall claimed to make rests and charge compound interest on the amount due under the mortgage deed of 1847. These charges for compound interest were contested by Crosskill, and, after some discussion, the first bill was filed against the trustees and other members of the banking firm to have the business wound up, and the second by Bower and Hall against Crosskill to foreclose the equity of redemption.

The Solicitor General (Sir R. Palmer) and *Mr. J. H. Humphreys*, for William Crosskill, referred to—

Boddam v. Ryley, 1 Bro. C.C. 239.

Ferguson v. Fyffe, 8 Cl. & F. 139.

Bentley v. Crowen, 18 Beav. 75.

Broughton v. Broughton, 5 De Gex, M. & G. 160, 164; a. c. 25 Law J. Rep. (N.S.) Chanc. 250.

Mr. Selwyn and Mr. Bury, for Robert Bower, James Hall and Thomas Ellery Turner, cited—

Rufford v. Bishop, 5 Russ. 346; a. c. 7 Law J. Rep. Chanc. 108.

Lord Clancarty v. Latouche, 1 Ball & B. 420.

Mr. Baggallay and Mr. Fry, for Harold Barkworth, John Hall and Robert Hartley Bower.

The Solicitor General, in reply.

THE MASTER OF THE ROLLS.—Although these two causes were heard together, they are distinct causes, and they are not properly and originally cross-causes. The only questions which are in dispute are the same in both causes, and the observations which I have to make will dispose of both. The first cause calls on the defendants Bower and Hall to account for the performance of the duty undertaken by them under a creditors' deed executed by the plaintiff, Mr. Crosskill, in 1855, and it prays a redemption of the mortgage granted by him to the defendants on the 15th of December 1847. The second cause is by the same defendants, as plaintiffs, to foreclose that mortgage so given to them on the 15th of December 1847. There is no dispute about the validity of the deeds. It is clear that in both cases an account must be taken, and in both cases a decree made. The account, however, is not precisely the same in both suits. In the second suit it is simply an account of what is due on the mortgage; and the first suit, besides this account, requires an account of the dealings of the defendants as trustees under the creditors' deed of 1855.

Two questions, both relating to the amount of interest to be charged, arose: one is confined to the amount due on the mortgage, the other relates to the management of the business conducted under the deed of 1855. The first question is, whether, in calculating the interest due on the amount, the defendants Messrs. Bower and Hall are entitled to charge interest at 5*l.* per cent. with annual rests; and, secondly, whether under the creditors' deed of the 24th of January 1855 they are to be allowed interest at 5*l.* per cent. with annual rests on the balances due to them.

[*The Master of the Rolls here stated the material facts to the same effect in substance as already given in the body of the report.*]

The first question I have to determine is the propriety of allowing compound interest on the principal secured by the mortgage. In considering this point it is necessary to see, whether it is concluded by the contract by

any parties themselves, or the dealings between the parties themselves—whether the latter amount to an implied agreement or acquiescence on their part; and for this purpose it becomes necessary, in the first place, to examine the mortgage-deed of the 15th of December 1847 in conjunction with the course of dealing between the parties throughout. This deed conveys certain property of the plaintiff to Bower and Hall, the bankers of Beverley, to hold the same, and then the expression is—"and to hold all such part of the said premises as consisted of personal estate, or was of the nature thereof, unto the said Robert Bower, Henry William Hutton, James Hall, and Edward Thomas Hutton, their executors, administrators and assigns: as to the whole of such hereditaments and premises and real and personal estate by way of mortgage, and for securing the payment to the said parties thereto of the second part, and the survivors and survivor of them, his executors, administrators, their or his partner or partners, or other the person or persons for the time being constituting the firm of the said banking-house, or their or his assigns, of all monies then due or thenceforth to become due to them, in the first place, for such sum or sums as then were or thereafter should be so due from the said William Crosskill on his separate account; and, in the next place, for such sum or sums as then were or thereafter should be so due from the said firm of Malams, Crosskill & Co. on their said co-partnership account, with interest for the same after the rate of 5*l*. for every 100*l*. by the year." I think it necessary to state that, although the Huttons' names are mentioned and there are other partners in the firm, yet Bower and Hall are the only persons concerned in this matter—that is admitted on both sides. It is, therefore, unnecessary to refer to that again. It was the custom of Bower and Hall to keep their accounts with their customers with interest at 5*l*. per cent., making annual rests, and the accounts of the plaintiff with them had been so kept and consented to by him. As long, therefore, as he carried on business this was the proper mode of keeping the accounts, and all this was continued up to the execution of the deed of 24th of January 1855, but upon the execution of that deed he

ceased to carry on the business. He ceased to pay any monies in or to draw any monies out of the bank, and his account ceased to be carried on as an ordinary mercantile bank account, and at that time the final balance due to the bank was ascertained. I am of opinion that after that period of time only simple interest at 5*l*. per cent. per annum could be claimed under this mortgage deed, and that Messrs. Bower and Hall are not entitled to take the account, making the annual rests, and charging interest on the balances so augmented thereby year by year. Unless the interest was given by the words of the mortgage-deed, and in the absence of some other agreement for that purpose, I am of opinion that only simple interest can be charged. I look at it in the same light as if a customer keeping an account with his banker died. If no fresh account had been opened by his executors, all that the banker could claim against his estate would be the balance due at his death. It would be a mere simple contract debt not carrying interest at all. The arrangement between the customer and the bank terminates at his death, and in the absence of any contract varying it, all interest would cease at that period. It would be exactly the same if the balance were in his favour, and the bankers had died or had ceased to carry on business, or had become bankrupt. The balance would have to be ascertained at that period, and the interest would cease, but this consequence follows in other events as well as on that of death. A customer may say to his bankers, I close my account with you. I shall now have no fresh dealings with you; thereupon the balance of the account, whichever way it was, would have to be ascertained at that period, and then all interest would cease. It depends on the pleasure of the bankers to enforce payment of the balance due to them at that time, or to abstain from doing so, or to obtain such security for their balance as they may be able. If this last course were adopted the new contract would regulate the matter of interest. In this case the mortgage deed is exactly such a contract. It is a continuing security for a fluctuating balance. It regulates the amount of interest when the balance is ascertained, and it provides that such balance shall bear

interest at 5*l.* per cent. per annum; but it contains no direction as to compound interest or annual rests, and involves no reference to any custom of bankers. It is the contract between the parties which regulates how the debt is to be secured. As long as the account was kept as an open current account it secured a floating balance, regulated by the custom of bankers and the dealings between the bank and the particular customer; but as soon as the account was closed as a current mercantile account then the balance ceased to be the previous fluctuating balance, and upon that ascertained balance the deed only gives 5*l.* per cent. per annum. The account remained open for the purpose of liquidation, but not for the purpose of receiving or paying anything. After the 24th of January 1855, as I understand the evidence, Messrs. Bower and Hall would not have honoured any cheque drawn by the plaintiff, and to have enabled him to draw, a fresh and distinct account must have been opened between him and the bank. It is argued, on behalf of the defendant, that a banker's account is not closed until it is paid, and this undoubtedly was true in one sense of the term, but its character is essentially altered. When a merchant, who keeps an account current with his banker, dies, it ceases to be a common mercantile account current, and becomes a simple contract debt due from his estate, on which, in the absence of any binding contract, no interest would be charged. It is true that in many cases a question of some nicety in point of fact might arise as to whether the account was closed or not in the sense in which I have used this term, and which this Court might have to determine on evidence; but in the present case no difficulty arises on this point, for it is the common case, that in the sense in which I have explained the term the account was closed at the execution of the deed of the 24th of January 1855, after which time it is regulated by the mortgage-deed which gives simple and not compound interest at 5*l.* per cent. per annum. In this light the deed of January 1855 has no application. It has a distinct and important application to the question of interest to be allowed for monies raised by the trustees; but it contains nothing that can affect the question as to whether on the balance

secured by the mortgage deed interest is to be calculated at compound interest, or by simple interest. This, which I consider to be the principle regulating accounts of this character, is very distinctly laid down by the authorities on the subject. *Ferguson v. Fyffe* is the only case of those cited which it will be necessary to refer to. In that case the House of Lords held, that an account between a customer and his banker was closed for the purpose of compound interest at the death of the customer. It is true in that case the customer had become of unsound mind in 1793, when the balance was in his favour; but as the bank had rendered an account up to his death in 1810, charging themselves with compound interest up to that time, and admitting a certain balance upon that principle to be due from them, they were bound by that account, which they did not contest, and therefore nothing turned on the rate of interest during that period. But from 1810, the banker was held to be liable for simple interest only, and it was distinctly laid down in that case that no title to compound interest could exist without a contract or custom; and also they held, (and this was not applicable in that case, which, being in India, was one to which the Usury Laws then in force did not apply,) that a valid custom for compound interest could not exist except in mercantile accounts current for mutual transactions; and even if the account were confined to this country, it is to be observed the repeal of the Usury Laws does not make a custom valid which was invalid before, and no custom is attempted to be proved in this case for charging compound interest when the account ceases to be a current account for mutual transactions between them. That custom, therefore, cannot be set up in this case, and as for contract there is none. It is said this case is inconsistent with other decided cases, and I was referred to *Rufford v. Bishop* and *Lord Clancarty v. Latouche*. If this was so, I should be compelled to follow the decision of the House of Lords; but, in truth, those cases are not inconsistent. *Rufford v. Bishop* only decided that in a case between customer and banker the account is to be kept with annual rests, and the mortgage having been given for the fluctuating balance which might be due

between the banker and his customer, that in that case it was perfectly legal that the final balance when ascertained should be charged on the lands. All that this case determines in favour of Messrs. Bower and Hall is, that the mortgage given on the 15th of December 1847 is a good mortgage for the balance due from the plaintiff on the 24th of January 1855, although that balance consisted partly of principal and partly of interest, the interest calculated with annual rests, which is admitted on both sides to be correct; but the point I am now considering, whether, after that final balance had been ascertained, the interest would still go on, and be calculated at compound interest, did not arise in that case, was not contended for, and as far as the words of the judgment go, would seem to be negatived by the words used by Sir John Leach.

In *Lord Clancarty v. Latouche* the point I am now considering does not seem to be argued, and as far as may be gathered from the Lord Chancellor's judgment, he treated the matter solely as an account between Mr. Conolly, who had died in 1803, and the defendants, the bankers. The decree in the cause was made five years after his decease, and the Masters' report, allowing compound interest on the balance due at his death, had been disallowed by the Lord Chancellor. After this the Master made a fresh report, finding a large balance due to the estate of Mr. Conolly. The case came on again before the Court on exceptions to this report, and a petition to the Lord Chancellor to rehear his former order, and on this latter occasion the Lord Chancellor varied his former order, and directed the accounts to be taken with annual rests, on the assumption that Mr. Conolly must be taken to have agreed at the end of each year that the interest should be treated as capital. It does certainly seem as if the Court had made no distinction in the mode of taking the accounts before and after Mr. Conolly's death; but judging from four lines which are to be found in *1 Ball & Beatty*, p. 429, it does appear that the executors of Mr. Conolly had carried on the account with the bankers on the same principle as a mutual account current, and that also it was for their interest that the account should be continued to be carried on

on the same principle as they had made advances, by which the principal had been reduced. You will also find a few lines at the end of the judgment, page 430, which confirms the view I have stated. On the first point, therefore, the manner in which the amount of the mortgage debt is to be calculated, I am of opinion that in the making of this decree for foreclosure or redemption, the debt consisting of principal, interest and costs is to be ascertained by calculating simple interest at 5*l.* per cent. per annum on the balance due on the 24th of January 1855.

The second point on which the question of whether interest is to be allowed with yearly rests arises in this way: the trustees, in order to carry on and manage the businesses which were entrusted to them by the deed of the 24th of January 1855, had large powers of borrowing money from bankers, and if they had when occasion required it opened an account with other bankers and obtained an advance on the usual bankers' terms of calculating interest at 5*l.* per cent. with annual rests, it would have been difficult to have held that they were not entitled to charge this against the plaintiffs; but the difficulty here arises from the circumstance that they were themselves both trustees and bankers, and in their character of trustees they have borrowed money from themselves in their character of bankers, and that they have in their character of bankers charged themselves in their character of trustees with interest at 5*l.* per cent. on the annual balance to the debit of themselves as trustees in the books of the bank, such annual balance being composed of principal and interest. The question is, whether, having undertaken the office of trustee, it was open to them to adopt this course? It is agreed that, in fact, the plaintiff's estate had the benefit of this course of proceeding, and if the money had been obtained from any other banker it would have been either on less advantageous terms, or fettered with securities, impediments and difficulties which would have been very injurious to the trade. I think the rule of the Court is imperative, that in the absence of any contract for that purpose, no person can, by acting as trustee, derive any pecuniary benefit to himself. The cases are very

numerous, and the principle is clearly laid down in them, and is one of universal application. It is well expounded in the case of *Broughton v. Broughton*, where, after stating the rule fully and as applicable to all the cases, the Lord Chancellor observes, "The result therefore is, that no person in whom fiduciary duties are vested, shall make a profit of them by employing himself." In this case Messrs. Bower and Hall, the trustees, have sought to make a profit of their fiduciary duties, by employing themselves as bankers and by advancing in that character money to be repaid with compound interest. In the absence of a contract for that purpose, either express or implied, I am of opinion that they are not entitled to do so.

I have then to examine whether there exists any contract, express or implied, enabling them to do so. The only express contract between the plaintiff and the defendants is the deed of the 24th of January 1855. This clause does not in my opinion justify the trustees in lending to themselves. I cannot look at this case in any different point of view than I should do if the trustees had been private gentlemen instead of being bankers. The same duties attach to them, and the same obligations. The power to borrow from any banker does not mean that they could themselves as bankers advance the money. It may be, for aught the Court can now ascertain, that from other bankers they might have obtained an advance at simple interest, or that they might have obtained a loan from persons not bankers at all, who might have advanced funds at 5l. per cent. on such security as the estate of Mr. Crosskill in their hands could have afforded. Whether this be so or not cannot now be ascertained, for the trustees have not made the attempt, but they have considered themselves justified in advancing the money. This very impossibility of ascertaining whether it was or was not necessary to do so indicates the reason of the rule. In order to entitle them to do so, the deed ought expressly to have authorized them as bankers to advance such monies as they might think fit in the ordinary manner of an advance of bankers to customers, but the deed contains no such power. The consequence is that there is no express agreement authorizing the trustees

to advance money at compound interest to carry on the concerns intrusted to them.

I then have to consider whether there be any implied agreement to this effect. The only agreement that could be implied in the circumstances of this case, and indeed the only implied agreement that is alleged by the defendant is, the knowledge of the plaintiff that the accounts were so kept, and his acquiescence in their being so kept. If this fact had been established, I should have adopted the conclusion come to in *Lord Clancarty v. Latouche*, and I should have held that Mr. Crosskill was bound by seeing the accounts so kept, and making no objection on the subject; but in examining the evidence on this point, it appears that Mr. Crosskill deposes positively to his total ignorance that the accounts were so kept until the accounts were furnished on the 7th of October 1861, and that he thereupon immediately objected to them. On the other hand, the evidence on the part of the defendant wholly fails in establishing any knowledge on the part of the plaintiff that the accounts were so kept, and as the burden of proof lies on the defendants to establish this fact, I should, even in the absence of any express denial on the part of the plaintiff, be unable to come to the conclusion that he had so acquiesced. With respect therefore to this second point, as to the mode of calculating interest, I am compelled to hold that by law the trustees are not entitled to claim more than simple interest at 5l. per cent. on the sums advanced by them, and that no agreement express or implied exists which entitled them to do otherwise. The decree, therefore, will be to take an account of what is due for principal, interest, and costs on the mortgage of the 15th of December 1847, the principal being the balance due to the plaintiffs in the cause of *Bower v. Turner* on the 24th of January 1855, together with simple interest thereon at 5l. per cent. per annum, and the costs of that suit. And also take an account of the receipts and payments of the defendants in the suit of *Crosskill v. Bower* in the execution of the trusts of the indenture of the 24th of January 1855, making all just allowances. But in taking such accounts the defendants Messrs. Bower and Hall are only to be allowed simple interest at 5l. per cent. per annum on all advances made by

them from the time when such advances were respectively made. The plaintiff in *Crosskill v. Bower* is entitled to the costs of the suit, so far as those costs have been increased by reason of the defendants claiming compound interest; but such costs are to be set off against what may be found to be due to the defendants Messrs. Bower and Hall. I am afraid I cannot make the usual decree for redemption or foreclosure on payment of what may be found due to Messrs. Bower and Hall in consequence of the complication of the two accounts, but I think that there should be a sale, looking at the nature of the property.

LOARDS JUSTICES. }

Dec. 18. }

GLOVER v. DAUBNEY.

Re-hearing—New Evidence.

Although the Court may in special cases permit new evidence to be given upon an appeal (e. g. where the evidence sought to be introduced is documentary and cannot have been tampered with), it will not allow fresh affidavits made by persons who have given evidence at the original hearing to be read on a re-hearing.

In this case the defendant Daubney moved for leave to make use of certain affidavits (sworn and filed since the hearing of the case at the Rolls) on the occasion of the re-hearing by way of appeal from the decision of the Master of the Rolls. The suit was instituted by the plaintiff to set aside a contract entered into by the defendant Mr. Daubney with a Mr. Brown, one of the defendants, for the sale to him, Brown, of leasehold property, on which the defendant Daubney held a mortgage, or for redemption. At the hearing, the Master of the Rolls dismissed the bill as against Brown, but made a decree with costs against Daubney, who alone appealed. It appeared that the decision at the Rolls was founded upon certain affidavits of a witness named Dent, who now wished to correct his evidence and repair the injustice done to the defendant Daubney by the effect of his former testimony.

Mr. Baggallay and Mr. Elderton, for the motion, contended that the Court had

authority to make the order asked, without the defendant being put to the cost and trouble of a bill of review, citing *Williams v. Goodchild* (1), the case being analogous to the practice at common law on granting a new trial on the discovery of new evidence—*Thurtell v. Beaumont* (2), the evidence being plainly material to the issue in the cause. The defendant, if the motion were granted, was willing to submit to any terms as to the plaintiff being also at liberty to examine witnesses, or to adduce new evidence in answer to the defendant's new evidence.

Mr. Selwyn and Mr. W. J. Bovill argued that a bill of review must be filed if the defendant wanted new evidence to be admitted, citing *Daniell's Chancery Practice*, 2nd edit. p. 1353.

Mr. Baggallay was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—The only question which, in my mind, remained to be determined at the conclusion of the opening was, whether the motion should be at once refused, or should be reserved to the hearing. The further argument has convinced me that it ought to be now refused, and of course with costs.

LORD JUSTICE TURNER.—I will not say that there are no cases in which evidence, not produced in the Court from which a case is appealed, may not be given on the re-hearing, but they must be cases of a very special character. The case cited for the defendant in support of the present case, namely, that of *Williams v. Goodchild*, was one in which the evidence sought to be introduced was documentary, which could not have been tampered with, and therefore a case in which that course might be allowed. The present, however, is not such a case. If we were to grant the present application, I can see no case in which it will be necessary to file a bill of review for the purpose of introducing new evidence, and all the restrictions and safeguards which surround that course will thus be evaded. In the present case the witness whose deposition is sought to be introduced was a witness in the cause already, and it would be most mischievous to allow a party, when

(1) 2 Russ. 91.

(2) 1 Bing. 339; a.c. 2 Law J. Rep. C.P. 4; 8 Moore, 612.

by a decree against him he discovers the weak points in his case, to adduce new evidence for the purpose of bolstering up the weak points. I agree that the motion ought to be refused with costs.

ROMILLY, M.R. }
Feb. 27; } HALL v. BARROWS.
March 16. }

Trade Mark—Distinction between Local and Personal Trade Marks.

A firm consisting of three partners for many years used the letters B B H (being the initials of the three partners' names) with a device as a brand for the goods manufactured by them, and on one partner dying, the use of the brand was continued by the survivors. In 1858, one of the two survivors died under circumstances which, in the opinion of the Court, entitled the executor of the survivor to have the business sold as a going concern:—Held, that the right to use the brand did not form part of the saleable assets of the business.

Distinction in this respect between a trade mark indicating the locality where goods are made, and a trade mark indicating the firm by which they are made. If the trade mark had been of the former kind, it would have been saleable.

A surviving partner has a right to use the name, and pari ratione the personal trade mark, of the old firm—(per Master of the Rolls).

Blanchard v. Hill (1) doubted.

The plaintiffs were the executors of Joseph Hall, late of Edgbaston, in the county of Warwick, deceased, ironmaster, and they filed this bill to ascertain the share of the testator in certain iron works which he carried on with the defendant William Barrows. The bill asked for an account, and that the partnership business and goodwill, with the stock and property thereof, might be sold and divided.

Joseph Hall, the testator, had, for some time previous to 1836, been carrying on iron works at Bloomfield and elsewhere, in the parish of Tipton, in the county of Staf-

ford, in partnership with several persons, and ultimately with William Barrows and Richard Bradley, under the style of "Bradley, Barrows & Hall." On the retirement of Mr. Bradley, in 1844, a new partnership was formed between J. Hall, W. Barrows, the defendant, and John Joseph Bramah, under the style of "Bramah, Barrows & Hall," for fourteen years from the 7th of May 1845, determinable by death.

This was continued until the death of Mr. Bramah in September 1846.

The business of both firms was most extensive, and the iron manufactured and sold by them was branded with the letters B B H and a crown, and it had obtained not only a character and reputation, but a preference, in the market.

By a deed, dated the 7th of May 1844, the Bloomfield Iron Works were conveyed to such uses as the three partners should appoint, and in default to the use of them, as tenants in common in fee, but they were to be considered as personal estate; and it was declared that, after the decease of any or either of them, the survivors or survivor should either sell the property or purchase the share of the partner dying, at such price as might be agreed upon, and that the receipt of the survivors should be a good discharge for the purchase-money.

On the death of Mr. Bramah, his share in the works was, by a deed, dated the 16th of November 1846, conveyed to Messrs. Barrows & Hall, as tenants in common in fee, and it was declared to be personal estate; and it was provided, as before, that upon the decease of either, the survivor should sell the lands or purchase the share of the deceased partner.

Messrs. Barrows & Hall continued the business under articles of partnership dated the 3rd of May 1847, which recited that they were jointly interested in the business of iron-manufacturers, and in the machinery and implements of the same. It was agreed that they should continue partners for the residue of the term of fourteen years, determinable as thereafter mentioned under the style of "Barrows & Hall," and that the iron works, with the houses, land, mines and premises adjoining and belonging to the co-partners, including the machinery and apparatus attached thereto, and the stock-in-trade, implements, tools and other

property belonging to the business, with the money therein embarked, and all debts due to the joint trade, should be taken as the then present capital of the partnership, and belong to the parties in equal shares; and the iron works and hereditaments (which were of freehold tenure) should be held as personal estate. And that upon the settlement of the yearly accounts the clear gains and profits should be equally divided between the said parties. And that if either of the parties should die before the expiration of the co-partnership, it should be lawful for him by will or other instrument to nominate a son or sons to succeed him. And that in default of such nomination, his executors or administrators should be entitled to his share in the capital and increase of the co-partnership, and in that case the surviving partner should have the option of taking to himself all the stock belonging thereto, on paying to the executors or administrators of the party so dying the amount or value of the share of such deceased partner, or otherwise the co-partnership should stand and be finally dissolved. And that at the expiration of the partnership trade and dealings the said partners should take an account in writing of all the stock, property and effects remaining in the joint trade, or due or belonging to the parties on account of it, and of all debts and demands owing by them, and settle and adjust a full and final account of all transactions relating to the trade, and thereupon a final division should be made of all the partnership assets amongst the parties, according to their shares and proportions therein.

Messrs. Barrows & Hall carried on business until the partnership expired on the 7th of May 1858, and it was continued without any new articles till the death of Mr. Hall, on the 18th of January 1862.

Throughout the whole of this time they marked all the iron manufactured and sold by them with the B B H and a crown, and the plaintiffs now alleged that it was an important item in the assets of the partnership of Barrows & Hall.

Mr. Barrows continued to carry on the business after the decease of Mr. Hall, and also to use the trade mark; and the plaintiffs now said that they were unable to agree on the value of the share of Mr. Hall in the business, among other grounds, because the

defendant alleged, that the goodwill of the business and the exclusive right to use the trade mark or brand ought not to be taken into account in estimating the value of the partnership property.

The business had been carried on at two smaller works, called "Tipton Green" and "Factory Works," which were held by the partners, as yearly tenants; these the defendant claimed a right to retain upon accounting for the partnership property and effects; he also considered that the goodwill of the business had survived to him, and that he was entitled to the exclusive use of the trade mark, and he objected to the works being sold as a going concern. The plaintiffs, however, insisted that the goodwill and trade mark ought to be taken into account in estimating the value of the testator's share, and that they ought to be sold, together with all the premises, as a going concern.

Mr. Selwyn and Mr. Eddis, for the plaintiffs—

Mellersh v. Keen, 27 Beav. 236; 28 Ibid. 453, 455.

Cook v. Collingridge, Jacob, 607; s. c. 27 Beav. 456.

Bradbury v. Dickens, 27 Beav. 53; s. c. 28 Law J. Rep. (N.S.) Chanc. 667.

Smith v. Everett, 27 Beav. 446; s. c. 29 Law J. Rep. (N.S.) Chanc. 236.

Wade v. Jenkins, 2 Giff. 509; s. c. 30 Law J. Rep. (N.S.) Chanc. 633.

Churton v. Douglas, Johns. 174; s. c. 28 Law J. Rep. (N.S.) Chanc. 841.

Mr. Hobhouse and Mr. Fischer, for William Barrows.—

Davies v. Hodgson, 25 Beav. 177; s. c. 27 Law J. Rep. (N.S.) Chanc. 449.

Robertson v. Quiddington, 28 Beav. 529.

Lewis v. Langdon, 7 Sim. 421.

The Collins Company v. Brown, 3 Kay & J. 423.

Motley v. Downman, 3 Myl. & Cr. 1; s. c. 6 Law J. Rep. (N.S.) Chanc. 308.

Hammond v. Douglas, 5 Ves. 539.

Southern v. How, Pop. 143.

Blanchard v. Hill, 2 Atk. 484.

Croft v. Day, 7 Beav. 840.

Webster v. Webster, 3 Swanst. 490.

Tudor on Mercantile Law, 482.

Mr. Selwyn, in reply.

The MASTER OF THE ROLLS.—I must direct a sale of the ironworks, the goodwill and business, as a going concern. The goodwill is attached to the particular spot; it is the right of carrying on the business there; it is altogether independent of the trade mark, and it must be included in the sale. I must also order the accounts to be taken, but without disturbing any settled accounts. The defendant also must undertake not to discontinue the works without notice to the plaintiffs, so as to give them time to apply for the appointment of a manager; the defendant also must be at liberty to bid at the sale. I shall reserve the question of trade mark for consideration.

The MASTER OF THE ROLLS (March 16).—This is a partnership which is dissolved by the death of one of the partners. The suit is instituted for the purpose of realizing the assets and taking the accounts of the partnership. They carried on business as iron-founders at Tipton, in Staffordshire. They were interested in the works and in the land on which they stood in equal moieties, as tenants in common in fee simple, and the profits and losses were also equally divided. Both sides admit that the works must be sold in the most advantageous manner for both parties, and there is little difficulty with the exception of the manner in which the trade mark of the firm is to be dealt with.

I have already expressed my opinion, that the works should be sold as a going concern, that appearing to be most advantageous for both parties; and if necessary to accomplish that object, that a manager would be appointed by the Court; but any direction on this subject I understood to be unnecessary, because, in fact, the business has been since, and is now, carried on by the surviving partner. I also disposed of all the other matters that arose, with the exception of the trade mark.

The question is, first, whether the use of this mark is a matter which can properly be sold with the works? and, secondly, if it can, whether the exclusive use of it can be sold, that is, whether the surviving partner can be restrained from making use of it? After considering the case with reference to the principle and authorities which

affect the subject of trade marks, I am of opinion that, in the present case, both of the questions must be answered in the negative, and that the defendant must prevail.

To explain the reasons for this conclusion, it is necessary to consider the subject of trade marks generally. These trade marks are commonly of one or other of two descriptions: either they denote the spot where certain articles are manufactured, or they denote the persons by whom they are manufactured. The property which a manufacturer acquires in a trade mark by the adoption of the use of it is of a very peculiar nature. The case of *Blanchard v. Hill* was cited for the purpose of establishing that there was no property of any kind in the use of a trade mark, or, at least, none that equity will notice. Lord Hardwicke says this: "The motion is to restrain the defendant from making cards with the same mark, which the plaintiff has appropriated to himself" (namely, the Mogul stamp on the cards), "and, in this respect, there is no foundation for this Court to grant such an injunction. Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it. The Attorney General has mentioned a case where an action at law was brought by a cloth-worker, against another of the same trade, for using the same mark, and a judgment was given that the action would lie—*Popham*, 151. But it was not the single act of making use of the mark that was sufficient to maintain the action, but doing it with a fraudulent design to put off bad cloths by this means, or to draw away customers from the other clothier; and there is no difference between a tradesman's putting the same sign and making use of the same mark with another of the same trade." I doubt very much, notwithstanding the high authority of Lord Hardwicke's name, whether this case would be followed at this day to the extent to which it is there carried, and on the grounds on which it is there rested. His Lordship seems to state that, in no case would this Court grant an injunction to restrain one trader from using the mark of another; but at the present day the books are full of

cases where injunctions have been granted to restrain such a use. It was established as early as *Popham's Reports*, that an action at law would lie for the piracy of a trade mark, but Lord Hardwicke seems to say that this is owing to the use being made with a fraudulent design of putting off bad cloth on the public by this means, or to draw away customers from the other clothier. But these reasons, if valid, would be as applicable to equity as to law, and in *Webster v. Webster* an injunction was applied for to restrain the surviving partner from using the name of the deceased partner; and when it was suggested by Mr. Mitford that, if the use of the deceased partner's name did not subject his estate to the debts of the firm, it must be a fraud on the public. Lord Loughborough refused the injunction, and stated, fraud on the public is no ground for a plaintiff coming into this Court; that is, as I understand it, by a person who has no interest in the subject-matter by which the fraud is committed. And this is in accordance with the constant principle prevailing both at law and in equity, which is, that although they will discountenance, and do nothing to assist, any false representation, still they do not deal with the general interest of the public at the suit of persons having no property in the subject-matter, and for these reasons, the suit must be at the suit of the Attorney General. As to the second ground put forward by Lord Hardwicke, namely, the benefit to be fraudulently derived by the person who takes another's mark, it is obvious that the motive of the person who pirates the mark must be the same both in contemplation of law and equity, and it appears that the same principle must govern both cases.

It must, therefore, be conceded that some property exists in the use of a trade mark, which at present is sufficient to support an action and to maintain an injunction. It is true that this property, like property in a goodwill, is of a very evanescent character; still, frequently, it is one of great value. It is clear from a variety of decided cases, that a manufacturer who has originally stamped his goods with a particular brand, has a property in his mark at law, and can sustain an action for damages for the use of it by another. It is also clear that Courts of equity will restrain the use of it by

another person. It has sometimes been supposed that a manufacturer can only acquire such a property in a trade mark as will enable him to maintain an injunction against the piracy of it by others, by means of a long-continued use of it, or, at least, such a use of it as is sufficient to give it a reputation in the market where such goods are sold. But I entertain great doubt as to the correctness of this view of the case. The interference of a Court of equity cannot depend on the length of time the manufacturer has used it. If the brand or mark be an old one, formerly used, but since discontinued, the former proprietor of the mark undoubtedly cannot retain such a property in it, or prevent others from using it; but, provided it has been originally adopted by a manufacturer, and continuously, and still used by him to denote his own goods when brought into the market and offered for sale, then I apprehend, although the mark may not have been adopted a week, and may not have acquired any reputation in the market, his neighbours cannot use that mark. Were it otherwise, and were the question to depend entirely on the time the mark had been used, or the reputation of it had been acquired, a very difficult, if not an insoluble inquiry, would have to be opened in every case, namely, whether the mark had acquired in the market a distinctive character denoting the goods of the person who first used it. The adoption of it by another is proof that he considers that at that time it is likely to become beneficial; and if the manufacturer who first used it were not protected from the earliest moment, it is obvious that malicious and pertinacious rivals might prevent him from ever acquiring any distinctive mark or brand to denote his goods in the market by adopting his mark, however varied, immediately after its adoption or change by the original user of it. This evil would not be obviated by putting his name in full, for if the name of the manufacturer was a common one, it would be difficult for him to point out to the public what goods were or were not manufactured by him.

These observations apply to brands and marks generally; but it is essential to point out the distinction that exists between the two different sorts of marks already noticed, namely, the marks which denote the place where the goods are manufactured, and

nothing more; and those which, on the other hand, denote the person who manufactures them, and nothing more. In *Molloy v. Downman*, the mark was the letters "M.C." branded on tin plates made at certain works at Carmarthen. The letters had been adopted and used for a long series of years at those works although carried on by different persons who succeeded each other. One of the lessees of these works, who had used the brand while he occupied the works, was held not to be entitled to restrain his successors from using the same brand. Lord Cottenham seems to have considered the letters "M.C." denoted tin plates made at the works in question, and not those made by the plaintiff at any other place. Assuming this to be so, then I apprehend the mark or brand which denotes goods manufactured at a particular place may be, and probably would be sold with the works themselves, and the mark would be, as it were, attached to the spot, to denote which it was first adopted, and which might possess peculiar local advantages for the manufacture of the article. If, in this case, the mark had denoted the Bloomfield Iron Works at Tipton, and nothing else, then it might properly have been the subject of sale with the works, and the exclusive use of the mark would have been given to the purchaser so long as he carried on the same business at these works. But that is not so here, the mark or brand in the present case belongs to that class of marks which denotes the persons who manufacture the goods. Such marks it is obvious have no distinctive object of locality. It is personal and not local. I remember a firm in Sheffield of the name of Rodgers had great celebrity for cutlery, and that their name was stamped in a particular manner with a peculiar device on knives manufactured by them. This mark would have followed them everywhere, and any one attempting to adopt it would have been restrained from doing so by this Court. But, as a person *bonâ fide* possessing the same name would have been entitled to use the name of Rodgers, though not with the same device, many manufacturers have adopted a device to distinguish their goods instead of putting their name on the article.

In the present case, I am of opinion the letters B B H, surmounted with a crown, designated the firm which manufactured

the particular goods. Such a device is not the subject of a sale. It would obviously be a fraud on the public if the Court of Chancery were to attempt to sell to another person the right of holding out to the public that the goods manufactured by him were, in fact, goods manufactured by another and distinct firm. The case of *Webster v. Webster* established the right of the continuing partner to retain the original name of the firm, and this is correct where there is no break in the continuity, although every one of the original partners may have been long since dead. For instance, in London, no one doubts the legality of one set of bankers calling themselves Child & Co., and another set of bankers calling themselves Coutts & Co., although it may have been many years since a person of the name of Child was a partner in the one, or a person of the name of Coutts was a partner in the other. The name, in such cases, denotes the original firm continued without interruption by successive additions of partners down to the present time.

The defendant, therefore, is fully entitled to use the letters B B H with a surmounted crown, and this Court, consistently with its principles and decided cases, could not interfere with that right. But, on the other hand, it cannot give to any new firm the right of making use of that mark which, as it denotes a particular firm of manufacturers, is not of an alienable character, whatever may be the value of it.

Upon these grounds, my opinion is, that in the sale of these works, it is not competent to give the purchaser the right to use these letters with the symbol of a surmounted crown, or without it; but that the exclusive right of using them survives to the defendant. All the goodwill that may attach to the spot where the works are carried on, will be sold, and the purchaser will have the benefit of the species of habit which will induce customers to deal with the persons who carry on business at the spot. But the right of using such a device as to induce the public to believe that the works there carried on are under the management of the former proprietors or their surviving partners, will not be given to the purchaser; and to whatever extent this may prejudice the sale of the works, it is inevitable, and must be submitted to.

ROMILLY, M.R. }
Feb. 11, 23. } TYRWHITT v. TYRWHITT.

Merger of Charge—Presumption.

*T. J. and J. A. L. were trustees of a sum of 9,200*l.* as to the whole fund upon trust for J. M. for life, and after his decease as to 5,000*l.* upon trust for H. E. C. M. and as to 4,200*l.* upon trust for T. J. the trustee. The fund was advanced to T. J. who gave a mortgage for the amount on property belonging to him in fee; and by the mortgage deed trusts were declared of the mortgage money for J. M. for life, and after his decease as to the 4,200*l.* for T. J., his executors, administrators and assigns. J. M. died, leaving T. J. surviving, who died, seised of the property and absolutely entitled to the 4,200*l.*, without expressing any intention either that the charge should or should not merge:—Held, that the declaration of trust for T. J., his executors, administrators and assigns, was to be regarded merely as the statement of the trust then affecting the fund, and not as affording any indication of an intention to keep the charge on foot, and that T. J. the owner of the estate, having subsequently become absolutely entitled to the charge, the charge must be treated as having merged.*

The following is a brief outline of the leading facts of this case, which will be found more fully stated, in some respects, in the judgment of the Master of the Rolls.

Under a settlement, dated 1820, Sir Tyrwhitt Jones and John Arthur Lloyd were, in 1827, trustees of a sum of 9,200*l.* which, in the events that had happened, was held by them upon trust for John Mytton for life, and after his decease, as to 5,000*l.*, upon certain trusts for Harriet Emma Charlotte Mytton, and as to 4,200*l.* upon trust for Sir Tyrwhitt Jones himself. The whole 9,200*l.* was, in 1827, advanced to Sir Tyrwhitt Jones, who, by indentures dated the 1st and 2nd of August 1827, made between Sir Tyrwhitt Jones of the first part, John Mytton of the second part, and Sir T. Jones and J. A. Lloyd of the third part, gave a mortgage for the amount upon estates of which he was owner in fee simple; and he and his

co-trustee, by the mortgage deed, declared the trusts of the 9,200*l.* for John Mytton for life, and after his death, as to the 4,200*l.* upon trust for Sir Tyrwhitt Jones, his executors, administrators and assigns. Upon John Mytton's death, in 1834, the charge became absolutely vested in Sir Tyrwhitt Jones, who had previously become lunatic, and who died, in 1839, without any indication of intention, except as afforded by the deed of 1827, either to merge the charge or to keep it on foot.

Sir Tyrwhitt Jones, by his will, made previously to the mortgage of 1827, bequeathed all his personal estate to his wife, the plaintiff, absolutely, and devised his real estates to the plaintiff for life, with remainder to the testator's son Henry Thomas for life, with remainder to his first son in tail male, with remainders over.

The bill was filed by the widow (who together with the testator's son Henry Thomas had resumed the original family surname of Tyrwhitt) against the son Sir Henry Thomas Tyrwhitt, and his eldest son Henry Tyrwhitt Tyrwhitt, and the surviving trustee John Arthur Lloyd, praying a declaration by the Court that the 4,200*l.* ought to be raised and paid, or else a declaration that it was no longer a charge and ought not to be raised.

Mr. Kenyon and Mr. Rodwell, for the plaintiff, Dame Eliza Walwyn Tyrwhitt, the widow of Sir Tyrwhitt Jones.—The 4,200*l.* is an existing charge upon the estate of Sir T. Jones. His declaration of trust was evidence of intention to keep the charge on foot at that time; and the defendants were bound to prove some change of intention at or subsequent to the death of John Mytton, which in this case could not be done in consequence of the lunacy of Sir T. Jones.—

Wigzell v. Wigzell, 2 Sim. & S. 364; s. c. 4 Law J. Rep. (N.S.) Chanc. 84.

Swinfen v. Swinfen, 29 Beav. 199.

Gunter v. Gunter, 23 Beav. 571.

Forbes v. Moffatt, 18 Ves. 384, 390.

Grice v. Shaw, 10 Hare, 76.

Mr. Tudor, for John Arthur Lloyd, the trustee.

Mr. Selwyn and Mr. Karlake, for Sir H. T. Tyrwhitt and H. T. Tyrwhitt, devisees in remainder of the real estate.—The charge

must merge in the beneficial interest of the estate, in the absence of some expressed or implied intention to keep it on foot. The declaration of trust in the mortgage deed afforded no evidence of intention against merger, it being antecedent to the actual union of the property and the charge. The trust declared by the deed was satisfied on the death of the surviving tenant for life, and nothing less than an express subsequent declaration of trust could prevent the charge from merging.—

Astley v. Milles, 1 Sim. 298.

Pitt v. Pitt, 22 Beav. 294.

Hood v. Phillips, 3 Beav. 513.

Swabey v. Swabey, 15 Sim. 106.

Tyler v. Lake, 4 Sim. 351.

THE MASTER OF THE ROLLS.—The question in this case is, whether a charge of 4,200*l.* merged in the estate of Sir Tyrwhitt Jones on the death of Mr. Mytton, who was entitled to a life interest in that sum. There was a charge of 40,000*l.* affecting the estates of Sir Tyrwhitt Jones, created by a deed of the 19th of December 1814, of which Harriet Emma Jones, one of the daughters, was entitled to one-fourth, namely, 10,000*l.* On her marriage with Mr. Mytton, a settlement was executed, dated the 20th of May 1818, by which 800*l.*, part of it, was paid to Mr. Mytton for his benefit; the remainder was settled upon trust to pay the income to Mrs. Mytton for life, with remainder to Mr. Mytton for life, and after the decease of the survivor, “if there should be issue of the said John Mytton by the said Harriet Emma Jones, an eldest or only son who should become entitled under the limitations of the said indenture of release of equal date therewith, and only one other child, then as to the sum of 5,000*l.*, part of the said monies and premises, after the decease of the survivor of them, the said Harriet Emma Jones and John Mytton, upon trust that they, the said John Arthur Lloyd and Sir Tyrwhitt Jones, their executors, administrators and assigns, should transfer the said sum of 5,000*l.*, and the stocks, funds and securities on which the same should be invested (and which said sums are thereby directed to be set apart from the residue of the trust monies therein mentioned), to or among such child or children, or the issue of any

of the same child or children, who should depart this life in the lifetime of the said Harriet Emma Jones and John Mytton, or the survivor of them, leaving issue then living, in manner therein mentioned, that is to say, the same to become and be vested in such child or children or other issue respectively, or any one or more exclusively of the others or other of them, to be paid to him, her or them respectively at such age or respective ages, in such manner and, if more than one, in such proportions as the said Harriet Emma Jones, notwithstanding her coverture, should by deed in manner therein mentioned, or by her last will and testament, to be signed and published by her in the presence of and attested by two or more witnesses, direct and appoint; and in default thereof then to and between such child or children in manner following, that is to say, if there should be but one such child the said sum of 5,000*l.* to vest in such child, being a son, at his age of twenty-one years, or being a daughter, at her age of twenty-one years or on her marriage.” And as to the residue of the 9,200*l.*, and if the previous limitations did not take effect, then as to the whole, upon trust, in case Mrs. Mytton died in the lifetime of her husband, as she should appoint; and in default of appointment, for her next-of-kin.

Mrs. Mytton made a will which was dated the 23rd of June 1820, and she appointed the 4,200*l.* to her brother, Sir Tyrwhitt Jones, subject to the life interest of her husband; and she also in fact appointed the whole of the 9,200*l.*, in case the previous conditions as to the 5,000*l.* did not take effect. She died in the following month, leaving an only daughter Harriet Emma Charlotte Mytton her surviving, and upon this will and the trusts of the indenture made on her marriage, some doubt arose whether the daughter was entitled to the 5,000*l.* so settled, because no eldest son had been born. Sir Tyrwhitt Jones, however, resolved not to raise that question, but to confirm the claim of his niece; and in August 1827, the 9,200*l.* remaining due on Mrs. Mytton's share was raised and paid to the trustees of her settlement, who were Mr. Lloyd and Sir Tyrwhitt Jones, and after it had been paid to them it was lent to Sir

Tyrwhitt Jones on a mortgage of a certain estate of his in the parish of Hatcham, in Shropshire, and the trusts of the money were expressed in these terms: "It is witnessed that for the considerations herein mentioned, the said John Arthur Lloyd, at the request of the said Sir Tyrwhitt Jones, and also the said Sir Tyrwhitt Jones and each of them, do hereby agree and declare that they, the said John Arthur Lloyd and Sir Tyrwhitt Jones, their executors, administrators and assigns, will stand possessed of the said sum of 9,200*l.* and the interest, dividends and proceeds thereof respectively, subject to the life interest therein of the said John Mytton, upon and for the trusts, intents and purposes following; that is to say, as to the sum of 5,000*l.*, part of the said sum of 9,200*l.*, and the dividends and produce thereof upon and for such, or the like trusts, intents and purposes, and subject to such or the like powers for maintenance and otherwise, in such manner for the benefit of the said Harriet Emma Charlotte Mytton, her executors, administrators and assigns, as under the said indenture of settlement the trustees for the time being would have held the said sum of 5,000*l.*, and the interest and proceeds thereof for her and their benefit, in case there had been issue of the said marriage an only son entitled as therein mentioned, and also her the said Harriet Emma Charlotte Mytton and no other child; and as to the sum of 4,200*l.*, the residue of the said sum of 9,200*l.* hereby secured after deducting therefrom the said sum of 5,000*l.*, immediately from and after the decease of the said John Mytton, and as to the whole of the same sum of 9,200*l.* in case the said Harriet Emma Charlotte Mytton should die under the age of twenty-one years and without having been married, and the interest, dividends and proceeds thereof respectively, in trust for the said Sir Tyrwhitt Jones, his executors, administrators and assigns, for his and their absolute benefit."

The question is, whether, on the death of Mr. Mytton, the tenant for life of this fund, the 4,200*l.* merged into the inheritance—into the fee simple of the estate at Hatcham which was vested in Sir Tyrwhitt Jones in fee, or whether this reservation of the trust of it to him, his executors, admin-

istrators and assigns, kept it severed from the freehold, and made it part of his personal estate?

Mr. Mytton died on the 29th of March 1834. Sir Tyrwhitt Jones survived him about five years and a half; but as he had, in consequence of an accident, been incapable of managing himself and his affairs as early as 1830, no expression of intention of his, relative to this matter, is to be found on the death of Mr. Mytton, or indeed at any other time, except what is to be gathered from the trusts of the mortgage-deed.

Now I take the rule to be this: *prima facie*, the charge merges in the inheritance; but this presumption may be rebutted, if it can be shewn that the intention of the owner of the charge was that it should not merge. Three tests are usually applied for the purpose of ascertaining whether the owner of the charge intended that it should merge in the inheritance at the time he became entitled to the absolute interest of the charge: first, any actual expression of that intention; secondly, where the form and character of the acts done are only consistent with the keeping the charge on foot; and thirdly, that such an intention may be presumed when, although there is a total silence in all other respects, it appears it is for the interest of the owner of the charge that it should not merge in the inheritance. This last point does not assist the case of the plaintiff on the present occasion, for Sir Tyrwhitt Jones was owner in fee simple of the land on which the 4,200*l.* is charged, and in such cases it is the presumption of law, which is also in accordance with the ordinary custom, that it is for the interest of the owner of the estate that the charge should not be kept on foot.

If, therefore, the presumption of merger is to be rebutted in the present case, it must be by reason of the intention of Sir Tyrwhitt Jones expressed or to be implied from the form of the transaction. Except from the contents of the deed of August 1827, and the declaration therein contained, no such intention can be gathered from any words or acts of Sir Tyrwhitt Jones. The question, therefore, is confined to the fair inferences to be drawn from that deed. After carefully considering this case, I am

of opinion that there is no sufficient evidence of such intention on the part of Sir Tyrwhitt Jones to be gathered from that deed. In the first place, the declaration that the 4,200*l.* shall, immediately after the death of Mr. Mytton, *be in trust for Sir Tyrwhitt Jones, his executors, administrators and assigns, for his and their absolute benefit*, is merely the statement of the trust which already affected the fund, and cannot therefore, I think, be properly taken to be an expression of his intention that the fund should not merge at a future period. The observation pressed upon me, that if Sir Tyrwhitt Jones had intended that the charge should merge, he would have so expressed it in the deed, does not meet with my assent. It might well happen that Sir Tyrwhitt Jones might have pre-deceased Mr. Mytton, in which case the charge must necessarily have been kept on foot, and the expression of such an intention that the 4,200*l.* should merge could only have been properly applied to the case of Sir Tyrwhitt Jones surviving Mr. Mytton, and not to his dying before him; in which case, in the event of intestacy, the land would necessarily have gone to the heir, and the charge to his legal personal representative and next-of-kin; and without adopting or expressing any opinion as to whether the previously-expressed intention of Sir Tyrwhitt Jones would be sufficient to create a present merger, this I apprehend to be clear, that no previous expression of such intention would have any effect, unless Sir Tyrwhitt Jones lived to the time when such two interests became united. In any other event, the only way in which Sir Tyrwhitt Jones could operate upon the fund would be by dealing directly with it, either by deed or will. Of course, if Sir Tyrwhitt Jones had thought fit specifically to dispose of this property by will in favour of his heir, or any other relation, he might have done so, and then the disposition would have taken effect, and this question would never have arisen—it would have taken effect even if he had pre-deceased Mr. Mytton. I also entertain very considerable doubt whether any expression of intention of Sir Tyrwhitt Jones previously to the time when the properties united could fairly settle this matter. It is clear he could

alter his intention at any time up to the time of merger; but what principally influences my judgment is, that I do not think any such expression of intention is fairly to be found in the deed, that the charge should not merge, but was to remain on foot. This expression of intention ought to be the expression of the owner of the charge, but there is not any such expression here; it is no more the expression of Sir Tyrwhitt Jones than it is of Mr. Lloyd. It is true that it is stated here, that this was at the request of Sir Tyrwhitt Jones, but that, in my opinion, applies only to the 5,000*l.* which was given to Miss Mytton. They are both trustees, and they both in their character of trustees declare the trusts of the fund. Except as trustees, they declare nothing. In order to have satisfied the contention of the plaintiff, assuming the declaration of intention by anticipation to be the period when the charge falls in (as to which I mean to express no opinion), there ought to have been an expression of intention of Sir Tyrwhitt Jones alone, in his character of *cestui que trust*, and not jointly with Mr. Lloyd in his character of trustee.

I have looked carefully through all the cases on the subject, and I find none that govern this case. In almost all the cases the property is conveyed to a third person in order to prevent its merging, so that it is kept on foot; the charge is conveyed to a third person in trust for the benefit of the owner of the estate, his executors, administrators and assigns; and in this case, no doubt, if Sir Tyrwhitt Jones, upon the death of Mr. Mytton, had thought fit to direct this charge to be transferred to a third person in trust for himself, his executors, administrators and assigns, it would have kept it on foot; but nothing of that sort happened, or could have happened, by reason of what has occurred.

My opinion therefore is, that when Mr. Mytton died this charge merged in the inheritance, and I must make a declaration to that effect.

WOOD, V.C. }
June 3, 5. } WALSHAM v. STANTON.

Multifariousness—Demurrer—Parties—Fraud.

In the year 1771, G. assigned fifty-five shares in a Scotch public company called Carron Company to his bankers as security for a debt and further advances. In 1813 the bankers sold fifteen of such shares to J, and in 1817 the then personal representative of G. sold the remaining forty shares to H. J. continued manager of the company up to his death in 1815; and the fifteen shares bought by him were subsequently sold by his representatives. H. died in 1851, and the forty shares were still standing in his name. In 1862, a bill was filed by the personal representative of G. then recently constituted in England, against the personal representatives of J. and H, alleging that J. and H. who managed the business of Carron Company, had fraudulently misrepresented the state of the affairs of the company, whereby they had been enabled to purchase the fifteen and the forty shares respectively at an undervalue, and praying re-transfer of the forty shares, and that the estates of J. and H. might jointly and severally answer the difference between the purchase-money and value of the fifteen shares:—Held, on demurrer, that the bill was multifarious.

Although a person who is accessory to a fraud from which he has himself derived no pecuniary benefit may be made a party for purposes of discovery and to make him answerable for costs; he cannot be made liable for damages in equity, and after his death a bill cannot be maintained against his representatives.

This was a demurrer.

The plaintiff was the legal personal representative of Francis Garbett, one of the original shareholders of Carron Company. The demurring defendant was the personal representative of Joseph Stainton.

The bill, after stating that Carron Company were a corporation incorporated in 1773 by Royal Charter, under the Union Seal of Scotland, set forth various stipulations of a deed of the 6th of May 1771 regulating the affairs of the company, from

which it appeared that the capital stock of the company consisted of 150,000*l.* divided into 600 shares of 250*l.* each; that those partners only who held ten shares and upwards were entitled to vote, and that every person holding shares in the company who might wish to sell was to offer his shares, at the price at which he might desire to sell, to the company in the first place, and to the voting partners in the second place.

The bill then alleged, that in March 1771, F. Garbett, who was then the holder of fifty-five shares in Carron Company assigned his shares to Messrs. Glyn & Halifax, to secure a debt and further advances.

That F. Garbett died in January 1800; and that in 1806 one Charles Selkrig, without notice to any person interested in F. Garbett's estate, procured himself to be deemed executor creditor to the extent of forty of the fifty-five shares.

That one Joseph Stainton was manager of Carron Company from 1786 to 1825, and that from 1808 to 1851 Henry Stainton was the resident agent of the company in London.

That in April 1813 thirty of such shares were offered for sale by Glyn & Halifax, and on the 29th of June 1813, the same were agreed to be purchased by J. Stainton, at the rate of 133*l.* per share, but fifteen only of such shares were transferred to J. Stainton in January 1815.

That on the 29th of September 1817, the remaining forty shares were offered for sale by the said Charles Selkrig, and purchased by H. Stainton.

The bill then after stating the death of J. Stainton and shewing that the defendant W. Horn was his personal representative, and the death of H. Stainton, and shewing that certain other defendants were his personal representatives alleged that the plaintiff in 1860 ascertained for the first time that the sales of the fifteen shares and forty shares were fraudulent and void.

The bill also alleged that from the time J. Stainton was appointed manager of the company, he had introduced his relations and friends into Carron Company, particularly one Joseph Dawson, who was appointed assistant-manager at Carron, and William Dawson.

The 30th paragraph of the bill was as follows:

"The said J. Stainton and H. Stainton, taking advantage of their respective positions in the said company, and in collusion with the said J. Dawson and the defendant W. Dawson, entered, long previous to the year 1815, into a scheme to secure to themselves the whole benefit of the said company, and with that view conspired together to procure the discontinuance of the said committees of management where proxies were not allowed, and to keep the accounts of the said company fraudulently, so as to conceal from the shareholders of the said company the real value of the shares, in order that they might buy up at an undervalue such shares as were offered for sale, and at the same time make themselves a majority of votes at the meetings of the company."

The bill further alleged that the company had, for many years previous to 1815, been in the habit of supplying government with military stores, which were manufactured at Carron, and consigned to the agent in London for delivery to the Board of Ordnance. That J. Dawson and J. Stainton used to invoice the goods to London, and to debit them to the Board of Ordnance in the books at Carron, at a price much less than that at which they had contracted to sell them to the Board of Ordnance. That after the Board had paid the full contract price, H. Stainton entered the sums which he actually received to the credit of the Board of Ordnance in the separate account with them kept in the books of Carron Company in London, but that he remitted to Carron only the sums at which the goods were invoiced thence to him, the difference between this sum and the sum paid by the Board of Ordnance being retained and invested in the name of J. Stainton as a secret reserve fund. That between the years 1808 and 1816, the company had very large transactions with the Board of Ordnance. And that on the 1st of January 1808, the company was possessed of government stock standing in the name of J. Stainton as trustee to the amount of 80,000*l*. That between 1808 and 1816 H. Stainton, with the privity of J. Stainton, purchased stock to the amount of 110,000*l*., with monies which he had received from the Board of

Ordnance in excess of the sums charged to them in the books at Carron. That previous to 1816, stock to the amount of 70,000*l*. had been sold for the use of the company, and that at that date 120,000*l*. stock, which belonged to the company, was standing in the name of Joseph Stainton, and that the dividends upon the stocks so from time to time purchased for the company, were regularly carried to the credit of the company in the books at Carron from 1808 to 1816; but that the amount of stock belonging to the company nowhere appeared in the books at Carron or in London. That up to 1816 H. Stainton, in the Ordnance account sent from London to Carron, stated the sums received from the Board of Ordnance at the true amount, so that the Ordnance account in London shewed that the Board had paid large sums in excess of what they were charged with, but that J. Stainton in transferring these accounts to the books at Carron altered them so as to make it appear that the sum paid by the Board of Ordnance was the sum at which the goods had been invoiced from Carron to London.

The bill also alleged that H. and J. Stainton, between the years 1808 and 1817, retained in their own hands other very large sums belonging to the company, and that the accounts of the company had been falsified, and that under the circumstances the said fifteen and forty shares had been purchased by J. and H. Stainton at an undervalue. That the existence of the secret reserved fund was never, until 1852, communicated to or made known by any of the shareholders of the said company other than J. Stainton, H. Stainton, J. Dawson and W. Dawson; but that after that date H. Stainton was compelled to disclose the existence of such fund, and that he subsequently paid or accounted for it to the company. That the debt due to Messrs. Glyn & Halifax had been discharged; and that that firm had disclaimed all interest in the forty shares which were still standing in the name of H. Stainton.

The bill prayed that it might be declared that the sale of the forty shares to H. Stainton was obtained fraudulently by him, and was therefore void, and ought to be set aside, and that proper directions might be

given for transferring such forty shares into the name of the plaintiff; and that it might also be declared that the sale of the fifteen shares to J. Stainton was fraudulently obtained, and that the estates of the said H. Stainton and J. Stainton were jointly and severally liable to pay and make good to the plaintiff the difference between the purchase-money given for such fifteen shares and the actual value thereof at the time of such sale; and that an account might be taken of all dividends and bonuses which had accrued upon the said fifteen and forty shares respectively since the transfer thereof to H. Stainton and J. Stainton respectively.

To this bill the defendant, W. Horn, demurred for want of equity and multifariousness.

Sir H. Cairns and *Mr. J. Pearson*, for W. Horn, the representative of J. Stainton, in support of the demurrer, submitted that the proper plaintiff was not before the Court. The plaintiff on the record was the representative of F. Garbett, who was the mortgagor of the fifteen shares. The plaintiff had not, by any allegation in the bill, entitled himself to sue in respect of these shares. If fraud was practised at the time of the contract, the proper persons to complain were Messrs. Glyn & Co., but there were no allegations in the bill that Messrs. Glyn & Co. had been misled in any particular. Then the allegations of fraud were extremely vague, and did not make even a *prima facie* case against J. Stainton. The relief prayed by the bill, as against J. Stainton, was simply "damages." Until the recent act, a Court of equity never gave damages, except in the case of mesne profits, which, in reality, came within the rule of profits made by a wrongdoer.

Powell v. Aiken, 4 Kay & J. 343.

Wilde v. Gibson, 1 H.L. Cas. 605.

There was no authority for a bill of this sort in equity: a bill not to undo the transaction and place the parties *in statu quo*, but to obtain in equity damages analogous to the damages that would be obtained in an action for deceit at law, when from the lapse of time, the action at law could not be maintained.

The bill was also multifarious; the sale of the forty shares to H. Stainton being a transaction entirely distinct from the sale

of the fifteen shares to J. Stainton. The bill, so far as it related to the forty shares, ought to be against the estate of H. Stainton only, and J. Stainton's representatives were not proper parties. If relief was sought against them, it must be by a separate bill.

Mr. Giffard and *Mr. Eddis*, in support of the bill, contended that J. Stainton's representatives were properly made parties: this being a suit in respect of a fraud recently discovered.—

The Attorney General v. Cradock, 3 Myl. & Cr. 85; s. c. 6 Law J. Rep. (N.S.) Chanc. 341.

Blair v. Bromley, 2 Ph. 354.

The fraud was an entire fraud, and there was a distinct allegation of the period at which it was discovered, which was all that was requisite. At any rate, the bill could be sustained against J. Stainton's representatives, J. Stainton standing in the position of a trustee, who had colluded with his co-trustee in defeating the rights of the plaintiff.

As to multifariousness, the representative of Joseph Stainton was a proper party in respect of the fraud as affecting the sale of forty shares, and the representatives of H. Stainton were proper parties in respect of the fraud as affecting the sale of the fifteen shares. If the transactions were to be treated as distinct, there could be no reason for filing two bills by the same plaintiff against the same defendants, thus making two suits necessary instead of one.

Wood, V.C.—I think that the allegations in this bill would be insufficient to maintain it if it were a bill against J. Stainton alone in respect of the fifteen shares. That, of course, would only be a question of amending, but further, it seems to me that a bill framed like this is multifarious, and that any relief sought against J. Stainton in that respect must be by separate bill.

There are several inaccuracies in this bill. Now accuracy is requisite in every case, and more especially is it required in a case where thirty-eight years after the death of a man who, the plaintiffs say, committed a fraud, and half a century after that fraud is said to have been committed the plaintiffs come into this Court to charge the person who is third or fourth representative of the de-

ceased man with the consequences of that fraud. In that state of circumstances a very distinct case must be made, and very precise allegations indeed are required.

The allegations, if they are taken as against J. Stainton alone, stand thus. In April 1813, a treaty is made for the sale of thirty shares to J. Stainton at a fixed price; the contract was completed as to fifteen shares only in January 1815, but it was made and the price fixed in 1813, and that is what we must look to. The allegation of fraud contained in Paragraph 30. is not precise enough to invalidate the transaction which took place in April 1813, because the fraud alleged might well be "long previous to 1815," and yet after the sale. Then there are allegations as to how the fraudulent scheme was carried into effect. Then all that we get from the allegations that follow is this: that in 1808 there was 80,000*l.* standing in the name of J. Stainton as trustee for the company, and that of that sum 70,000*l.* was properly applied before 1816, it not being said what was done with the rest. How can I carry back the fraudulent contrivance to this matter? The only fraud alleged anterior to 1813 is with reference to the Ordnance stock: and I find that actually 70,000*l.* of that stock was rightly and duly applied without any fraud at all, for the benefit of the company. Then, again, we find that up to the year 1816, H. Stainton stated the true amount paid by the Board in his London account, so that the Ordnance account in London shewed that the Board had paid large sums in excess of what they were charged with; therefore anybody looking into the two sets of books could have seen the fraud, if there were any. Nothing was kept back, but up to 1816 everything was straightforward and proper. Then follow allegations as to the manner in which the accounts were kept; but why am I, fifty years after the transaction, to assume that all these things are fraudulent beyond what they are positively and clearly stated to be? Then after that there is nothing alleged beyond the existence of a secret reserve fund which was never, until 1852, communicated to or known by any of the shareholders of the company, other than J. Stainton, H. Stainton, J. Dawson and W. Dawson. But there is no averment which shews that

until after 1813 there was any secret fund which would make the shares worth a farthing more, inasmuch as out of all that is alleged to have been purchased up to that time, viz., 80,000*l.*, 70,000*l.* had been carried to the general account of the company, and though it is averred that the value of the shares was considerably more than 60,000*l.*, the whole surplus value may have been on the forty, and not on the fifteen, shares.

If there was simply inaccuracy in the allegations, I should allow leave to amend; but the question of multifariousness remains, which depends upon whether, assuming Joseph to have helped Henry in concealing the value of the shares, not with a specific view of defrauding those particular persons or any one else, he thereby became jointly responsible with Henry as a sort of surety or co-trustee for the difference between the purchase-money and the actual value of the shares taken by Henry.

Now, in the first place, as regards the shares, it is averred that all H. Stainton's shares are in existence; so far as regards these shares, then, you can get them back, and you could not make J. Stainton answerable for more than you get here; you have the shares, that is all you want.

The next point is, as to the bonuses and dividends. The third paragraph of the prayer asks, that an account may be taken of all dividends and bonuses which have accrued upon or in respect of the said forty shares and fifteen shares respectively, since the transfers thereof to the said H. Stainton and J. Stainton respectively; and that such directions may be given with reference to the payment to the plaintiff of such dividends and bonuses as shall seem just, the plaintiff being ready and willing to make all proper allowances on his behalf. I confess it does seem to me entirely new to say, that a person assisting in a fraud of this description may be brought here not for discovery and to pay the costs, or to join in paying the costs, but to be answerable in damages notwithstanding he has received no benefit from the fraud. This is not a case of two co-trustees holding a fund, and one allowing the other to sell it and pocket the money; permitting the money to be so dealt with, of course he would be answerable for the whole of it; but the case

is strained to this extreme. Here are two agents of a company who are keeping back for their own purposes and for their own benefit the actual price of the shares, so that when the persons who sell the shares are selling, they sell at an undervalue to one or other of those two agents; and then the question is, whether A, who has joined in this misrepresentation, who held out to the public that the shares were of such a value, can be held to make good out of his assets (having received no portion of the money) the difference in the value (the damages, in fact, for it is nothing else) between the price paid by B. and the actual value of the shares. If he is liable to make good the damages at all, which I do not think in this Court he would be, it appears to me it would be in an action at law for the damages sustained by the vendor in consequence of the false representations which were made to him of the value, which induced him to sell his shares, not to A but to somebody else, at an undervalue. This Court knows how to deal with a person who wrongfully receives a fund: the Court will make him refund it. Again, every person concerned in a fraud, and who assists in the fraud and occasions damage by fraud to another, may in his lifetime be brought here and compelled to give discovery and made answerable for costs; but I do not know of any case where a person has been made answerable in damages for the benefit accrued to another person from a fraud, or has been called upon to make good the profits which that other person so derived. The case is a great deal stronger when the person who made these false representations has been dead thirty-eight years, and his executors are now being brought here to answer for them.

I am not saying what might have happened assuming a clear case of fraud up to the present time, and J. Stainton receiving a benefit from the fraud. That is a different question from the question whether his executors are liable for H. Stainton's defaults; and if they are not liable for H. Stainton's defaults, then clearly they ought not to be brought here. If the case of H. Stainton is to be investigated as to a sale which took place three or four years after the sale to J. Stainton, that would be a perfectly different transaction; and I think myself

there is great reason for concluding from that statement about the 70,000*l.*, that the fraud might be found to have taken place under a totally different state of circumstances, with which the executors of J. Stainton ought not to be mixed up. On these grounds, I must allow the demurrer generally. I do not think enough is stated to make the case equitable; and it appears to me that this bill cannot be amended, so as to keep the executors of J. Stainton here with those of H. Stainton. I shall not, therefore, give leave to amend; but if there is to be a bill at all against J. Stainton's estate, it must be a separate bill.

ROMILLY, M.R. }
Jan. 29, 30, 31. } WINDOVER v. SMITH.

Copyright of Designs—6 & 7 Vict. c. 65.
—5 & 6 Vict. c. 100.

The 6 & 7 Vict. c. 65. applies only to new designs having reference to some purpose of utility; and in order to obtain the benefit of the act, the purpose must be specified in the description supplied for registration.

A coachmaker caused to be registered, under 6 & 7 Vict. c. 65, a design for a dog-cart, specifying as the purpose of utility that "higher front wheels could be used or closer coupling effected." The design consisted of parts 1, 2, 3, 4, of which 1, 2, and 3. had nothing to do with front wheels or closer coupling, and No. 4. was not new:—Held, that no exclusive privilege was gained by registration.

This bill was filed, by Charles Sandford Windover, to restrain George Frederick Smith from infringing the plaintiff's registered design for the shape and configuration of the body of a four-wheeled carriage, called a "dog-cart phaeton." It further asked that all carriages made according to the design might be delivered up, and for an account and payment of all money received from sales made, and for damages.

On the 19th of October 1859, the plaintiff, before any publication of the design, caused the same to be registered

under the 6 & 7 Vict. c. 65. (1) For that purpose he furnished to the registrar drawings or prints of the carriage, entitled "Windover's Dog-Cart Phaeton," with the following description of the design: "The purpose of utility to which the shape or configuration of the new parts of this design have reference is, that much higher front wheels can be used, or closer coupling is effected, and a saving in horse-power. The carriage is built with a double-curved arch, as shewn at 4. : 1. the seat ; 2. the opera board ; 3. the boot ; and 4. the curved arch, under which the wheels turn. The parts marked 1, 2, 3. and 4. are new ; the rest is old, so far as regards the shape and configuration thereof." The registrar affixed the No. 4205 upon the drawings.

The arch referred to was directly under the body of the carriage, so that the wheels, while revolving, pass under it when the carriage is turned.

On the 3rd of June 1862 the plaintiff discovered that the defendant had for some time been making and selling dog-cart phaetons in imitation of the plaintiff's design. This bill was therefore filed. The three years' monopoly allowed by the act had expired since the filing of the bill.

Mr. Selwyn and *Mr. Bevir*, for the plaintiff.—The outline of the body of this carriage was formed from an original idea of the plaintiff: it was altogether new, and its parts had been adapted to purposes of utility: it came strictly within the term "configuration" under the 6 & 7 Vict. c. 65. s. 2. The plaintiff, therefore, was entitled

to an account of sales, and to all other consequential relief.

Mr. Baggallay and *Mr. Shebbeare*, for the defendant, denied that there was either novelty or originality in the design; it was preceded by that of *Mr. Thorn*, which was made for purposes similar to those of the plaintiff's design. Besides, the only part of the design which had reference to any purpose of utility was the curved arch, and as to that arches had frequently been used before. The idea was certainly not new; the purpose was not new, and no monopoly could be claimed for a curve more or less inflected. The case was certainly not within the 6 & 7 Vict. c. 65.—They referred to *Norton v. Nicholls* (2), decided upon the 5 & 6 Vict. c. 100, the act relating to copyright in designs for ornamenting articles of manufacture.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS.—The question involves the 5 & 6 Vict. c. 100. and the 6 & 7 Vict. c. 65 ; both these acts give a monopoly to proprietors of new and original designs ; both the acts relate to the configuration of the article or design, but the one applies to ornamental designs and the other to designs of utility. These purposes might be combined ; there might be a design in which beauty was inseparable from utility ; it possibly might be registered under one or both of the acts, but when registered, the object of the registration must be considered. Between patents and registered designs there is this analogy : the patent must be accurately specified, and the design must be accurately described upon the register. In this case the design is for a carriage, the figure of which is pleasing and satisfactory. It was not registered under the 5 & 6 Vict. c. 100, so that the symmetry cannot affect the question. There were, however, four things claimed by the registry under the 6 & 7 Vict. c. 65 : first, the seat—it might add to the beauty of the carriage, but it would not facilitate the use of higher wheels, or increase the claim of utility ; secondly, the opera board—it was no novelty, and its usefulness was not a benefit claimed ; thirdly, the boot—it contributed nothing to the utility ; fourthly, the curved arch—that

(1) The act by section 1, after referring to 5 & 6 Vict. c. 100. (relating to copyright of designs for ornamentation) recites as follows: "And whereas it is expedient to extend the protection afforded by the act to such designs hereinafter mentioned, not being of an ornamental character, as are not included therein." And by section 2. enacts as follows: "And with regard to any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article, and that whether it be for the whole of such shape or configuration, or only for a part thereof; be it enacted, that the proprietor of such design not previously published in the United Kingdom of Great Britain and Ireland or elsewhere, shall have the sole right to apply such design to any article, or make or sell any article according to such design for the term of three years to be computed from the time of such design being registered according to this act."

(1) 1 E. & E. 761 ; s. c. 28 Law J. Rep. (N.S.) Q.B. 225.

did contribute to utility. It is not necessary to consider whether the mention of the three points which did not conduce to utility could invalidate the registration—possibly not. It is, however, necessary to consider whether the curved arch is such a new and original design that its registration entitled the plaintiff to a monopoly of the design; it is no doubt useful, but each side said that an arch was previously used to allow the front wheels to pass under when the carriage was turned; the only novelty therefore claimed is, that the arch is something higher, so that larger front wheels can be used, but such an application cannot be claimed as a novelty, merely because each had been constructed a little larger. How, therefore, can the design be considered new within the meaning of the act? The examination of the plaintiff made it apparent that the nature of the invention was accurately stated in the certificate of registration, and the evidence generally on his behalf sufficiently shewed that he was not the first maker of this kind of dog-cart; still it is not that which affects his case: he had failed to establish the design as a novelty, and in consequence no relief can be given. The bill, therefore, must be dismissed with costs.

ROMILLY, M.R. }
Feb. 26, 27. } ELLICE v. ROUPELL.

*Pleading—Bill to perpetuate Testimony—
Plea to amended Bill—Consol. Order XIV.
Rule 9.*

A bill was filed to perpetuate testimony, charging that the matter in dispute (viz. whether a particular deed was a forgery) could not be made the subject of judicial investigation, and interrogatories were filed. The defendants put in an answer, and witnesses were examined and cross-examined. The bill was then amended and further interrogatories filed seeking more extensive discovery. The defendants then pleaded in bar, that since the filing of the answer the plaintiffs had filed a bill in another branch of the Court against the defendants and other persons, whereby they had made the matter in dispute the subject of judicial in-

vestigation, and that it was not the fact that the matter in dispute could not be made the subject of judicial investigation:—Held, that the substance of the plea was, that the matter of dispute could be made the subject of immediate judicial investigation; and that as this might have been pleaded to the original bill, it could not be pleaded to the amended bill, and the plea was ordered to stand for an answer, with liberty to except.

Semble—that a plea to the same effect to the original bill would have been good.

The bill was filed, on the 6th and amended on the 22nd of September 1862, and was by Russell Ellice and John Henry Manners Sutton, against Richard Roupell the heir-at-law, and Sarah Roupell, the widow of Richard Palmer Roupell, deceased, praying that they might be at liberty to examine as witnesses and perpetuate the testimony of Alfred Douglas Harwood and other persons, to establish the due execution, by R. P. Roupell and his wife, of a deed, dated the 26th of September 1853, and to prove any matter connected therewith, and, if necessary, that a commission might issue.

The bill stated that Richard Palmer Roupell was, in his lifetime, seised in fee simple of a large real estate, situate in the several parishes of Lambeth, Norwood and Streatham, called "The Roupell Park Estate."

That by an indenture, dated the 26th of September 1853, R. P. Roupell and Sarah his wife, in consideration of natural love and affection, granted, bargained and sold unto his son William Roupell, his heirs and assigns for ever, all the Roupell Park estate, free from all dower to which Sarah Roupell might become entitled.

The names of the parties executing the deed to which seals were affixed, were Sarah Roupell and Richard Palmer Roupell.

The attestation clause was signed by Alfred Douglas Harwood, 8, Copthall Court, gent.

The certificate that Sarah Roupell acknowledged the deed, under the 3 & 4 Will. 4. c. 74, was dated the 24th of October 1853, and as indorsed thereon was signed "T. N. Talfourd," then one of the Judges of the Common Pleas.

The bill also stated that William Roupell took possession, and that he in January following mortgaged the estate in fee, and that he subsequently created further charges thereon, amounting in the whole to 100,000*l*.

By a deed, dated the 14th of February 1862, Messrs. Ellice and Sutton became entitled to the whole of these mortgages, and they took possession of the estate.

In April 1862 the interest was in arrear, the plaintiffs therefore desired to sell portions of the estate; but upon advertisements being issued, they received a notice from Richard Roupell, dated the 26th of April 1862, claiming the whole of the Roupell Park estate, either as heir-at-law or devisee of his father R. P. Roupell, and stating his intention to take legal proceedings to establish his title to the estates and to recover the rents, on the ground that the estates belonged to his father at the time of his death.

This notice made it impossible for the plaintiffs to sell any part of the estate.

The plaintiffs then said that the whole of the principal, with a large arrear for interest and costs, was due to them, and that they desired either to realize their security or to enjoy the estate free from all equity of redemption.

The bill alleged that the defendants pretended that R. P. Roupell did not execute the deed of the 26th of September 1853, but that the whole estate belonged to R. P. Roupell at his death in September 1856, and that Messrs. Ellice and Sutton had no right to it, and that Richard Roupell claimed to be entitled to the fee simple of the estate as heir-at-law of his father, while Sarah Roupell claimed the estate as devisee under a will, dated the 2nd of September 1856, and that both the defendants claimed the estate free from the claims of the plaintiffs and the mortgages.

The plaintiffs, however, charged that the deed of the 26th of September 1853 was duly signed and delivered by R. P. Roupell and Sarah his wife, in the presence of A. D. Harwood, and that under it W. Roupell acquired the fee simple of the estate, and that the mortgage was a valid security for the sums due and owing. That there were other persons besides A. D. Harwood (one

of whom was infirm) who could prove divers matters and things tending to shew the validity of the deed and the title of the plaintiffs, and that R. P. Roupell during his life acknowledged or admitted the title of William Roupell under the indenture.

The plaintiffs further charged that the several matters, and particularly the validity of the indenture, could not be made the subject of judicial investigation, inasmuch as the defendants might delay to dispute the validity of the deed, and to prosecute their claims until such time as they might think proper, and that the plaintiffs were in danger of losing the testimony of the witnesses who were material to their case, and that their possession and quiet enjoyment of the estate and their security would be endangered, unless they were permitted to examine their witnesses and have their testimony preserved.

Interrogatories were filed to the bill as amended; and on the 17th of December 1862 the defendants put in a full answer.

On the 8th of January 1863 the plaintiffs re-amended their bill, and alleged that Richard Palmer Roupell knew that William Roupell had entered into possession under the indenture of the 26th of September 1853, and that he thenceforth treated him as the owner of the estate; and that the defendants in 1854 admitted that W. Roupell had entered into possession of part of the Roupell Park estate, and ought therefore to set forth under what title he did enter; and that Sarah Roupell admitted that she executed the deed of the 26th of September 1853, and acknowledged it before a Judge; and that she ought to set forth full particulars respecting the indenture, her execution and acknowledgment thereof, and as to Richard Palmer Roupell's knowledge of the said indenture.

Further interrogatories were filed; but instead of answering, Mrs. Roupell put in a plea to this re-amended bill, alleging that Messrs. Ellice & Sutton, on the 2nd of February 1863, had filed another bill, before Wood, V.C., against Richard Roupell, Sarah Roupell and others, in which, after stating that Sarah Roupell and Richard Roupell had said that the deed of the 26th of September 1853 was a forgery, they denied the truth of such statement, and

had raised the question whether such deed was or was not a forgery; and that the plaintiffs then prayed that the said Sarah Roupell and Richard Roupell might be restrained by injunction from taking any proceedings to obtain possession of the estate; and therefore that the plaintiffs had thereby made the several matters in the re-amended bill in this suit, and particularly the validity of the deed, the subject of judicial investigation; and further, that Mrs. Roupell, since she filed her answer, had ascertained by the means aforesaid that it was not true that the several matters to the re-amended bill, and in particular the validity of the deed, could not immediately be made the subject of judicial investigation.

The plea was set down to be argued.

Mr. Selwyn and *Mr. C. Swanton*, for Sarah Roupell.—The plaintiffs, by filing the second bill before Wood, V.C., had satisfied themselves that the question in dispute could be made the subject of judicial investigation, and that consequently any further proceeding in this suit was a work of supererogation, and ought not to be permitted.

Mr. Hobhouse and *Mr. Cotton*, for the plaintiffs.—The defendants having answered the original bill, are concluded from pleading or demurring to the re-amended bill, upon grounds open to them upon the original bill. It is settled that the Consolidated Order XIV. rule 9. does not enable a defendant who has answered an original bill to demur to the amended bill upon any cause of demurrer to which the original bill was open—*The Attorney General v. Cooper* (1). This plea was based upon the allegation, that the facts alleged were not immediately capable of being made the subject of judicial investigation; the contrary might have been pleaded to the original bill. The plea, therefore, by analogy to the decisions with respect to demurrers, must be overruled, as the defence now set up might have been pleaded to the original bill.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS.—This is a plea to a bill filed, by the plaintiffs, *in perpetuam rei memoriam*, to prove the validity

of a deed which the defendants allege to be a forgery. The course which this Court always adopts in such cases is simple. It says, that when a person files a bill raising an issue that can be tried at once, it is not a case for a bill to perpetuate testimony. On the contrary, as the evidence when taken cannot be used if the witnesses are alive, — and as the depositions are sealed up, and can only be used when the case arises hereafter, — it would be idle for this Court to go into a question of perpetuating testimony, when the case might be tried at once and the witnesses examined. If the case solely depended upon one witness, or one witness was very old, then the Court can allow in the cause that person to be examined *de bene esse* without the necessity of a bill to perpetuate testimony.

But then it has always been held, that if a person is in possession of an estate in fee simple, and he hears of another person who seeks to impeach his title upon the ground that the deed by which he got possession of the estate was a forgery, as he can take no step to assert his title, and as the person out of possession will not bring an ejectment against him until all his witnesses are dead, he then very properly files a bill to perpetuate the testimony of those persons, in order to frustrate the design of the person who wishes to bring forward his case, when the witnesses who can speak to the truth are no longer in existence, and thereupon it has always in that case been held that he can file a bill. In this case the plaintiffs are mortgagees, and have entered into possession. The mortgagees are not in possession claiming the whole title to the estate; but they are in possession as mortgagees, and, accordingly, they are liable to account hereafter to the rightful owner, supposing their mortgage to be a good one; they are liable to account to the rightful owner of the equity of redemption in that strict and severe form in which this Court always takes an account against mortgagees in possession. Then, if this plea had been filed in the first instance to this bill, I should have to consider this: Does the ordinary rule of the Court, which undoubtedly would apply if the plaintiffs were in as purchasers of this estate, apply to the case of a mortgagee, because a mort-

gagee may file a bill to foreclose, he may file a bill to realize his security, and there are various modes by which he could bring before the cognizance of a Court of law the question of the validity of the deed? Certainly, if he got a decree to foreclose against the persons who allege that the deed is a forgery, it appears that it would be impossible for them, at any future period, to contest the validity of that decree, which would have been enrolled in Chancery, not touched by the House of Lords, the time for appealing against it being gone, which would have given a good title to the mortgagees; and I am much disposed to think, though I have not been able to find any case on the subject, that if this plea had been filed in the first instance, it would have been a good plea, or, upon the statements, possibly a demurrer might have been filed to the bill. But the case is this, which is the peculiarity of its form: The pleader for the defendant seems to have thought upon the authority of the cases, that as the plaintiffs were in possession of the estate, and had a perfectly good legal title, that their case was analogous to that of purchasers, which they were at law, though not in equity, and thereupon he answers the bill. The matter is carried on in a very peculiar form, (though I cannot say entirely without precedent,) for it is sought by filing a great number of interrogatories to make the suit perform the double function of a bill to perpetuate testimony, and a bill of discovery. Now, whether the answers can be used at any future time in any other proceeding, I do not wish to prejudge, or whether they could be of any effect. This is clear that the depositions cannot be used so long as the witnesses are alive, that is quite clear; but they must be examined again. It is also clear that a defendant may take advantage of a cause of this description. This is a cause in which the plaintiff may merely examine his witnesses, and the defendant may merely cross-examine, and then the plaintiff has to pay all the costs; but if the defendant thinks fit to take advantage of it, and to examine witnesses to establish his view in the matter, then the costs are divided, but even then the depositions can only be used against the defendant if the witnesses are dead, and can only be used with relation to the

subject-matter stated in the bill. All these things are quite certain.

The defendant has thought fit to answer all these matters; and then it was re-amended, and he was called upon again to answer all the various matters in the re-amended bill.

This singularity then takes place: a bill is filed, from which, from the statement in the plea, the validity of the deed of mortgage would come in question, that is to say, the validity of the conveyance of the title of the mortgagor, who had given them the mortgage, would come in question in a suit filed before one of the Vice Chancellors. Then the defendant says, if I had known this before, I would have pleaded, because it depended upon you, and you yourself have shewn that you can bring it before a Court of law. Well, I am of opinion that the fact of the plaintiff having done so does not alter the law at all on the subject that it was just as competent for the plaintiff to do that when the bill was first filed, as it is now; and that the defendant was bound to know that, just as much as ever a person is bound to know the law, or, at least, cannot plead ignorance of the law as a justification of the acts. That being so, when he pleads here that this can be tried in a court of justice, and that the plaintiff has himself so shewn if he is merely doing that which he might have foreseen, and might have pointed out to the Court, could have been done in the first instance, and which would have made it unnecessary for him to answer any part of the bill.

It is true that the rule with respect to the subject now is, that a plea does not overrule an answer; but I concur with the observation, that the object of rule 9. of the Consolidated Order XIV. was to prevent a *bona fide* plea from being overruled by the technical objection that the plea covered part of the same matter as the answer, and that that was the sole meaning of it. There is a great deal of substance in the rule that you must not answer a matter that is to be pleaded to. It is obvious that if you did in a case where the bill asks for actual relief, the plaintiff would not know whether he was to go into evidence or not. But here this appears in a very striking form, for if the plea is allowed, the bill, as was well observed,

is out of court, for the plaintiffs can only take issue on the plea; and it is undoubtedly true that the other bill is filed in the Court of Chancery, therefore, the bill is out of court if the plea is allowed, and yet the defendants have answered all the matters in the bill, and have cross-examined the plaintiffs' witnesses. Having so done, this defendant is not at liberty after that to file a plea, and if she intended to plead at all, she ought to have pleaded in the first instance.

That being so, I shall not allow the plea, but direct it to stand for an answer, and give the plaintiffs liberty to except. (2).

STUART, V.C. }
March 13, 14. } ADAMS v. SWORDER.

Pleading — Bankruptcy — Fraudulent Composition with Creditors — Bankrupt's Right to sue—Parties.

Where a bankrupt, after having by fraud procured his bankruptcy to be annulled, filed a bill against the solicitor and the auctioneer of his assignees to set aside a sale of his property made by the assignees to such solicitor and auctioneer, but did not make his assignees parties to the suit, the Court, as it did not appear that even if the property were re-sold, at the highest price which it might be presumed it would bring, any portion of the purchase-money would, after payment of his creditors, be payable to the bankrupt, dismissed the bill, but without costs.

This suit was instituted by Samuel Adams against Thomas Sworder and William Green Ree, for the purpose of setting aside a sale to the defendants of certain real estate and a policy of assurance on the plaintiff's life.

In July 1856 the plaintiff was adjudicated bankrupt, and J. G. Elsey and J. Lawrence were appointed creditors' assignees, and W. Whitmore official assignee.

Previously to, and at the time of, his bankruptcy, Adams was entitled for his

life to certain real estate called Cannons, situate in the town of Ware in Hertfordshire, of the alleged annual value of 750*l.*, and he was seised in fee of a piece of land contiguous to such real estate, and he was also entitled to a policy of assurance on his own life in the Reliance Life Assurance Office for the sum of 1,200*l.*

By an indenture, dated the 6th of August 1857, the life interest of Adams in the real estate called Cannons, and the fee in the piece of land contiguous thereto, were, in consideration of 2,020*l.*, conveyed by his assignees in bankruptcy to the defendant Sworder, subject to a proviso for redemption on payment to him by the defendant Ree of the sum of 2,020*l.* and interest.

By another indenture of the same date the assignees in bankruptcy of Adams, in consideration of 133*l.*, assigned to the defendant Sworder the policy of assurance before mentioned, subject to a proviso for redemption on payment to him by the defendant Ree of the sum of 133*l.* and interest.

The bill alleged that Sworder was one of a firm of solicitors, and Ree one of a firm of auctioneers and surveyors, who respectively acted for the assignees of Adams; that the purchases of the real estate in Ware and of the policy of assurance were made on the joint account of the defendants, and that the purchase of the real estate was made at an undervalue, the same having been previously bought in by the plaintiff's assignees at a sale by public auction for the sum of 2,980*l.* in October 1856.

The plaintiff charged that the defendants from their office and employment respectively, and from having by such office and employment acquired the means of gaining a full knowledge of the real estate comprised in the indenture of the 6th of August 1857, and of the policy of assurance, and the value thereof respectively, were precluded from purchasing, and they ought not to have purchased the said premises, and that the aforesaid sale to the defendants was fraudulent, inoperative and void, and ought to be set aside.

The bill prayed that the sale to the defendants of the plaintiff's interest in the Cannons estate and piece of land adjoining

(2) See further report of the case, *infra*, upon the hearing of exceptions filed by the plaintiffs which were overruled.

and of the policy of assurance might be declared to be fraudulent, inoperative and void, and that it might be set aside.

The bill was filed in July 1861.

The assignees were not parties to the suit.

The plaintiff's debts under his bankruptcy were about 95,600*l.*, and at the period of his bankruptcy his assets were represented to be about 60,000*l.*

In March 1860 the plaintiff made a composition with his creditors, under the Bankrupt Law Consolidation Act, 1849, at the rate of 6*s.* in the pound, and thereupon, in May 1860, his bankruptcy was annulled.

By a deed, dated the 14th of March 1860, and made between the plaintiff of the one part, and his assignees of the other part, after reciting the adjudication in bankruptcy of the plaintiff, his having compounded with his creditors, and that various sales of his real and personal estate had been made by the assignees, and that it had been agreed in order to protect and indemnify the assignees, and all persons claiming under them from all liability and risk incurred by them by reason of any acts or things done or authorized to be done by them, and in order to ratify and confirm all such acts and things, it was witnessed that the plaintiff thereby ratified and confirmed all the sales entered into by the assignees, and thereby declared that every such sale should be thenceforth as binding on him as if the bankruptcy had not taken place, and he thereby acquitted and released the assignees in respect of all acts done by them.

On the 4th of May 1860, an order was made by Mr. Commissioner Fane annulling the adjudication in bankruptcy of the plaintiff; but without prejudice to any sale made, or other act, matter or thing done by his assignees or otherwise, under the adjudication.

The defendant Sworder, by his answer, submitted that the plaintiff had no equity to impeach the sale, and that if he ever had any right to do so, such right had been lost by the release and indemnity of the 14th of March 1860, or by the delay which had taken place in instituting this suit.

The defendant Ree, by his answer, said that the plaintiff was upon terms of intimacy with him, and was well aware of his inten-

tion to make the purchase impeached by the bill, and that he had acquiesced in it; that it was not competent to the plaintiff to set aside the sale made to the defendant, having regard to the terms of the deed of the 14th of March 1860; and that if any benefit would arise from setting aside the purchase, the same would enure for the benefit of the plaintiff's creditors under his bankruptcy, and not for himself.

The plaintiff, Samuel Adams, was cross-examined *visà voce* in Court, and in the course of such cross-examination he stated that he had not included in his accounts in bankruptcy sums owing to him at the date of his bankruptcy to the amount of upwards of 1,200*l.*, and that he had since his bankruptcy was annulled instituted legal proceedings in respect of such sums, and would shortly have paid to him about 1,000*l.* thereof. He admitted that he claimed to have paid to him 10,000*l.*, part of a sum of 30,000*l.*, in a suit of *Kay v. Johnston*. Such sum of 10,000*l.* also was not included, as it should have been, in his accounts in bankruptcy. He had paid altogether to his creditors 6*s.* in the pound upon the debts owing by him at his bankruptcy.

[STUART, V.C., at the conclusion of the plaintiff's cross-examination, said, that the plaintiff's evidence shewed that the composition-deed, which was the foundation of his right to sue, had been obtained by a gross fraud upon his creditors. How could the plaintiff sue when his right to do so was based in fraud? For the purpose of the argument upon that point, it might be assumed that the sale to the defendants was improper.]

Mr. Malins and Mr. Herbert Smith, for the plaintiff.—Even if Adams had acted fraudulently in regard to the composition with his creditors, he was not thereby prevented from maintaining this suit—*Sharp v. Taylor* (1).

The defendants, being one of them the solicitor, and the other the auctioneer, of the assignees, filled a confidential character towards them, and were by that circumstance incapacitated from purchasing from them—

Ex parte James, 8 Ves. 337.

Hatch v. Hatch, 9 Ibid. 292.

Ex parte Morgan, 12 Ves. 6.

Pooley v. Quilter, 2 De Gex & J. 327;
s. c. 27 Law J. Rep. (N.S.) Chanc.
374: reversing 4 Drew, 184; s. c. 27
Law J. Rep. (N.S.) Chanc. 180.

The bankruptcy having been annulled,
the plaintiff was restored to all the rights
which he had prior to his bankruptcy in
regard to his property in the same manner
as if he had never been bankrupt—

Charman v. Charman, 14 Ves. 580.

Wearing v. Ellis, 6 De Gex, M. & G.
596; s. c. 26 Law J. Rep. (N.S.)
Chanc. 15: affirming 25 Law J. Rep.
(N.S.) Chanc. 248.

The right which the assignees had of set-
ting aside the sale to the defendants be-
came vested in the plaintiff when his bank-
ruptcy was superseded—

Stump v. Gaby, 2 De Gex, M. & G.
623; s. c. 22 Law J. Rep. (N.S.)
Chanc. 352.

Gresley v. Mousley, 4 De Gex & J.
78; s. c. 28 Law J. Rep. (N.S.) Chanc.
620: affirming 1 Giff. 450; s. c. 27
Law J. Rep. (N.S.) Chanc. 779.

Gibbs v. Daniel, 4 Giff. 1.

The plaintiff would, if the property were
re-sold at a higher price than the defendants
had paid, account for the surplus to his
assignees.

Mr. Bacon and *Mr. Marten*, for the
defendant Sworder; and

Mr. Hobhouse, *Mr. Charles Newton* (of
the common law bar) and *Mr. Waller*, for
the defendant Ree, were not called upon.

STUART, V.C.—The plaintiff's right of
suit (if any) depends upon the composition
and arrangement made by him with his
creditors. If his conduct in relation to
that composition and arrangement, upon
which his right to sue is founded, were
not *bona fide*, his right to sue is gone.
From the evidence of the plaintiff himself
it appeared that he had acted fraudulently
with his creditors in regard to the arrange-
ment which he had made with them.
At an early stage of the hearing of the case,
I put it to the plaintiff's counsel whether
it was possible to go on in the absence of
the assignees. They contended, however,
that the plaintiff could maintain this suit.
The right to set aside the sale to the de-
fendants was obviously in those who had

not received the full amount of their debts.
Even if the property, the sale of which is
by this suit sought to be set aside, could
be sold at the highest possible price, it did
not appear that any portion of the sum
beyond what the defendants had paid for
it would go to the plaintiff. His creditors
who had only received 6s. in the pound
would be entitled to such surplus. It had
been said that if the sale were set aside
and the property sold at a higher price than
the defendants had paid for it, the plaintiff
would account to the assignees for the
surplus. But inasmuch as the plaintiff has
not shewn that any benefit can result to
himself from the litigation after he should
have paid the surplus to his creditors, he is
not entitled to sue. The bill must, therefore,
be dismissed.

Mr. Hobhouse and *Mr. Waller*, for Ree,
asked for his costs.

STUART, V.C.—I wish to dismiss the bill
upon the ground I have mentioned, but
without going into the merits at all, which
I intend shall be wholly unadjudicated
upon. In order to dismiss the bill with
costs, I must go into the merits. I there-
fore dismiss the bill without costs, and with-
out prejudice to the rights of the assignees
in bankruptcy or creditors to take such
proceedings as they may be advised to
take.

STUART, V.C.	}	O'BRIEN v. LEWIS.
Dec. 3, 4.		
WESTBURY, L.C.		
Jan. 30.		

*Solicitor and Client—Gift by Client to
his Solicitor.*

*Gift made in 1852, pending the relation
of solicitor and client, by a client to his
solicitor, by means of a parol direction on
the part of the client to the solicitor to retain
a sum of money in the hands of the latter
belonging to the client, set aside upon a bill
filed in November 1861, the relation of soli-
citor and client having continued from the
time of the gift up to the early part of 1861,
when it was terminated.*

*Although a gift by a client to his solicitor
may be influenced by proper motives, it is*

subject to be set aside unless there be clear evidence of removal of that pressure upon the client, which the Court always presumes where the relation of solicitor and client is proved to subsist.

This suit was instituted, by John O'Brien against James Graham Lewis and George Coleman Hamilton Lewis, who were solicitors and attornies, for the purpose of obtaining payment to the plaintiff of a sum of 300*l.*, alleged by him to have been improperly retained by the defendants out of monies belonging to him in their hands while they acted as his professional advisers, but which sum was asserted by them to have been a gift to them from the plaintiff, and also for an account.

The bill alleged to the effect that in the year 1852 the defendants, who acted as attornies and solicitors for the plaintiff in certain proceedings at law and in equity, arranged those proceedings for him by obtaining a payment to themselves on his account of a sum of 800*l.*, and a further payment to themselves of a sum of 120*l.* for costs; that the defendants accounted to the plaintiff for 500*l.* only, part of the sum of 800*l.*, and appropriated the sum of 300*l.*, being the residue of the sum of 800*l.*, and also the sum of 120*l.* to their own use; that the defendants admitted that they had so appropriated the sum of 300*l.* besides the costs, but they alleged that the plaintiff made them a present of, and told them to retain 300*l.*, part of the sum of 800*l.*, and to keep the same as a present to them; that such allegation was untrue; that the plaintiff did not make the defendants a present of the sum of 300*l.*; and the plaintiff charged that even had he told the defendants to keep such sum of 300*l.* as a present they would not be entitled to retain the same, inasmuch as, being the solicitors of the plaintiff, they had no right to make a gain at the expense of their client in the said arrangement.

The bill also alleged that the defendants had, in the year 1860, received other sums on the plaintiff's account, which they had not accounted for, and that they had, in answer to an application on his behalf, made on the 9th of October 1861, for an account of all their transactions with him, refused to furnish the same.

The bill prayed that it might be declared that the defendants were liable to pay, and might be decreed to pay to the plaintiff the sum of 300*l.* so improperly retained by them as aforesaid, with interest at the rate of 5*l.* per cent. per annum, and for an account of all monies received by the defendants or either of them as solicitors, attornies or agents of the plaintiff, and that if necessary, in taking such account, the defendants might be charged with the sum of 300*l.* and interest on the balances in their hands belonging to the plaintiff.

The plaintiff employed the defendants as his attornies and solicitors up to the beginning of the year 1861, and the bill in this suit was filed on the 19th of November 1861.

The defendants in their answer admitted having retained the sum of 300*l.* upon the occasion referred to in the bill; but they said that they did so in pursuance of the plaintiff having engaged to make them a present of that sum out of the amount of 800*l.* for which the proceedings at law and in equity mentioned in the bill were arranged, and also in pursuance of a direction by the plaintiff to the defendant James Graham Lewis, on behalf of his firm, to retain and keep the sum of 300*l.* as a present to the defendants. They also admitted having received 120*l.* for costs on the occasion of the arrangement of such proceedings.

They said further, that until August 1861 they had never been applied to by the plaintiff or any one on his behalf respecting the sum of 300*l.*, and that on the 12th of May 1852 the plaintiff wrote to the defendants a letter from Paris, where he then was, inclosing an account referring solely to the matters which were the subject of the before-mentioned arrangement; that such account was signed by the plaintiff, and that he therein took credit, not for the full sum of 800*l.* which had been paid to the defendants on the plaintiff's account as before mentioned, but for the sum of 500*l.* only, being the said 800*l.* after the deduction therefrom of 300*l.* in fulfilment of his said promise.

The defendants admitted that they had refused to furnish the plaintiff with an account of all their transactions with the plaintiff, and they said that no balance was due to him from them.

They also stated that, in September 1860, the plaintiff filed his petition, under the Act for facilitating Arrangements between Debtors and Creditors (7 & 8 Vict. c. 70), in the Court of Bankruptcy, and that in the schedule to such petition he neither directly nor indirectly mentioned, referred or alluded to any debt or sum of money due to him from the defendants, nor did he allude therein to any unsettled account between him and them.

They submitted that the plaintiff's claim was frivolous and vexatious, and that he had by his conduct, as well as by the lapse of time since the greater part of the matters of business was transacted, during which no account was demanded or claim made by him, acquiesced in the various dealings, arrangements, settlements and accounts, receipts and payments, complained of in the bill.

Mr. Bacon and *Mr. Jessel*, for the plaintiff, denied that the sum of 300*l.* was a gift by him to the defendants. But even if the plaintiff had made a present of that sum to the defendants as stated by them, the transaction took place while the relation of solicitor and client subsisted between the plaintiff and the defendants in its full force, and the gift was therefore void.—

Hatch v. Hatch, 9 Ves. 292.

Middleton v. Welles, 4 Bro. P.C. 245.

Montesquieu v. Sandys, 18 Ves. 302, 313.

An attorney also could not bargain with his client for a remuneration in respect of professional services beyond his costs. The plaintiff's claim was not barred by acquiescence, inasmuch as the doctrine of acquiescence would not apply while the relation of solicitor and client existed, and he had filed his bill within a few months after he had discontinued to employ the defendants as his attorneys and solicitors. Hence this case was clearly distinguishable from

The Marquis of Clanricarde v. Henning, 30 Beav. 175; s. c. 30 Law J. Rep. (N.S.) Chanc. 865.

Upon the question of account, they referred to

Lord Hardwicke v. Vernon, 4 Ves. 411.

Mr. Malins and *Mr. Brooksbank*, for the defendants, contended that the gift was

made to them by the plaintiff deliberately and with a full sense of the great obligation he was under to them, and without the shadow of a ground for saying that it was tainted by fraud or undue influence. Upon this question they referred to—

Harris v. Tremenhoe, 15 Ves. 34.

Cooke v. Lamotte, 15 Beav. 234; s. c. 21 Law J. Rep. (N.S.) Chanc. 371.

Hoghton v. Hoghton, 15 Beav. 278; s. c. 21 Law J. Rep. (N.S.) Chanc. 482.

Tomson v. Judge, 3 Drew. 306; s. c. 24 Law J. Rep. (N.S.) Chanc. 785.

Re Holmes's Estate, 3 Giff. 337.

The plaintiff might by means of the common order for taxation at the Rolls have obtained all that he required under the prayer for an account—

Morgan v. Higgins, 1 Giff. 270.

Coleman v. Mellersh, 2 Mac. & G. 309.

STUART, V.C.—This suit has two objects, which are materially connected with each other.

The question which has been chiefly argued is as to the right of the defendants to retain the sum of 300*l.*, which they insist was a gift or present properly made to them by their client, the plaintiff.

The other question, with which the first is materially connected, is as to the right of the plaintiff to an account of all the dealings and transactions between the defendants and himself during the time they acted as his solicitors. The plaintiff seems to me to have completely established his case upon both points.

The transaction as to the 300*l.* is alleged by the defendants to have been a gift; but it was made during the subsistence, in its fullest influence, of the relation of solicitor and client. And although it is called a gift, it has this remarkable feature—that the money which was the subject of the transaction never was in the hands of the plaintiff to give. The gift is said to have been made by a parol direction to the solicitors to retain it as a present. Now, it is impossible, after what has been so clearly laid down in this Court, that a mere parol direction of this kind, given during the subsistence of the relation of solicitor and client, can amount to such a gift or

such an act of bounty as not to be subject to question in this court. It is not only subject to question; but it is subject to be set aside, unless there be clear evidence of the removal of that pressure upon the client, which the Court always presumes where the relation of solicitor and client is proved to subsist. Therefore, as to the right of the plaintiff to have that sum of 300*l.* accounted for, I have no doubt whatever.

With reference to the other question, the right, namely, of the plaintiff to have an account of the dealings and transactions between him and the defendants, the case is equally clear in his favour.

The counsel for the defendants were driven to say that the account, which is now asked by a decree of the Court after a long and expensive suit, might have been obtained by the short and simple process of a petition at the Rolls; but it never has been held, that the summary jurisdiction by petition at the Rolls excludes the right of a client to file a bill against his solicitor for an account where there have been pecuniary transactions between them, and to have the account regularly taken by the Court, under its general jurisdiction as a Court of equity, entertaining suits for account between plaintiffs and defendants.

The plaintiff having succeeded upon both points, the question of costs remains to be considered; and upon this part of the case I called the attention of counsel to what was said by Lord Eldon in *Harris v. Tremeneere*. In cases of this kind, involving the validity of a gift, or an alleged gift by a client to his solicitors, the Court acts upon the high ground of public policy; and although the transaction may have been as reasonable a one as ever was entered into, and although the motive for the gift may have been rational and proper, yet it has been held by all the greatest Judges that upon the ground of public policy such a gift shall not be permitted to stand.

The question being disposed of upon the ground of public policy, the right to costs, where the gift is set aside, follows almost as a matter of course. I do not say that in some cases there may not be such extraordinary conduct in the course of the litigation, or in the mode of raising the question, as might induce the Court, by that

discretion which it always retains for itself upon the subject of costs, to make some modification of the strict rule, that the defendant is in such a case to pay the costs. But there is nothing whatever in the present case to induce the Court to relax that rule which public policy requires to be observed; and therefore the defendants must pay the costs of the suit.

A decree was made for a general account, with a direction that the defendants should be charged with the sum of 300*l.*; the defendants to bring in their bills, and the same to be taxed.

The defendants now appealed from this decision.

The plaintiff, in person, supported the decree of the Vice Chancellor.

Mr. Malins and *Mr. Brooksbank*, for the defendants, cited—

Harris v. Tremeneere, 15 Ves. 34.

Cooke v. Lamotte, 15 Beav. 234; s. c.

21 Law J. Rep. (N.S.) Chanc. 371.

Hoghton v. Hoghton, 15 Beav. 278; s. c.

21 Law J. Rep. (N.S.) Chanc. 482.

Re Holmes's Estate, 3 Giff. 337.

Hatch v. Hatch, 9 Ves. 292.

THE LORD CHANCELLOR.—The general principles of the Court have long been established on the ground of public utility. The law treats the relation between solicitor and client in a peculiar manner. It has laid down certain rules and scales of charges by which the services of a solicitor are to be remunerated, and it imposes upon him an obligation not to bargain with his client, while that relation exists, for any additional benefit beyond that legal remuneration. I particularly wish so to express that principle, because at present I say nothing as to a gift made by a client to his solicitor after everything is finished and the relation of solicitor and client is determined. I will take the defendants' case from their own representation. They state in their answer that a bill had been filed against the plaintiff containing many personal charges against him; and that they were the solicitors employed by him to conduct the defence; that the plaintiff, the defendant in that suit, was under considerable anxiety about it, and

said he would give them 300*l.* beyond their regular costs if they should succeed for him. The solicitors ought to have said, we can accept no such thing; yet they not only accepted the promise, but having acted for the plaintiff in the suit and succeeded in obtaining for him a sum of 800*l.*, they retained the 300*l.* so promised out of that sum. That promise was good for nothing. It created no kind of legal right or obligation, and it was the bounden duty of the solicitors not to accept such a promise. Now the bill is filed after a long period of time, which is filled up by transactions in which the relation of solicitor and client continued between the parties; and it has been argued, in the first place, that the lapse of time alone is a sufficient bar to this claim; but I by no means think that time alone would be a bar; and, in the next place, I am told that there has been recognition on the part of the plaintiff; but recognition will not make valid a promise which was originally absolutely void, and I am bound to relieve the policy of the law from any such imputation; but, even if this were so, I find no evidence of any such recognition beyond the fact, that in the accounts between them the plaintiff had not debited the defendants with this amount, nor was it necessary for him to do any such thing in order to throw the onus of proof upon the defendants. I am willing to take it for granted that the demand is a most ungracious one. There can be no doubt the defendants had conferred great services upon the plaintiff, as he has acknowledged; but I am not going to return him this 300*l.* on account of his own merit, but because I must uphold the general rule founded on considerations of public policy, that a solicitor must not be a party to an engagement of this description. I have been pressed to relieve the defendants from the costs of this suit, but it is impossible I can do so, because it was their bounden duty to know that they ought not to permit such a promise to be made, nor to retain the money in pursuance of it. The Vice Chancellor has taken a correct view of the case, and the petition of re-hearing must be dismissed, with costs.

STUART, V.C. }
Dec. 16, 17, 18. }
LORDS JUSTICES. } WARNER v. SMITH.
Feb. 24. }

Partnership—Different Firms entering into a Particular Adventure—Division of Profits.

A, carrying on business by himself, joined with B. and C, carrying on business under the style of "B. & C." in an adventure of a wholly different description from the usual business of "B. & C."—Held, by one of the Vice Chancellors, that the existence of the partnership between B. and C. did not in itself afford any ground for inferring that the profits of the adventure were to be shared otherwise than if B. and C. had been separate traders; and that, in the absence of evidence of agreement to any other effect, the profits must be divided in equal third parts between A, B, and C.

The adventure in question was for the supply of small-arms to a foreign government; and the arrangement to tender for the supply was verbally come to without any distinct agreement respecting the division of the profits. In the contracts for supply subsequently entered into with the representative of the foreign government A. signed separately, and B. and C. were made parties by the name of their firm, and signed in that character:—Held, by the Lords Justices, on appeal, that the proper inference from the form and mode of execution of the contracts was that the adventure was undertaken by B. & C. as a firm, i. e. as one person, conjointly with A. as another person, and consequently that the profits ought to be divided in moieties, one to A. and the other to B. & C, and they decreed accordingly.

The bill contained allegations to the following effect: The plaintiff carried on business as a merchant and commission agent in Threadneedle Street, London, under the style of "Arthur Warner," and the defendants John Harrison Smith and Frederic Gregory carried on business in co-partnership as ship and insurance brokers and otherwise, in Gracechurch Street, Lon-

don, under the style or firm of "Messrs. Smith & Gregory."

In November 1859, the defendant Smith called on the plaintiff and stated to him that the defendants' firm had been applied to in order to make a tender for the supply of 20,000 stand of arms for the Piedmontese army, and asked whether the plaintiff could take the matter up, as he said it was quite out of the defendants' way of business. The plaintiff agreed to entertain the proposal, and "it was then verbally agreed between the plaintiff and the defendant J. H. Smith, acting on behalf of his said firm, that if the business were done the profits should be divided between the plaintiff and the defendants' firm in equal moieties, the plaintiff taking one moiety thereof."

Accordingly, by a contract dated on the 6th of December 1859, the plaintiff and the defendants entered into an agreement with Messrs. Delarue & Co., bankers, of Genoa, for the supply to Messrs. Delarue & Co. of 20,000 stand of arms of various descriptions for the Piedmontese army, for the sum of 53,000*l*. The contract was drawn up and signed at Paris, and was in the French language, and was made between, 1, Messrs. Smith & Gregory and Arthur Warner of the one part; 2, M. Achille Ambroise, merchant, 12, Rue de Menars, Paris, acting as agent and correspondent of Messrs. Smith & Gregory and Arthur Warner, of the other part; 3, and M. Camille Heurtier, merchant, of 44, Rue de Marais St. Martin, Paris, acting in the name of Messrs. Delarue & Co., also of the other part; and it was signed as follows:

Smith & Gregory,
Arthur Warner,
Achille Ambroise.
Camille Heurtier,

(Special Mandataire of Delarue & Co.)

The contract was signed by Ambroise merely as agent for the plaintiff and Messrs. Smith & Gregory, and he had no interest in it; but he was to share in a certain commission of 6,000*l*. on the contract, which the plaintiff and the defendants agreed to allow to Camille Heurtier.

The agreement by which it was stipulated that Camille Heurtier should receive

such commission was dated on the 6th of December 1859, and was signed—

Smith & Gregory,
Arthur Warner,
Ach. Ambroise.

The contract was carried into effect by means of sub-contracts entered into by the plaintiff and the defendants jointly, on behalf of the plaintiff and the defendants' firm, with certain manufacturers by whom the arms were made and supplied.

These sub-contracts were all in writing, and were made by letter. The proposals were made by the sub-contractors, and were accepted by the plaintiff and the defendants. The letters of proposal were uniformly addressed by the sub-contractors to "Messrs. Smith, Gregory & Warner," and they were uniformly accepted by letters signed by the plaintiff in his own name and by the defendant John Harrison Smith, in the name and in the behalf of his firm, in the following terms:

Arthur Warner,
Smith & Gregory.

One of such proposals was made by Mr. J. D. Goodman, one of the sub-contractors, to the defendants' firm, and was accepted in the following terms: "We accept the above, and agree to the terms named—

Smith & Gregory,
J. Harrison Smith,

For Arthur Warner.

It was stated in the bill that the defendants alleged that some correspondence between the plaintiff and the defendants and the sub-contractor was signed "Smith, Gregory & Warner;" but the bill charged that in fact the letters so signed were written and sent by the defendant Smith, and were signed by him "Smith & Gregory, for Smith, Gregory and Warner," and that the plaintiff never sanctioned or acquiesced in such form of signature; and if any letters were so signed by or with the privity of the plaintiff, the use of such signature was never intended by him to indicate any equality of interest between him and the defendants.

On the 21st of March 1860, a further contract was entered into by or on behalf of the plaintiff and the defendants Messrs. Smith & Gregory, with M. Malatesta, for providing 1,000 carbines at the price of

3,970*l*. The bill alleged that this contract was entered into on the same terms as the former. It was signed at Paris on the 31st of March 1860, was in the French language, and was expressed to be between, first, Achille Ambroise, acting on behalf of Messrs. Smith & Gregory, merchants, living in London, 17, Gracechurch Street, and Arthur Warner, merchant, living in London, 31, Threadneedle Street; secondly, in the name as agent and correspondent of the two houses above-named and acting for them, of the one part, and M. Malatesta, advocate, living actually in Paris, 23, Rue de Laval, acting in the name and on behalf of the Tuscan Government, of the other part, and it was signed—

Ach. Ambroise,
Baptiste Malatesta.

The contract last-named was approved and confirmed by the plaintiff and the defendants, by two letters dated respectively the 23rd and 31st of March 1860, addressed to M. Malatesta, and signed respectively by the plaintiff in his own name and by the defendant John Harrison Smith, in the name and on behalf of his firm. One of such letters accordingly was signed—

Arthur Warner,
Smith & Gregory,

and the other,

Smith & Gregory,
Arthur Warner.

There was now in the hands of the defendants a considerable sum arising from the profits of the two contracts, and the defendants contended that those profits should be divided into thirds, of which the plaintiff was entitled to one-third only, while the defendants were entitled to the other two-thirds.

The plaintiff charged that it was agreed between himself and the defendants, through the defendant John Harrison Smith, that the profits in the above two contracts should be shared in equal moieties between the plaintiff and the defendants' firm.

The bill prayed that it might be declared that the plaintiff was entitled to one half share of and in the net profits which had arisen from the arms supplied under the said contracts respectively, and for an account.

The defendants by their answer denied that there was any such verbal agreement

as that alleged in the bill respecting the division of the profits of the two contracts. They said that the adventures which were the subjects of those contracts had nothing to do with their usual business, but were quite distinct from it; and that, in entering into them, Smith was not acting on behalf of his firm of Smith & Gregory. No other agreement was come to regarding the contracts, or the division of the profits arising therefrom, than that the plaintiff and the two defendants were to share therein. As a firm, Smith & Gregory had no power under their partnership articles to enter into a speculation such as that which was the subject of the contracts; and they submitted that the plaintiffs and themselves were entitled to the profits of the contracts in equal thirds and not in moieties.

Mr. Malins and *Mr. Druce*, for the plaintiff, contended that the adventures were entered into by the plaintiff and the defendants as two firms, and that the profits were divisible in moieties, and not with reference to the number of persons comprising those firms. Where partnerships in particular adventures were entered into by independent firms, it was the practice among merchants to divide the profits into as many equal parts as there were firms, and that each firm should take one part of such profits.

Mr. Greene and *Mr. Roberts*, for the defendants, contended that the adventures were wholly unconnected with their general business, and that their private partnership was to be disregarded in determining the mode of the distribution of the profits in question.

They referred to

Peacock v. Peacock, 16 Ves. 49.

Webster v. Bray, 7 Hare, 159.

M'Gregor v. Bainbrigg, Ibid. 164, n.

Paine v. Wagner, 12 Sim. 184.

Warrington v. Warrington, 2 Hare, 54.

Stewart v. Forbes, 1 Mac. & G. 137.

Robinson v. Anderson, 20 Beav. 98.

Mr. Druce, in reply.

STUART, V.C. — The plaintiff sues in respect of a partnership between himself and the two defendants Smith and Gregory, the purpose of which was confined to two adventures for the supply of arms.

It is not in dispute that the partnership consisted of those three individuals; and what the Court has to look at in determining the question of the proportion in which they are to share in the profits of those adventures is the contract by which they associated together for the purpose of the adventures. The counsel who argued the case in reply for the plaintiff, very clearly and ably contended that the question does not turn upon the contract formed for sharing in those profits, but upon a contract which was previously entered into for a partnership between the two defendants. It is quite a legitimate thing, no doubt, where the question is in what proportion partners are to share in the profits of a business, if there be no contract in writing, or if there be a contract in writing, for the purpose of even enabling a construction to be put upon it, to refer to the course of dealing and transactions during the conduct of the business. But although these matters may be referred to, still the question must be, what was the contract upon which the association or partnership was formed? In the present case the partnership was formed by parol. There is no doubt about the number of persons concerned, although it has been argued that the contract was between two parties only. It has been contended that because out of the three persons engaged in these joint adventures, two were associated by a contract of partnership in another business, there is to be imported into this partnership the contract for the partnership in the other business, and that the fact that two out of the three were associated in partnership in another business, is to have the effect of reducing the number of participators in the present partnership to two. That is, no doubt, a legitimate mode of reasoning; but if it be shewn that the contract of the three persons in these adventures was upon the footing that all three should participate, all reference to another contract must fail. Lord Eldon, in the case of *Peacock v. Peacock*, held what I must consider to be a sound view in questions of this kind, viz., that if two persons enter into a partnership formed for conducting a business, they must, in the absence of evidence to the contrary, be considered to be entitled to the profits in equal shares. The same law must prevail

in the case of the three individuals. After looking carefully at the evidence in this case, and at the form and language of the documents, including the contracts with Malatesta, and after hearing all that has been said on both sides, I find nothing to justify me in concluding that the plaintiff was to have one-half of the profits. That being so, I must dismiss the bill so far as it prays that the plaintiff may be declared to be entitled to one moiety of the profits, and declare that the plaintiff and the two defendants were associated together as partners, and that each of them is entitled to one-third of the profits.

From this decision the plaintiff appealed, and the appeal was heard on the 24th of February,—

Mr. Druce appearing for the appellant, and *Mr. Greene* and *Mr. Roberts*, for the respondents. The cases cited below were again referred to.

LORD JUSTICE KNIGHT BRUCE, in delivering judgment, said that the question depended upon the construction of two instruments, the originals of both of which were in the French language. The question depended wholly upon the evidence, and did not involve any point of law. Messrs. Smith & Gregory, who were carrying on business in partnership together as merchants in London, were the defendants in the suit, and Mr. Warner, who was carrying on business separately as a merchant, was the plaintiff. In the years 1859 and 1860 certain contracts had been entered into by these parties to supply arms for the use of the Sardinian Government, upon certain terms agreed upon. These contracts were all entered into on behalf of Messrs. Smith & Gregory and of Mr. Warner; all parties acted under them, and they were carried into effect. The contracts proved profitable, and the sole question was, whether the profits which accrued were to be divided into thirds or into moieties; whether, in effect, Smith & Gregory were to be regarded, for the purposes of this particular adventure, as two distinct persons, or as constituting one person only. Upon considering the two French contracts, one of which was the inception of the whole matter, it appeared—and his Lordship thought

that upon the original instrument it so appeared even more strongly than upon the translation—to be the correct inference that Smith & Gregory acted in this speculation as a firm, that is to say, as one person, and that Mr. Warner, the plaintiff, acted as another person. The inference, therefore, to be drawn from that state of things would be, that the profits ought to be divided in equal moieties. But besides the contracts themselves, there was other evidence, and it might be fairly represented that, of that evidence, some portions led to the conclusion of the defendants, whilst other portions might, with equal fairness, be represented as leading to the conclusion of the plaintiff; but his Lordship thought there was nothing to which great weight or importance ought to be attached in any part of the case, except the two French contracts themselves. His Lordship was therefore of opinion that the whole of the evidence, *ultra* the two contracts, might be left out of consideration, and his conclusion was, that upon the two contracts Messrs. Smith & Gregory appeared to have entered into them as one person, and that Mr. Warner entered into them as another person; and the consequence of that view was, that the profits ought to be divided between the plaintiff and the defendants in equal moieties. His Lordship thought, however, that there ought not to be costs on either side, as there were circumstances in the case which rendered it right that each party should bear his own costs.

LORD JUSTICE TURNER, after entering into a minute examination of the evidence in the cause, expressed his entire concurrence.

ROMILLY, M.R. } LECHMERE v. BROTHERIDGE.
May 1, 27. }

Baron and Feme—Real Estate—Separate Use—Alienation.

If freeholds of inheritance be vested in trustees upon trust for a married woman for her separate use, she does not thereby acquire any additional power of disposing of the equitable fee, and cannot do so otherwise than by a deed duly acknowledged under the 3 & 4 Will. 4. c. 74.

Scutls—as respects an estate in lands limited for the separate use of a married

NEW SERIES, 32.—CHANC.

woman during her life: this she may alienate, in equity, by deed unacknowledged.

Adams v. Gamble (1) *dissented from.*

This bill was filed, by Sir Edmund Anthony Harley Lechmere and others, representing the firm of “Lechmere, Lechmere & Isaac,” bankers, at Tewkesbury, praying an account of what was due to them on a security they had taken from Ambrose Day Brotheridge and Ann his wife, and that the property therein comprised, or such part as might be necessary, might be sold, and that they might be paid what was due to them out of the proceeds.

It further asked that the trustees of the estate might join in the sale, and execute such conveyances as might be necessary to vest the legal estate in the purchaser during the joint lives of Mr. Brotheridge and his wife, and the life of the survivor of them. It also asked for a receiver in the mean time.

John Packer, by his will, dated the 30th of September 1854, devised to George Packer, Thomas Weaver and George Watson, as trustees, their heirs and assigns, all his messuages and lands in the parish of Ashchurch, in the county of Gloucester, in trust, to permit Ann Brotheridge to occupy and enjoy or receive the rents and profits thereof during her life, for her sole and separate use and benefit, free from and independent of the debts, control and engagements of her husband. And after her decease, upon trust to permit and suffer Ambrose Day Brotheridge to receive the rents and profits thereof during his life. And after the decease of the survivor to stand seised of the hereditaments upon trust for the children of Mr. and Mrs. Brotheridge who should be living at the death of the survivor of them, and the issue of any of them who might be then dead leaving issue as tenants in common in fee, *per stirpes*. And the testator gave the residue of his real and personal estate unto and to the use of the said George Packer, Thomas Weaver and George Watson, their heirs, executors, administrators and assigns, upon trust to pay life annuities to several persons (one of which was an annuity of 10*l.* a year to Ann Brotheridge) during the life of G. Packer and

(1) 12 Irish Chanc. Rep. 102.

Ann his wife and the life of the survivor of them, if the annuitants should respectively so long live, and subject thereto upon certain trusts during the life of the defendant G. Packer and Ann his wife and the survivor of them, and after the decease of the survivor upon trust as to all the residue (*except two messuages in Barton Street, Tewkesbury,*) for Thomas Packer, Charles Matthias Packer and Ann Brotheridge, their heirs, executors, administrators and assigns, in equal shares; but if either of them should then have departed this life without leaving issue, the testator directed that his or her share should go to the survivor or survivors of them; and if either should then have departed this life, leaving issue, such issue should take the share whether original or accruing of the deceased parent, with benefit of survivorship between them, if more than one, in case of the decease of either under the age of twenty-one; and if all such issue should die under twenty-one, their share of the trust estate was to go and be paid to the survivors and survivor of them, the said T. Packer, C. M. Packer and the defendant Ann Brotheridge; or if they should all have departed this life, then to the heirs, executors, administrators or assigns of the survivor. And the testator directed that the share of the defendant Ann Brotheridge in his trust estate *should be for her separate use.*

The testator died on the 26th of September 1855.

By an indenture dated the 17th of December 1856, after reciting that the defendant A. D. Brotheridge had for some time past kept a banking account with Messrs. Lechmere, Lechmere & Isaac, and was then indebted to them on such account, it was witnessed that A. D. Brotheridge and Ann his wife granted and assigned, firstly, all the Ashchurch estate devised by the said will of J. Packer; secondly, all that annuity or yearly sum of 10*l.* to which Ann Brotheridge was entitled; and, thirdly, all that the undivided third part or share and all other the part or share whether vested or contingent of Ann Brotheridge or of A. D. Brotheridge, in her right of and in the entire residue of the real and personal estate and effects of the said J. Packer deceased (other than the two houses in Barton Street, Tewkesbury) so devised to the defendants,

the trustees of the will of the said J. Packer, upon the trusts as aforesaid, and all other the interest of Mr. and Mrs. Brotheridge, and each of them, under the said will, to Sir E. A. H. Lechmere and J. W. Isaac, their heirs, executors, administrators and assigns, upon trust that they of their or his own proper authority, without any further consent or concurrence of Mr. and Mrs. Brotheridge, their heirs, executors, administrators or assigns should sell and dispose of the hereditaments, annuity and premises, or any of them, or any part of the same respectively, by public auction or private contract, and convey the same, when sold, to the purchaser or purchasers thereof; and out of the rents and income of the premises thereby assured, and the annuity and also the money which should arise from such sale or sales respectively, after paying the costs, charges and expenses of the sale and the money disbursed for taxes and repairs of the premises, or the insurance of the buildings from damage by fire, or in any suit at law or in equity for obtaining possession of the premises respectively, or any of them, or in enforcing the performance of any contract to purchase, or otherwise in execution of the trust thereinbefore contained; should retain or pay unto the said plaintiffs, Sir E. A. H. Lechmere and J. W. Isaac, or other the person or persons for the time being constituting the firm or their or his assigns, all sums of money then due from A. D. Brotheridge, on the balance of his account, either for money already paid or advanced, or thereafter to be paid or advanced by them to A. D. Brotheridge, or at his request, with interest from the several times at which they should be advanced, after the rate of 5*l.* per cent. per annum, unless any agreement should have been made to the contrary; and in case of such agreement, then in the manner and after the rate of interest stipulated, with commission and other usual bankers' charges, but not exceeding 1,000*l.* (exclusive of any sums paid for the insurance of the said buildings); and upon trust, after full payment of all and every the sum and sums of money, interest, bankers' charges, costs, damages and expenses aforesaid, to pay the residue of the money and to convey the remainder of the estates unto A. D. Brotheridge and Ann Brotheridge, or the survivor of them, his

or her heirs, executors, administrators or assigns. The deed also provided that no sale should be made of the estates until two months after notice demanding payment of what was due.

The bankers were desirous of selling the annuity of 10*l.* per annum and also the Ashchurch estate for the joint lives of Mr. and Mrs. Brotheridge, and the life of the survivor: all the other property being reversionary.

The legal estate in the Ashchurch estate was vested in Messrs. Packer, Weaver and Watson; but Mr. and Mrs. Brotheridge were in possession, and the trustees refused either to convey the legal estate or to do any act to secure either the rents and profits or the annuity to a purchaser.

Upon the plaintiffs filing this bill, Mrs. Brotheridge put in a voluntary answer, in which she said that she was told that the deed was only to affect "The Spa" estate, and was to secure 1,000*l.* to the bank, but that she had no idea that the whole of the property given to her by her uncle was included, and that the indenture was not and never had been acknowledged by her in pursuance of the 3 & 4 Will. 4. c. 74, and that her husband had said to her that unless she consented to sign he should leave the country, and she must support herself and the children, and that it was solely upon that threat that she signed.

The evidence established the fact, that the deed was read to Mrs. Brotheridge, that she was under no pressure, that she well knew what she was doing, and that she had refused to extend the security, though double the money for which it was given was due to the plaintiffs from her husband, and alleged as a reason that the bankers had got every thing, but she refused to understand that it was limited to 1,000*l.*

The cause was brought on upon a motion for a decree.

Mr. Selwyn and *Mr. Wickens*, for the plaintiffs. — The real estate, of which a married woman is seised to herself and her heirs, can only be charged or disposed of by a deed acknowledged by her, with the concurrence of her husband, under the 3 & 4 Will. 4. c. 74. But this act left all property, whether real or personal, which was given to her for her separate use, and whether it was vested in trustees or not,

unaffected: as to such property she was a *feme sole*; and in the absence of any restraint, by way of anticipation, she could deal with it in any way and for any purpose she might think fit. The ability, therefore, to charge or sell was incidental to her position as sole unlimited owner; it was not within the 3 & 4 Will. 4. c. 74. ss. 77, 78: it was a power vested in her, independent of the act. In this Court it was her recognized separate estate, and by its rules it was protected from the interference of her husband; but if the deed by which she dealt with the plaintiffs required an acknowledgment, then her husband's concurrence was requisite, and his marital influence would intervene between her and the rights reserved to her by this Court. It would be admitted that she could deal with her personal property and with the life interest in the real property; and if this could be done, it must be admitted that she could also deal with her reversion in the real estates which were vested in trustees for her separate use —

Atchison v. Le Mann, 23 Law Times, 302.

Minot v. Eaton, 4 Law J. Rep. Chanc. 134.

Adams v. Gamble, 12 Irish Chanc. Rep. 102.

Bentley v. Mackay, 31 Beav. 143; s. c. 31 Law J. Rep. (N.s.) Chanc. 697.

Harris v. Mott, 14 Beav. 169.

Mr. F. C. Millar, for the trustees.

Mr. W. Forster, for Ann Brotheridge. —

The deed was executed under pressure and influence created by a fear of the future of herself and family, and in the absence of any advice. As a married woman, however, she could still fall back upon the protection afforded by law, which restrained her from charging or alienating real estate of which she was seised in fee without her acknowledgment of the deed. The words "separate estate" were improperly applied to real estate: they were applicable alone to personal estate; they were inapplicable also to a life interest in real estate. If these words were to be applied to real estate, a married woman would be in a worse position than if real estate was given to her absolutely, instead of being given, either to herself or to trustees, for her separate use, since, by an inverted construction of this Court,

she would be deprived of the protection of the 3 & 4 Will. 4. c. 74, and she would be left under the influence of her husband, without the protection either of the common law or the statute. A Court of equity had never gone so far; it had never contemplated the removal of all protection from the wife, by leaving her to deal with her real estates as if she were a *feme sole*. If such a construction were to prevail, it would deprive her of the benefit of the statute, and her other common-law rights. Before the 3 & 4 Will. 4. c. 74. a fine of some sort, adapted to the estate to which the wife was entitled, would have been necessary to pass her estate or interest; but whatever the tenure of the lands may be (except copyholds) a married woman can only dispose of them by deed acknowledged; and the same form is required to extinguish any interest in land. It was by adopting these forms, with the concurrence of the husband, that she could act as a *feme sole*. A special examination was made necessary before a married woman could surrender her equitable interest in copyholds; it could, therefore, scarcely be assumed, that her equitable estate in lands of other tenures was not contemplated. Sections 90. 80. of the act clearly applied to separate estate. The husband's concurrence certainly intervened; but this in no way militated against her right of separate enjoyment of her property as a *feme sole*. The general wording of the 3 & 4 Will. 4. c. 74. s. 77. enabled a married woman to deal with any estate in lands; this must include her equitable estate, and apply to her separate estate. In every case, therefore, in which a fine of any sort would have been required at law, there also a deed must be executed and acknowledged, with the concurrence of the husband, if the wife in any way desired to deal with, charge or dispose of her real estate or any interest she may have in it, especially if any succession is to be taken away. This, of course, would not apply to a power authorizing a married woman to appoint an estate or any interest therein; that of itself would regulate the disposition of the property. The authorities, however, had gone so far that it was impossible to say she might not pass her annuity of 10*l.*, and also the rents and profits of the Ashchurch estate, to which she was entitled for life;

but the unacknowledged security relied upon by the plaintiffs could not affect the reversionary estates given to Mrs. Brotheridge by the will of her uncle.—

Peacock v. Monk, 2 Ves. sen. 190.

Anon. cited in 2 Ves. sen. 192.

Harris v. Mott, 14 Beav. 169.

Field v. Moore, 19 Ibid. 176; s. c. 24 Law J. Rep. (n.s.) Chanc. 161; 7 De Gex, M. & G. 691; 25 Law J. Rep. (n.s.) Chanc. 66.

Crofts v. Middleton, 2 Kay & J. 194; s. c. 25 Law J. Rep. (n.s.) Chanc. 513; 8 De Gex, M. & G. 192.

Blachford v. Woolley, *ante*, p. 534.

Sanders on Uses, 380, 384, 5th edit.

Roper's Husband and Wife, vol. 2. p. 182, et seq. 2nd edit.

Wright v. Cadogan, 1 Bro. P.C. 486.

Churchill v. Dibben, 9 Sim. 447, n.

Owens v. Dickinson, Cr. & Ph. 48.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS.—The question in this case is, whether real estate given to the separate use of a married woman can be conveyed by her without an acknowledgment of the deed of disposition under the statute 3 & 4 Will. 4. c. 74. On the first ground of defence, namely, that the mortgage-deed was executed by Mrs. Brotheridge under pressure and without its having been properly explained to her, the evidence shews that the deed was properly explained to her, and although no doubt Mrs. Brotheridge states correctly that a pressure was brought to bear upon her, yet as it is not proved that any part of that pressure proceeded from the plaintiffs, and as no suit has been instituted to cancel the deed, this defence cannot be sustained in this suit. The other point in the case is more difficult. It was argued, on the one side, that the words "she alone" in the 3 & 4 Will. 4. c. 74. s. 77. must extend to all the property of the wife, including her separate estate; that this section was intended merely to substitute the acknowledgment of a married woman for a fine, and that before the act a fine would have been necessary; and, on the other side, it was contended that this estate for the separate use of a married woman, which, though a mere creature of equity, was a recognized and admitted estate, constituted

the woman a *feme sole* as regarded that property to all intents and purposes, and that the right of alienation was necessarily incidental to that estate. The cases of *Adams v. Gamble* and *Atchison v. LeMann* were cited for the purpose of shewing that the statute did not relate or apply to the separate property of the wife. It is undoubtedly true that Courts of equity, which require the consent of a married woman in order to enable a sum of money belonging to her to be paid out of court, to her husband, do not require her consent to be given where the money is settled to her separate use; although it is obvious, morally speaking, that the consent is in fact as necessary in one case as in the other.

Some obscurity is produced by assuming that if the principle applies to one species of property of the wife, it applies to all her property. It is necessary to distinguish between the different species of property, and to consider how the principles to be gathered from the reported decisions affect each of them. I am of opinion, according to all the authorities, and upon principle, that when the wife has an estate for life for her separate use in freehold hereditaments, she can alienate that estate without any acknowledgment under the statute, and that no fine was necessary for that purpose previously to the passing of that act. Both the decided cases and the opinions of text-writers concur in this. I therefore consider that the defendants, the trustees, will be bound to account for the rents of the Ashchurch estate to any person who may become the purchaser thereof under a sale to be made by the plaintiffs. The legal estate is in the trustee; and although it is not their duty to convey the legal estate to a purchaser, it is their duty to give to the purchaser of such life estate of Mrs. Brotheridge exactly the same facilities for taking and receiving the rents of the Ashchurch property, as they would have given to her; the purchaser, in fact, will be exactly in her place, he will be entitled to the same rights, and be subject to the same liabilities.

The next property assigned is the annuity of 10*l.* per annum, given during the joint lives of Mrs. Brotheridge and the survivor of the defendants, G. Packer and his wife. This annuity is not given to the separate use of Mrs. Brotheridge. The mortgage,

therefore, does not bind her reversionary interest in the annuity in the event of her surviving her husband, and the trustees are bound to pay the annuity to a purchaser thereof during the joint lives of Mr. and Mrs. Brotheridge. The annuity, however, will determine on the death of the survivor of Mr. and Mrs. G. Packer before that period.

The third property assigned is the one-third of the testator's residuary real and personal estate, subject to a contingent accruer by the death, without issue, of either or both of the other residuary devisees, before the decease of the survivor of Mr. and Mrs. G. Packer. This is given to the separate use of Mrs. Brotheridge. I will consider it first as regards the real estate, and next as regards the personal estate.

First, in regard to the real estate, the beneficial interest in which is given to Mrs. Brotheridge in fee, for her separate use. It does not appear, for the present purpose, that it is a matter of much, or indeed of any moment, that the interest of Mrs. Brotheridge is reversionary. The question is, whether the words "separate use," as applied to a devise of freehold hereditaments to a married woman in fee simple, have such an effect as to give her a different quality of estate, in the contemplation of equity, as to the manner in which she may alienate the same, from what she would have taken in the same lands if the words "separate use" had been omitted from the devise. I am of opinion that in such a devise the words "separate use" have, as regards the alienation of the inheritance of the property, no such practical effect; that if a married woman had attempted before the statute to dispose of such lands she must have levied a fine, and that since the statute an acknowledgment under the 77th section is equally necessary. I find difficulty in attaching a meaning to the words "separate use" as applicable to the fee simple estate of a married woman: if they are intended to go further than to bar the interest of the husband in the real estate of the wife, which, without such words, he would have taken. The words in other cases are meant to bar the interests of the husband. In the case of a fee simple estate of a married woman that interest consists in the receipt by him of the rents of

the property during their joint lives, and also during his widowhood if they have a child. It seems to be decided, by the case of *Baggett v. Meux* (1), that the addition of the words "without power of anticipation" (which, as applied to the life estate of a married woman in lands, are intelligible and pertinent,) can also be applied to the absolute interests of a married woman in land so as to prevent her from selling or mortgaging the property. If this be correct, then it is obvious that a grant of lands in fee simple to a married woman for her separate use with a restraint against anticipation is merely another way of giving her a life estate for her separate use without power of anticipating the rents; for if she cannot alienate, her interest would be confined to this, except that the words "separate use," according to *Atchison v. Le Mann*, leave the wife at liberty to dispose of the land by will in any way she may think proper, without the concurrence of her husband. It is strange, however, if the power to devise is included, that the power to alienate by deed is not also included: nor is it easy to understand how the restraint upon anticipation can be properly applicable to such an estate, except that the whole doctrine of separate estate and its union with a restraint against anticipation is altogether anomalous. It was also laid down by Lord Justice Turner, in *Atchison v. Le Mann*, that a married woman might dispose by will of lands given to her for her separate use, although the devise or grant to her contained no power for that purpose. This is, undoubtedly, an important decision, and if it were settled law that where property is given absolutely to a married woman, the mere addition of the words "for her separate use" would necessarily imply a power to dispose of it by will, it has a strong bearing on, although it is by no means decisive of, the case before the Court. It was not, however, necessary to decide that point in *Atchison v. Le Mann*, but assuming it to have been so decided the contention here advanced goes far beyond that, for the contention here is not only that she may dispose of the land by will, but that she may do so by sale or grant; not only

without the concurrence of her husband, but without the forms expressly imposed by the statute. In other words, the contention is, that the words "separate use" as regards alienation *inter vivos*, have the following, and no other meaning, viz: "I give my estate to A. and her heirs for ever for her separate use; that is, I do so in order to enable her to dispose of it without any acknowledgment under the statute." I am of opinion that it is not in the power of any testator to avoid the statute by the introduction of such words any more than he could have done if he had expressed his meaning distinctly thus: "I leave Whiteacre to A. and her heirs for ever, and I declare that my intention is, that she may dispose of the same without acknowledgment, under the statute 3 & 4 Will. 4. c. 74." The common law, independently of equity, treats the wife as the separate owner of the land so far as the inheritance in it is concerned. That does not pass to her husband, and the common law provided a mode by which she might dispose of that which was her separate interest in her land in the lifetime of her husband, namely, by fine or recovery, and not otherwise. For this common law conveyance, the statute substitutes a deed acknowledged before a constituted officer. How can a testator or grantor repeal this act, and also stay the operation of the common law by the introduction of the words "separate use"? The effect of these words is this: they apply to and bar the husband from receiving what, without such words, he would have received, viz., the rents of the property during the life of the wife, and during his tenancy by the courtesy, in case he had a child by her; but how can the words "separate use" add anything to what was her own separately and distinctly from her husband? or how can they enable her to dispose of what is her separate property without such words, viz. "the inheritance in the land," and this in a different way from what she could have done before the statute? In other words, I cannot understand how these words can have the magical effect of repealing the express words in the clause of the statute.

Again, a devise of lands to a married woman in fee without any additional words, gives a portion of the usufruct of that land to her husband and leaves the rest in her.

(1) 1 Coll. C.C. 138; s.c. 13 Law J. Rep. (N.S.) Chanc. 228; 1 Ph. 627; 15 Law J. Rep. (N.S.) Chanc. 262.

What is the husband's he can dispose of without her consent, &c., can sell the rents during the joint lives of both, and also during his own life estate by courtesy. But to touch anything beyond that, a conveyance from the wife always has been and still is necessary. It is her separate property by common law, and the mode by which she conveyed it was by fine and recovery before the act; and since the act by deed acknowledged. Now, take the next step, and suppose a devise of the same lands to the married woman in fee, with the words "for her separate use" superadded. Those words are confined to barring the husband's interest in the lands, and giving that interest to the wife; but how can these words alter the estate of the wife in that portion of the property which never went to the husband at any time, and over which he could never have had any control?

The case of *Atchison v. Le Mann* does not govern this question. The only question in that case was, whether the wife had an estate for life with a power of disposing of the inheritance by will, or whether she took an estate in fee simple. The Vice Chancellor Wood and the Court of Appeal both held, that she took an estate for life with a testamentary power, and that she had exercised that power in favour of a person through whom the defendant claimed. The question at present before the Court did not and could not arise in *Atchison v. Le Mann*; in fact, it was principally cited for the dictum of the Lord Justice Turner, to which reference has already been made, but respecting which, as the point does not arise in and cannot influence the decision in the present case, I abstain from expressing any further opinion. In *Adams v. Gamble* it was, however, held that a married woman could dispose of freeholds settled to her separate use as if she were a *feme sole*, without an acknowledgment under the statute. This case came before the full Court in Ireland, by way of appeal from the Lord Chancellor. I have carefully read and considered that case, but am unable to concur with the two learned Judges who dissented from and overruled the decision of the Lord Chancellor of Ireland. If the decision had been unanimous, I should not have ventured to differ from it; but as the

Lord Chancellor on reflection adhered to his previous opinion, the case has not that weight which it would otherwise have possessed. The distinction that the words "separate use" applied only to what the husband would have taken if those words had not been used, does not appear to have been sufficiently presented to the minds of the learned Judges who dissented from the Lord Chancellor. The case of *Baggett v. Meux* was then relied upon; but, as has been already stated, that case only decided that a restraint against anticipation, or rather a prohibition against parting with or disposing of the estate, might be applied to the fee simple estate of a married woman given to her for her separate use. *Major v. Lansley* (2), the other case relied upon in *Adams v. Gamble*, only applied to the alienation of the life estate of a married woman in real estate. The question is certainly one of considerable difficulty, but when I consider the other authorities which bear upon this question, beginning with *Peacock v. Monk*, I must choose between conflicting decisions, and I am of opinion that on principle, and by the preponderance of authority, it is established that before the 3 & 4 Will. 4. c. 74. a fine was necessary to pass the interest of a married woman in that part of her fee simple estate which did not belong to her husband, and that since that statute an acknowledgment, under the 3 & 4 Will. 4. c. 74. s. 77, is necessary for that purpose, notwithstanding that the estate of the wife is given for her separate use. If the fact, that the property is reversionary has any effect upon the case, it only increases the difficulty of giving to the words "separate use" the effect contended for by the plaintiffs. Except for the words "separate use" in the testator's will, the deed of 1856 would merely amount to a covenant by the husband and wife that the wife should make the acknowledgment required by the statute when the estate fell into possession, which would in no respect bind the wife. But, in fact, this leaves the question precisely where it was, and it is still necessary to decide whether, when the words "separate use" are used, the statute is made

(2) 2 Russ. & M. 355; s. c. 9 Law J. Rep. (N.S.) Chanc. 102.

nugatory, and the wife is enabled by deed, without acknowledgment, irrevocably to convey her reversionary fee simple estate. I am of opinion that the words of the 77th clause are applicable to an estate in fee simple of a married woman, though given for her separate use, and therefore that the deed of the 17th of December 1856 did not affect the reversionary fee simple of Mrs. Brotheridge.

As to that portion of the residue given to Mrs. Brotheridge which consists of personalty, the statute has no application; and it has been repeatedly held by the Court of Chancery, and it is the constant practice to allow a married woman to deal with a money legacy given to her absolutely for her separate use as her own, her receipt alone being all that is necessary for the protection of the executors; and her application to the Court to have the money paid to her when and to whom she may direct, is always complied with without any examination or ascertainment of her unbiassed wish. With respect to personal property, no distinction can be made between that which is immediately receivable and that which is reversionary; if the property is hers as a *feme sole*, she may deal with it as a *feme sole*, and sell or incur it as she pleases. The words "separate use" in this case exclude the husband from any portion of the property, whether he survive his wife or not, and accordingly as to all the residuary personalty coming to Mrs. Brotheridge, whether vested or contingent, I am of opinion that it is bound by the deed, and will pass to a purchaser from the plaintiffs, and that the defendants, the trustees, will be the trustees of that share for the benefit of such purchaser and his assigns when the same falls in.

I shall make a declaration as to the rights of the parties as follows: Declare, that under the trust contained in the indenture of the 17th of December 1856, the plaintiffs are entitled to sell the life interest of the defendant Ann Brotheridge in the Ashchurch estate, and also her reversionary interest in the residuary personal estate of the testator, and also the annuity of 10*l.* per annum given by the will of the testator to the defendant Ann Brotheridge during the joint lives of the defendant Ann Brotheridge and the survivor of the defendants

George Packer and his wife. Declare that the deed of the 17th of December 1856 does not affect or convey the interest of the defendant Ann Brotheridge in the residuary estate of the testator so far as the same consists of real estate. The plaintiff's costs must be added to their security, and be paid in the first instance out of the proceeds of the sale. The trustees must undertake to pay over the rents and profits to the person entitled thereto.

LORDS JUSTICES.

June 6.

} *In re* BYRON'S ESTATES.

*Lands Clauses Consolidation Act, 1845—
Purchase by Company — Re-investment —
Costs.*

Where a re-investment of purchase-moneys paid into Court by two railway companies is sought, the costs of the re-investment are to be borne by the two companies in equal shares, and not in proportion to the amount paid in by each company; and this rule will not be departed from except in cases of extreme hardship.

This was an appeal, by the South-Eastern Railway Company, against an order made by Vice Chancellor Stuart. The facts were, that Mr. Thomas Byron was tenant for life of certain estates under a deed of settlement. In 1851 part of the lands were taken by the Regent's Canal Company under their act. In 1854 other parts of the lands were taken by the Caterham Railway Company. The last-named company subsequently merged in the South-Eastern Railway Company. The Canal Company paid into court their purchase-money of 1,853*l.*, which by re-investment in land had been reduced to 1,137*l.* 4*s.* 4*d.* consols. The railway company's purchase-money of 1,108*l.* 2*s.* 6*d.* was also paid into court and invested in 1,206*l.* 15*s.* 3*d.* reduced 3*l.* per cent. The petition of Mr. Byron and his trustees set forth that he had contracted to purchase other lands, to be subjected to the uses of the settlement, for 1,484*l.* 12*s.*, and it prayed that the purchase-money might be raised by sale of the whole of the reduced 3*l.* per cent., and of such part of the consols as would suffice to make up the deficiency, and that the costs of the re-investment and

of the petition might be borne and paid by the two companies rateably and in proportion to the amounts of the purchase-monies taken from that paid in by them respectively. Vice Chancellor Stuart made the order as prayed by the petition, and the South-Eastern Railway Company appealed.

It appeared that the costs were taxed at 191*l.* 14*s.* 8*d.*, which sum was apportioned under the order thus, 147*l.* 13*s.* 10*d.* to the railway company and 44*l.* 0*s.* 10*d.* to the canal company.

Mr. Malins and *Mr. J. T. Humphry* supported the appeal, contending that it had been settled by their Lordships, in the case of *Ex parte the Bishop of London* (1), that under such a state of circumstances the costs should be borne in equal shares by the companies whose monies were to be applied.

Mr. Wickens, for the canal company, while admitting the general rule, argued that, under the exceptional circumstances of the present case, it would operate most hardly upon the Canal Company. The landowner had thought fit, with the assent of his trustees, to take the whole of the railway company's purchase-money and only a small part of that of the Canal Company, instead of taking an equal part from each, in consequence of which the Canal Company would have to bear the whole costs of the second investment, and the railway company be exempt, so that the justice of the Vice Chancellor's order was obvious.

LORD JUSTICE TURNER.—In my opinion the rule laid down by this Court in *Ex parte the Bishop of London*, that the costs of a re-investment of monies paid in by different companies should be borne by those companies in equal shares, and should not be apportioned rateably to their amounts, was a beneficial and on the whole a just rule, which should not be disturbed; and although it might in some instances work hardship, yet here the hardship is not of an extreme character, and I think the order ought to be varied in accordance with the general rule.

LORD JUSTICE KNIGHT BRUCE.—I am of the same opinion.

(1) 2 De Gex, F. & J. 14; s.c. 29 Law J. Rep. (N.S.) Chanc. 567.

[IN THE HOUSE OF LORDS.]

May 15, 18, { WALSH v. THE SECRETARY OF
19, 21. { STATE FOR INDIA AND AN-
OTHER.

Deed—Covenant in Gross—East India Company—Act of Parliament, Effect of upon a Covenant in a Deed.

By a deed made in 1770, between the East India Company and Robert Lord Clive, after reciting that in 1766 five lacs of rupees, bequeathed to Lord Clive by a former Nabob of Bengal, and in 1767 three lacs of rupees, the gift of the then Nabob of Bengal, had been paid to the East India Company, and cash notes given to Lord Clive for the amount, and that in pursuance of a scheme therein recited for making a provision for officers and privates in the Company's service who might be disabled by age, war or disease, Lord Clive had delivered up the cash notes to be cancelled: it was agreed between Lord Clive and the Company that the eight lacs of rupees should remain in the hands of the Company, and that the Company should allow yearly a sum equivalent to 8*l.* per cent. thereon, and that the Company and their successors should be perpetual trustees, subject to the proviso therein contained, of the said fund of eight lacs of rupees for the due application and appropriation of the interest and produce thereof, for the relief of invalid and superannuated officers and soldiers in their military service, and upon the company ceasing to employ a military force then for the relief of invalid and superannuated officers and seamen in their marine service; and the deed contained a covenant by the Company for repayment to Lord Clive, his executors, administrators or assigns, of the full sum of five lacs of rupees, subject to a due proportion of existing charges, in case it should happen that the Company should cease to employ a military force in their actual pay and service, and also ships for carrying on their trade. In 1834 the Company ceased to employ ships for carrying on their trade. In 1858 the property (except only the capital stock), liabilities and military forces of the Company were transferred to the Crown:—Held (reversing the decision of the Master of the Rolls), that the covenant was not to be regarded as a stipulation for the restoration of a trust fund, but as a covenant in gross, and that upon the true con-

struction of the 21 & 22 Vict. c. 106. (the act transferring to the Crown the property and liabilities of the Company) five lacs of rupees were payable by the Secretary of State for India to the representative of Lord Clive, subject to the existing charges properly attributable to and payable out of the interest thereof.

This was an appeal from a decree made by the Master of the Rolls (1), the material question raised by the appeal being whether the respondent, the Secretary of State for India, was bound, as succeeding to the liabilities of the East India Company, to pay to the executor of the first Lord Clive the sum of five lacs of sicca rupees, which the Company undertook to pay to Lord Clive whenever they should cease to employ ships and to have a military force in their actual pay and service.

The appellant was the legal personal representative of Lord Clive.

By an indenture, dated the 6th of April 1770, and made between the United Company of Merchants of England trading to the East Indies, of the one part, and Lord Clive of the other part, after reciting that Meer Mahomed Jaffier Cawn, deceased, late Nabob of the kingdom or province of Bengal, before his death bequeathed unto Lord Clive, out of the monies and effects which the said Nabob had in his possession, the sum of five lacs of rupees; and that Najim al Dowla, the eldest son of the said Meer Jaffier, agreeably to the commands of his father, paid to the late Lord Clive the said five lacs of sicca rupees, of the value of 62,833*l.* 6*s.* 8*d.* sterling, which Lord Clive paid into the East India Company's Treasury at Calcutta, at different times in the year 1766, and that thereupon notes were signed to his Lordship for the same five lacs of sicca rupees, carrying interest after the rate of eight per cent. per annum sterling until paid; and reciting that Lord Clive, being zealous for the prosperity of the Company, the security of their territories and territorial revenues in India belonging to them, and their trade and commerce, which greatly depended on the bravery and conduct of their troops, and considering that the

establishment of a provision for such of the officers and private men employed in the Company's service as should be disabled by age, war, or disease contracted during their service, would tend to induce fit persons to enter into the said service, and encourage the bravery of the soldiery employed therein, had proposed to the Court of Directors of the Company to appropriate the interest of the said five lacs of rupees for the support of a certain number of officers, non-commissioned officers and private men in the service of the Company who, from wounds, length of service, or diseases contracted during their service, were unable or unfit to serve any longer, and whose fortunes might be too scanty to afford the officers a decent and the private men a comfortable subsistence in their native country, and also to make some provision for the widows of such officers and private men as should have been entitled to the said bounty, or whose husbands should have lost their lives in the Company's service; and reciting that Syf-al-Dowla, the then Nabob of Bengal aforesaid, had given to the Company the sum of three lacs of rupees as an addition to the above-mentioned fund; and reciting that the said three lacs of rupees had been carried to an account in the Company's Treasury in the month of April 1767, and that the Company's note for the said three lacs of sicca rupees, amounting to the sum of 37,700*l.* sterling, carrying interest after the rate of 8*l.* per cent. per annum, was issued from the Company's Treasury at Calcutta, payable to Lord Clive; and reciting that Lord Clive had also proposed that the said Court of Directors and their successors should be perpetual trustees of the said fund of five lacs of rupees, as well as of the said three lacs of rupees, for the due application and appropriation of the interest and produce thereof, which trust the Court of Directors had consented and agreed to accept; and reciting that it had been agreed by Lord Clive and the Court of Directors that the said eight lacs of rupees should, from the 29th of September 1766, carry interest at the rate of eight per cent. per annum, upon and subject to the several trusts, conditions, agreements and provisos thereafter mentioned; and reciting that Lord Clive, in pursuance of the said agree-

(1) 30 Beav. 312; s. c. 31 Law J. Rep. (N.S.) Chanc. 217.

ment, had delivered up the said cash notes for five lacs and three lacs of rupees to the Court of Directors to be cancelled: it was by the said indenture witnessed, that for the better and more effectual carrying the aforesaid agreement into execution, it was thereby mutually covenanted and agreed between Lord Clive and the Company that the said eight lacs of rupees should remain in the hands or Treasury of the Company, who should every year at their house in Leadenhall Street, London, or in any other house or place where their business should be transacted and carried on, pay and allow the sum of 8,042*l.* 13*s.* 4*d.* sterling, for and in lieu of interest of the said eight lacs of rupees, being after the rate of eight per cent. per annum to such persons, in such proportions and for such purposes as were thereafter mentioned of and concerning the same: and it was further covenanted and agreed between the said parties, that the said Court of Directors of the Company and their successors should be perpetual trustees, subject to the agreements and provisions thereafter contained, of the said fund of eight lacs of rupees, for the due application and appropriation of the interest and produce thereof, from the 29th of September then last past, to and amongst and for the relief and maintenance of European officers and soldiers who should become invalids or superannuated in the Company's service, and of their widows, and also the widows of such officers and soldiers as should die in the Company's service, in the shares, dividends and proportions therein mentioned; and after certain directions with respect to the distribution and management of the fund, and after reciting that the interest due from the Company upon the cash notes thereinbefore mentioned amounted, on the 29th of September then last, to the sum of 24,128*l.*, it was further agreed between the parties thereto, that the sum of 24,128*l.* should remain in the hands of the Company in India, and should be deemed and considered as capital, and should carry interest from the 29th of September then last, at the rate of 8*l.* per cent. per annum, which interest should be from time to time, disposed of and distributed by the Court of Directors of the Company for the time being, in the first place, for discharging all incidental charges and expenses

attending carrying into execution the trust thereby established, and subject thereto unto and amongst such objects of charity belonging to the Company's military service, or the widows or families of such objects as the Court of Directors should in their discretion think fit.

The Company then covenanted with Lord Clive, his executors, administrators and assigns, that in case they should at any time thereafter by any means whatsoever, otherwise than by the fate of war, be dispossessed or deprived of or part with their territorial possessions in Bengal and the revenues arising thereby, so that the Jaghire granted unto and then enjoyed by Lord Clive should, during the term agreed upon between the Company and Lord Clive for the continuation thereof, cease to be paid unto his lordship or his assigns, or in case the Company should at any time before the year of our Lord 1784 cease to employ and maintain in their immediate pay and service a military force in the East Indies, then and in either of the said cases, the said Company should and would forthwith pay unto Lord Clive, his executors, administrators or assigns, at their treasury in Calcutta aforesaid, the full sum of five lacs of sicca rupees to and for his and their own proper use and benefit, but subject nevertheless, with the interest of the aforesaid three lacs of rupees in the proportion the said respective sums bore to each other, to the payment of all such pensions and annuities as should at the time either of the aforesaid contingencies should happen be payable out of or chargeable upon the said trust fund, which said pensions and annuities it was thereby fully understood and agreed should continue to be paid and payable out of the interest of the said eight lacs of rupees, or such part thereof as should be wanting and necessary during the lives of the several persons then entitled thereto:

And it was by the said indenture further agreed upon between the parties thereto, that in case at any time after the commencement of the year 1784 it should so happen that the said Company should have no military force in their actual pay or service in the East Indies, then and in such case the interest and produce of the said trust fund of the said eight lacs of rupees should from thenceforth from time

to time be applied, paid and distributed towards the support, relief and provision of marine officers and seamen who should become invalids or superannuated in the said Company's service, and the widows of such of them as should die in the said service during their respective widowhoods only, in such shares and proportions, manner and form as, in case such event should happen, should be concluded and agreed upon between the Company and Lord Clive or his legal representative or representatives; and lastly, it was thereby agreed that in case it should happen that the Company after the commencement of the year 1784 should cease to employ a military force in their actual pay and service in the East Indies and also ships for carrying on their trade and commerce, then and in such case as soon as the said event should happen the Company should and would pay unto Lord Clive, his executors, administrators or assigns, for his and their own use, at their treasury in Calcutta aforesaid, the full sum of five lacs of sicca rupees, but subject nevertheless, with the interest of the said three lacs of rupees in the proportion the said sums bore to each other, to the payment of all such pensions and annuities for the lives of the persons then entitled thereto only as should at the time such event should happen be payable out of or chargeable upon the said trust fund.

By the 3 & 4 Will. 4. c. 85, which is intitled "An Act for effecting an Arrangement with the East India Company, and for the better Government of His Majesty's Indian Territories till the 30th April, 1854," it was enacted amongst other things, that the said United Company should, with all convenient speed after the 22nd of April 1834, close their commercial business. And in consequence of such enactment, the Company shortly after the 22nd of April 1834, ceased, and they have ever since ceased to employ any ships for carrying on their trade and commerce.

By the 21 & 22 Vict. c. 106, which is intitled "An Act for the better Government of India," all sovereign and territorial rights were taken away from the Company and vested in Her Majesty, and in consequence of such enactment the Company on the 1st of September 1858 ceased, and they have ever since ceased to employ a military force

in their actual pay and service in the East Indies.

The question on this appeal mainly depended upon the construction and effect of the last-mentioned act, some of the most material sections of which are as follows:

By section 39. "All lands and hereditaments, monies, stores, goods, chattels, and other real and personal estate of the said Company, subject to the debts and liabilities affecting the same respectively, and the benefit of all contracts, covenants, and engagements, and all rights to fines, penalties, and forfeitures, and all other emoluments which the said Company shall be seized or possessed of or entitled to at the time of the commencement of this act, except the capital stock of the said Company, and the dividend thereon, shall become vested in Her Majesty, to be applied and disposed of subject to the provisions of this act for the purposes of the government of India."

By section 42. "The dividend on the capital stock of the said Company secured by the act 3 & 4 Will. 4. c. 85, until the redemption thereof, and all the bond, debenture and other debt of the said Company in Great Britain, and all the territorial debt and all other debts of the said company, and all sums of money, costs, charges, and expenses which if this act had not been passed would after the time appointed for the commencement thereof have been payable by the said Company out of the revenues of India, in respect or by reason of any treaties, covenants, contracts, grants, or liabilities then existing, and all expenses, debts, and liabilities which after the commencement of this act shall be lawfully contracted and incurred on account of the government of India, and all payments under this act shall be charged and chargeable upon the revenues of India alone, as the same would have been if this act had not been passed, and such expenses, debts, liabilities, and payments as last aforesaid had been expenses, debts, and liabilities lawfully contracted and incurred by the said Company."

By section 56. "The military and naval forces of the East India Company shall be deemed to be the Indian military and naval forces of Her Majesty, and shall be under the same obligations to serve Her Majesty as they would have been under to serve the said Company, and shall be liable to serve

within the same territorial limits only, for the same terms only, and be entitled to the like pay, pensions, allowances, and privileges, and the like advantages as regards promotion and otherwise, as if they had continued in the service of the said Company; such forces and all persons hereafter enlisting in or entering the same shall continue and be subject to all acts of parliament, laws of the Governor-General of India in council, and articles of war, and all other laws, regulations and provisions relating to the East India Company's military and naval forces respectively as if Her Majesty's Indian military and naval forces respectively had throughout such acts, laws, articles, regulations, and provisions been mentioned or referred to instead of such forces of the said Company, and the pay and expenses of and incident to Her Majesty's Indian military and naval forces shall be defrayed out of the revenues of India."

By section 58. "All persons who at the time of the commencement of this act shall hold any offices, employments, or commissions whatever under the said Company in India, shall thenceforth be deemed to hold such offices, employments, and commissions under Her Majesty, as if they had been appointed under this act, and shall be paid out of the revenues of India, and the transfer of any person to the service of Her Majesty shall be deemed to be a continuance of his previous service, and shall not prejudice any claims to pension or any claims on the various annuity funds of the several presidencies in India which he might have had if this act had not been passed."

By section 67. "All treaties made by the said Company shall be binding on Her Majesty, and all contracts, covenants, liabilities and engagements of the said Company made, incurred, or entered into before the commencement of this act, may be enforced by and against the Secretary of State in Council in like manner and in the same courts as they might have been by and against the said Company if this act had not been passed."

On the 12th of July 1860, the appellant filed his bill, which was afterwards amended, and as amended was against the respondents, Her Majesty's Secretary of State in Council of India and Her Majesty's Attorney General; and prayed that it might be

declared that the estate of Lord Clive was entitled to receive from the Secretary of State five lacs of sicca rupees or the sum of 62,833*l.* 6*s.* 8*d.* sterling, and also five-eighths of the sum of 24,128*l.* with interest thereon from the 1st day of September 1858, subject only to the payment of such pensions as were properly payable out of the income of those sums under the provisions of the deed of the 6th of April 1770; and that the Secretary of State might be ordered to provide and set apart the monies due from him, and that the same might be properly secured for the benefit of Lord Clive's estate, subject only to the trusts of the said deed, and that it might be ascertained what pensions (if any) were properly payable out of the income of the said two sums, and that so much of the monies due from the Secretary of State as was not required to answer pensions might be paid to the appellant from time to time as the same was or might become disengaged.

The cause came on to be heard upon motion for a decree before the Master of the Rolls, who dismissed the bill with costs on the ground that the sums settled by the deed of 1770 were trust funds in the hands of the East India Company at the time when the act of 1858 was passed, and that by the provisions of the act this trust fund, in common with other trust funds held by the Company for the government of India, passed to Her Majesty to be applied to the same purpose.

Sir Hugh Cairns and *Mr. Hobhouse* (*Mr. Bridge* with them), for the appellant, referred to the various acts and charters relating to the East India Company which are contained in *The Law relating to India and the East India Company* (published by Allen & Co., London), to shew the relationship between the Company and its military forces. They then argued that the appellant's contention did not offend against the rules of perpetuity; as to contracts in gross no question of perpetuity could arise, and this was not a contract for the repayment of a specific sum; it was *intra vires* as regarded the East India Company; the act had caused the event contemplated by the deed to happen, upon which the obligation of the covenant with Lord Clive was to arise. This was a case of private contract. The present army could only become objects

of the trust by some express provision in the act, and no such provision was to be found in it. The words at the conclusion of the 58th section merely related to claims upon the superannuation funds of the Presidencies. The words of the 58th section could not be applied to the Clive Fund to the prejudice of the covenant in the deed; the 56th section was a contract by the Crown guaranteeing to its new servants certain advantages merely, and there was nothing to derogate from that positive covenant. The act was never meant to affect private individuals. It could have full effect given to it without doing so. It was for the Company to shew what claims there were upon the funds: if they shewed none it must be assumed that there were none—*Lupton v. White* (2).

The Solicitor General and *Mr. Forsyth* (*Mr. Melvill* with them), for the Secretary of State for India, argued, that the combined effect of the deed and the act of parliament must be looked at. The question was, whether the act brought about the liability under the deed or whether it avoided the question of such liability arising. They contended that this was a public contract, and referred to the 3rd volume of *Mill's British India*, 4th edit., by Wilson, p. 434, *et seq.*, to shew that the contract was considered as a public transaction.

[The LORD CHANCELLOR observed, that what was said by Mill was injurious to the character of Lord Clive and inconsistent with the facts before the House.]

The act of 1833 made the East India Company merely trustees for the Crown of the military forces. The act of 1858 was an answer to any argument that the event had occurred upon which any liability under the covenant arose. It was a reasonable construction of that act that the contract was meant to be transferred to the Crown, and that the Crown should have the benefit and the liability of it. The intention of the act was, that there should be no break, but a continuity and identity of service; the permanence of the force as a force was contemplated—the force present or future. The event contemplated by the deed could not occur so long as the object of the deed remained in force. In deciding in favour of the Secretary of State no violence would be done to the intention of Lord Clive in

the construction of the deed; it was only in the event of there being no military force at all that Lord Clive intended the fund to return to him.

The Attorney General and *Mr. Wickens*, for the Attorney General, said, that the interest of the pensioners and annuitants must be protected in the event of the House deciding in favour of the appellant, and suggested that in such case there should be a provision in the decree for ascertaining who were the persons interested, and for continuing the pensions and annuities during their lives.

Sir Hugh Cairns, in reply.—The deed partakes of a public character as to troops, no further. The recitals in the deed ("trade and commerce," &c.) were an answer to the argument that its provisions were able equally to apply to any military force in India. There was no fund which by a Court of equity would be understood as a trust fund; there was nothing ear-marked. It did not affect the liability on the covenant that the benefit of the deed as the East India Company held it, was transferred to the Crown. The 56th section merely guaranteed to the servants in India, out of the revenues of India, the like pay, advantages, &c., to those previously enjoyed. It was not material from whence they were derived.

The LORD CHANCELLOR.—My Lords, in the year 1770 that great man, the first Lord Clive, formed the design of establishing a pension fund for the relief of such European officers and soldiers in the service of the East India Company as might be disabled whilst in that service, and the widows of those who should fall during their service. He seems to have foreseen that the territorial possessions of the Company would increase, and that they would require at all times European troops for the maintenance of those possessions; and he has accordingly embodied in his deed the principal motive that influenced him and the object that he sought to attain, namely, to induce European officers and men to enter into the service of the East India Company. But he had probably some misgivings about that which the world afterwards saw with

admiration, namely, the power of a few ordinary traders in Leadenhall Street to enlarge, to establish, and to rule, dominions of such vast extent, including so many millions of the human race; accordingly he provided for the possibility of the Company ceasing to employ European officers and soldiers in their military service. He probably calculated that the time was not far distant when the Imperial Government would be required by necessity, or by expediency, to enter itself into the government of the territorial possessions of the East India Company, reducing the East India Company to its original position of a trading corporation.

Now in order to accomplish this end, Lord Clive being possessed of a large sum of five lacs of rupees, which he had lent to the East India Company upon its notes or paper, induced the Nabob of Bengal to advance for a similar purpose a sum of three lacs of rupees,—and the entire sum of eight lacs of rupees, together with some interest thereon, amounting, I think, to 24,000*l.*, was handed over in effect by Lord Clive to the East India Company; and it was so handed over, not for the purpose of being invested, not for the purpose of being appropriated or set apart so far as the principal was concerned, but for the purpose of being blended with the general property and revenues of the East India Company, and upon the terms that the East India Company should be bound to provide and apply an annual sum of money equal to the interest on the three principal sums, namely, the five lacs of rupees, the three lacs of rupees and the arrears of interest, at the rate of eight per cent. (the ordinary current rate of interest in India); and that the annual sum, thus measured by that rate of interest, and thus to be annually paid and provided by the Company, should be applied in furnishing pensions for disabled and retired officers and soldiers, and the widows of those who had fallen, in the manner prescribed by the deed.

Now, the cardinal question on which this case appears to me to turn is, the ascertainment of what is really the trust fund created by this deed. It has been supposed by the Master of the Rolls that the whole of the principal money was to be treated as a trust fund; and throughout his

judgment his Honour appears to have regarded that fund as if it had a substantive independent existence, was capable of being dealt with, had been transferred by a recent act of parliament, and was now in a separate and distinct state of existence and investment, subject to the trusts which his Honour supposed to have been declared or contained in that act of parliament.

I cannot concur in that view of the effect of the deed, or of the transaction which it embodied. There is no trust fund so far as the principal is concerned; the East India Company incurred no obligation to set apart or to keep any portion of its revenue in a distinct form or mode of investment. The only trust fund is the annual interest which the East India Company is bound to provide, and to apply; that is the object of the trust, and upon that and that alone the obligations of the deed attach.

The duration of the trust is upon the face of the deed perfectly clear; it will continue so long as there are objects of that trust. The objects of the trust are equally apparent upon the face of the deed. They are the European officers and soldiers in the service of the Company disabled by age or by the accidents of the service, and the widows of those who died in that service. Therefore, so long as these *cestuis que trust* continue so long has the trust duration.

The next point which is observable in passing, and which follows immediately from—what I take leave, with great respect, to denominate—the original misapprehension upon which the decree now appealed from is founded, is, the position laid down by his Honour that this bill is not to be regarded as if it were an action of covenant brought by the representative of Lord Clive upon the covenant contained in the deed, but is to be treated as if it were in the nature of a suit for the restitution or re-transfer of the trust fund. On the contrary, the suit itself occupies in the eye of a Court of equity the precise position and fills the character which an action at law would if it had been brought upon the covenant. The obligation of the East India Company is not an obligation in the nature of a duty of re-transfer, which may be the subject of a claim for restitution, but it is a common personal contract entered into by the East India Company, not, to pay out of any spe-

cific fund—not, to render back any definite trust security, but, out of its general revenues, if a certain event should happen, to repay to the representative of Lord Clive such a sum of money as should be equal to the full sum of five lacs of rupees, that being the property which had been the subject of the original donation by Lord Clive.

If that be the nature of the case, the question that arises upon the deed is one simple question alone, namely, has the event occurred which gives birth to an action of demand founded upon the covenant?

My Lords, that event is expressed in the covenant in the following way: "If the United Company after the year 1784 should cease to employ a military force in their actual pay and service in the East Indies, and also ships for carrying on their trade and commerce." There are two things here combined. One of them occurred (about which there is no controversy) after the passing of the act of 1833, when the East India Company ceased to be possessed of ships for carrying on their trade and commerce, and ceased to be a trading or commercial company. But the other event did not occur until after the passing of the act of 1858, when they ceased to employ a *military force*, because their troops were taken away from them, and they were disqualified from employing any military force in their actual pay and service in the East Indies.

Now, in the Court below there appears to have been no controversy as to whether the event described in the deed had or had not occurred. There it seems to have been taken for granted or admitted that it had occurred. Before your Lordships at your bar an argument was faintly raised to the effect that the thing contemplated by the deed was a voluntary act of the East India Company, and that the operation of the act of parliament being in the nature of a proceeding by *vis major*, could hardly be regarded as coming within the meaning of the covenant. I apprehend that that is an erroneous position, and that we have no right to limit, in any such form as that suggested by the argument, the natural meaning and effect of the deed. In all probability Lord Clive, the author of the

deed, contemplated the ceasing of the employment of a military force by the East India Company in the very manner in which that has happened, namely, by the intervention of the Home or Imperial Government. But the act of parliament requiring the Company to cease to employ a military force of its own cannot be regarded as anything in the nature of a tort or wrong, and therefore the Company must be considered to have properly, duly and in manner consistent with every obligation, ceased to employ a military force in their actual pay and service.

If, therefore, our attention in this matter were limited entirely to the deed, and bounded only by the consideration of that which is found in the deed, there would, I apprehend, be no question but that the right of action on the covenant would enable Lord Clive's representative, subject to the restrictive words contained in the covenant, to claim and recover from the East India Company the five lacs of rupees.

Now, although the East India Company became, immediately upon the execution of the deed of 1770, absolute proprietors and owners, with no fiduciary obligation, of the money then represented by their paper, and which on the surrender of their paper became blended and mixed with their general funds, yet in the year 1833, in the alteration that was then made in the condition of the Company, as your Lordships are aware, it seemed good to parliament that all the debts and liabilities of the Company should be charged upon the revenues of India. We must, therefore, look at the matter as if this contingent liability, this possibility of a claim embodied in this covenant, came then within the operation of the words of the act of 1833, and if it ever should ripen into a positive demand, it would be a demand which, according to the act of 1833, would be to be satisfied out of the general revenues generally of the East India Company.

In that condition of things the act of 1858 was passed. The manner in which the Master of the Rolls regards this act of parliament I have already adverted to. His Honour having, as it appeared to him, satisfactorily arrived at the conclusion that there was a trust fund, and that the covenant must be regarded as a trust to trans-

fer, addresses himself first to the inquiry whether this act of 1858 has or has not operated as a transfer of that supposed or assumed trust fund. His Honour arrives at the conclusion that the trust fund is transferred.

I have already commented upon that position, which is a necessary consequence of the original erroneous assumption in point of construction of law, and the consequence thereon in point of fact.

His Honour having come to the conclusion, therefore, that the trust fund is transferred to the Secretary of State, and transferred with fiduciary obligations contained in it, next inquires whether upon the face of the act of parliament he finds anything like a continuation of the original trust, or rather (speaking with greater accuracy) the substitution of different *cestuis que trust* or objects under a different denomination for the original objects of the supposed trust; and his Honour's judgment appears to have been founded chiefly on a consideration of two sections, namely, the 56th and the 58th sections.

With regard to the 56th section, it appears to me, with submission, that it is the only part of the act upon which anything like a reasonable argument can be founded by the respondents. The portion of the 56th section upon which I felt for some time the force of the respondents' argument, consisted in the particular word "pensions," "the like pay, pensions, allowances and privileges." The Master of the Rolls regarding the fund as transferred interprets the word "pensions" as comprehending the claims upon the fund, and he therefore arrives at the conclusion that by necessary implication there could be no right to a re-transfer of that assumed trust fund if it be transferred, and transferred *cum onere*, namely, transferred with the liability of a right assigned to the Queen's forces of claiming pensions out of that fund. If your Lordships will forgive the repetition, I would point out to you that the moment you arrive at the conclusion that there is no such trust fund, that there is nothing in the world more than personal liability on the part of the company, that which is contended for by the respondents may be in point of fact conceded without creating any prejudice or difficulty in the way of the

claim of the appellant. Because let me suppose, my Lords, that there was no external thing that could answer this word "pensions" in the 56th section, save those pensions that are described and acknowledged by the trust of the deed of 1770, yet this only would follow, that there was a continuation in favour of the transferred troops of the pensions, to which those troops in their original *status* and character might have been entitled. But the pensions thus continued would be pensions payable by the East India Company, and pensions which the general revenues of the East India Company now transferred to the Secretary of State would be the proper fund to answer and discharge.

If we arrived at this conclusion, and conceded *in omnibus* the argument of the respondents, the question would still remain, How, and in what manner, is the right of Lord Clive under the covenant, arising as it did immediately on the cesser of the employment of troops by the East India Company, affected or taken away by anything contained in this act of parliament? If indeed that claim were a claim of restitution only, and the thing to be reclaimed had been transferred and settled, the argument contained in the judgment of that very learned Judge the Master of the Rolls would have prevailed. But if the subject of the covenant is nothing more than that which is matter of personal liability, and the covenant is to be answered, not out of a specific fund but out of general funds, then the fact that the pensions to be equally answered out of the general fund are themselves continued, will not in the slightest degree prejudice or affect the right of the covenantant to bring that action and prosecute that claim, which is clearly given to him upon the event which has happened, and which there is not a word in this act of parliament, by any species of implication, in the smallest degree to release or prevent the prosecution of.

But I am by no means satisfied that the word "pensions" is to be read as the argument of the respondents would require; namely, the pensions given by the deed of 1770. There might be, and there are, indications of there being many extrinsic things that would answer the word "pensions,"

and satisfy its meaning, without assuming that it was intended to denote those pensions payable under the deed of 1770; and the onus would lie upon the respondent to prove that the state of things was such, that the word "pensions" would have no extrinsic thing to answer or satisfy its meaning, save the "pensions" under the deed of 1770; an onus which the Secretary of State for India has by no means discharged.

Another argument arising upon this 56th section was this, that the word "provisions," which occurs in the latter part of the clause in connexion with those words, namely, "all other laws, regulations and provisions," must be taken to be used here as a word comprehending the deed of 1770, and the provisions thereby made for the officers, soldiers and widows. But, my Lords, it is impossible to give any acceptance to that suggestion; the word "provisions" is clearly intended here to indicate the ordinances, rules, directions,—things *ejusdem generis* with these things, denoted by the words with which it is found in company, namely, things answering to laws and regulations. Your Lordships will observe, also, that the antecedent words are these: not that the forces and the persons hereafter enlisting shall have the benefit of the provisions, but that the forces and persons hereafter enlisting shall continue and be subject to all acts of parliament, laws of the Government of India in Council and articles of war, and all other laws, regulations and provisions relating to the East India Company. The word "provisions," therefore, was clearly not intended here to mean anything in the sense in which we often now use the word "provision," namely, as a material benefit in the form of an allowance of pension or gratuity; but "provisions" is here used in the sense of regulations or rules, in conformity with the meaning of the other words, "laws and regulations."

The argument is rested, in the judgment of his Honour the Master of the Rolls, upon the words of the 58th section. There it is said that the officers, who are transferred from the East India Company, for the purpose of the legacy shall be so transferred without prejudice to any claims to pensions, or any claims on the various

annuity funds of the several Presidencies in India, "which they might have had if this act were not passed." It is impossible to hold that these words are intended of necessity to designate, or do designate, the particular provisions under the deed of 1770, seeing that there are other things that sufficiently answer them; but it is perfectly immaterial whether they do or do not; because, if I had found a positive declaration by the legislature, in clear and definite language, that the transferred troops and their successors in the service should have the full benefit of retiring pensions for themselves and allowances for their widows, and all the other advantages designated by the deed of 1770; yet such positive enactments, unless they were accompanied by an enactment releasing or prohibiting the claim of Lord Clive's representative under the covenant, would not, in my view of the law and of the operation of the act of parliament, in any manner have availed to take away the right of action under that covenant, either directly or indirectly—not directly, certainly, for there is nothing in the act of parliament in the smallest degree abrogating a private right; nor indirectly, because even if those words had been found in the statute, they would not in the smallest degree have interfered with the form in which Lord Clive's representative's claim arises. Nor would they in the smallest degree have created this state of things, namely, the impossibility of answering the enactment without resorting to the fund in question.

My conviction, therefore, is, that this view of the case, which was the view taken in the Court below by his Honour the Master of the Rolls, is a view radically erroneous, and that the error originated through a mistaken assumption that there did exist, both in law and in fact, a separate trust fund, and that that separate trust fund was the subject of the claim made by the bill under the covenant in the deed; that, my Lords, I conceive, is a mistaken view both of the facts and of the law of the case; and it follows of necessity that, consistently with every rule by which these acts of parliament ought to be interpreted, especially the rule that they should in no respect interfere with or prejudice a clear private right or title; unless that private

right or title is taken away *per directum*, the right of the action under the covenant remains unaffected. Upon these grounds I must therefore advise your Lordships to dissent from the view taken by the Master of the Rolls, and to make a declaration in conformity, substantially, with the prayer of the bill.

But then a difficulty arises, and that difficulty arises from the circumstance that the extent and operation of the covenant in the deed are themselves limited and qualified by the insertion of the words that bind the extent of the right of action, and bind the damages to be recovered in that action, and which therefore introduce the necessity of ascertaining how much will remain from time to time by an application to a Court of equity such as that which has been made by this bill; for by the power of a Court of equity alone could that due apportionment be made which would extricate the question from the embarrassment thrown upon it by the words to which I have referred. Now, my Lords, the words are, that these five lacs shall be paid to Lord Clive's representatives, "but subject, nevertheless, with the interest of the said three lacs of rupees, in the proportion the said sums bear to each other, to the payment of all such pensions and annuities for the lives of the persons then entitled thereto only as should, at the time such event should happen, be payable out of, or chargeable upon the trust fund."

It becomes necessary therefore to ascertain the whole number of charges on the aggregate fund, namely, the interest at eight per cent. on the eight lacs of rupees. Then it becomes necessary to apportion out of the body of those pensioners or incumbents that relative part which is properly attributable to the five lacs. Of course this must be done in an equal ratio—what I mean to convey by an "equal ratio" is this, that not only shall the same amount of pensioners in number and value be thrown upon the five lacs as answers the just proportion which the five bear to the eight, but also that in ascertaining the objects to be henceforth attributed for the purposes of this account to the five lacs, a rule shall be found to make those objects—those *onera* equal in point of value to the *onera* that will be left to be answered by the three

lacs. As an illustration of what I mean, let me suppose that there are sixteen pensioners. Then of those sixteen pensioners, if they were all of the same age, it would be easy to take five-eighths and attribute them to the five lacs, leaving the remaining three-eighths to be attributed to the three lacs; but if there is a great number of pensioners of a variety of ages, then they must be classified and an equal proportion, namely, five-eighths of the whole of each class must be attributed to the five lacs, leaving an equal proportion, namely, three-eighths of the whole, to be attributed to the three lacs.

I have endeavoured, as far as it is possible to express it in words, to frame certain suggestions, which I will take the liberty to read to your Lordships, as the rule to be adopted by the Judge at chambers in ascertaining those several proportions, and, if your Lordships approve of it, the course I should recommend you to adopt would be this: not immediately to make part of your final order by your vote now these very words which I will read presently to you, but approving of them generally for the purpose of your present proceeding, to let them be handed to the parties who will respectively make, if they think proper, such observations and suggestions of alterations as they may deem right upon them, which they shall be at liberty to hand in to the Clerk of Parliament, who will communicate with me in the first place, and then, my Lords, with your permission, I will communicate with your Lordships upon those suggestions, and the final order shall then be in that manner ascertained and settled.

With these observations, if your Lordships will forgive me for trespassing so long upon your time, I will read the form in which I would submit that your Lordships' order, subject to what I have said, should be ultimately framed, that it may take the place of the order of dismissal pronounced by the Master of the Rolls:—"Declare that, subject to the payment of such of the annuities and pensions properly and duly granted by the East India Company under the provisions of the deed of the 6th of April 1770 before the passing of the act of 1858, and now subsisting, as shall under the inquiry hereinafter directed

be found to be payable out of the interest of the five lacs of rupees in the deed mentioned, the appellant as representative of Lord Clive is entitled to receive from the respondent the full sum of the five lacs of sicca rupees. Refer it to the Judge in chambers to ascertain what annuities or pensions granted by the East India Company under the deed of April 1770 were in existence at the passing of the act of 1858 and are now subsisting, and to apportion and ascertain such of them as, having regard to the whole amount of the funds applicable under the deed and the whole number of the pensions subsisting at the passing of the act, ought now to be attributed to and paid out of the interest of the said five lacs of rupees."

I will stop here to observe that the words here used, "the whole amount of the funds applicable under the deed," may perhaps lead to a little misapprehension, because your Lordships will find that the covenant in the deed refers only to the five lacs and the three lacs, and therefore I apprehend that the 24,128*l.*, the amount of interest due at the time, is not to be taken into account. It should therefore be "as having regard to the eight lacs of rupees and the whole number of the pensions subsisting at the passing of the act, ought now to be attributed to and paid out of the interest of the said five lacs of rupees, and declare that such part of the five lacs as shall not be required by its interest to keep down the pensions that shall be so apportioned, such interest being computed at eight per cent., and also such parts of the last-mentioned principal funds" (that is, the five lacs) "as shall be from time to time released by the cesser of any pension or pensions, ought to be paid over by the respondent to the appellant, and decree the same accordingly, with liberty to apply to the Court below from time to time in the event of any non-payment, in which case all questions of interest are reserved."

I dare say the parties observe that the possibility of some of the pensions that were apportioned failing between thirty days after the passing of the act of 1858 and the present time is not provided for, and they might possibly claim interest thereon. But I think in a matter of this kind, in which it is impossible to proceed

without an apportionment, your Lordships might not be advised to accede to that description of claim. I therefore mentioned it for the purpose of precluding that description of claim. Further, let the respondent pay to the appellant his costs of suit up to and including the hearing before the Master of the Rolls, and reserve further consideration and subsequent costs.

LORD BROUGHAM.—My Lords, I take the same view of this case entirely which my noble and learned friend has taken, and for the reasons which he has assigned. I had some little doubt at one time upon the different modes of expression used in describing the cesser of employment by the East India Company of their military and naval force. I mean in respect of these two statements of that cesser—the one being that in case it should happen that the said Company after a certain date mentioned "should cease to employ a military force in their actual pay and service in the East Indies, and also ships for carrying on their trade and commerce," and the statement in the other instance being that "in case it shall so happen that the United Company," not "should cease to employ," but "should have no military force in their actual pay or service," then so and so shall happen. But upon further consideration, I rather think that the latter clause, which I have now read, aids the construction to be put upon the former, and that "shall cease to employ a military force" must be taken to mean "shall in any way cease to employ," just in the same way as the former clause said "shall have no military force." I think that aids rather than obscures the construction. My Lords, my noble and learned friend has stated that the parties will be enabled to give in their suggestions,—of course they must understand that it is not any suggestions as to the number or amount of the pensions that they are to be allowed to give in, but a suggestion as to the mode and manner of ascertaining them.

LORD WENSLEYDALE.—My Lords, I agree entirely in the opinion which has been already expressed by my noble and learned friend on the woolsack, and by my noble and learned friend who preceded me, that the decree of the Master of the Rolls should be reversed.

The first question in the case is as to the construction of the deed of the 6th of April 1770, between the East India Company and Lord Clive. I think there is not any proper trust of the sum of five lacs of rupees, 62,833*l.* 6*s.* 8*d.*, with interest at the rate of eight per cent. constituted in the East India Company for the benefit of certain objects who are undoubtedly the European officers and private men employed in the East India Company's military and marine service. But whether there is or is not any proper trust, there is unquestionably a covenant between the Company and Lord Clive suable upon as a covenant to repay the five lacs of sicca rupees and interest; and the principal question, is whether the events have occurred upon which the sum was payable. The event was expressed to be "in case at any time after the commencement of the year 1784 the United Company should cease to employ a military force in their actual pay and service in the East Indies, and ships for carrying on trade and commerce," then as soon as the event should happen the Company covenanted to pay to Lord Clive or his executors for his own use at their Treasury in Calcutta the five lacs, &c., subject to all such pensions and annuities for the lives of the persons then entitled thereto only as should at the time such event should happen be payable out of or chargeable upon the said trust fund according to the true intent and meaning of that deed.

It is perfectly clear to me that the deed reserves a right to pensions and annuities to the then existing pensioners and annuitants only who have been already admitted and received as such, and I think that the section on which so much argument took place at the bar, the 56th section of the act of 1858, (21 & 22 Vict. c. 106.) giving the new military and naval forces of the Crown the pensions and privileges of the old Indian forces of the Company, cannot possibly be construed to alter the terms of the private contract with Lord Clive, and to give a right to claim a part of the fund to be reserved for them. That clause refers, no doubt, to other provisions, if any.

Has the event then arisen upon which the five lacs of rupees, &c., subject to existing charges, was covenanted to be paid? If it has, the balance must be paid over to Lord

Clive's representatives, and they have a right to sue for it.

I think it clear that the event has happened, because since the commencement of the year 1784, and on the passing of the 21 & 22 Vict. c. 106, the East India Company ceased to employ a military force in their actual pay and service in the East Indies, and they had already ceased to employ ships for carrying on their trade and commerce in June 1834.

It was contended that looking at the precise words of the covenant, the cesser must have been intended to be whilst the Company held the government of the East Indies, for the payment of the sum was to be at their Treasury at Calcutta, and that, in its proper sense, ceased to exist at the same time that the event happened. But I have no doubt that the true meaning of the covenant is that the money should be repaid to Lord Clive, subject to existing interests at the time that the then objects of the intended charity, the European army of the Company, should cease to be supplied, and that the place of actual payment was not an essential part of the covenant.

I think, therefore, that the appellant would have now a right to recover against the East India Company if it still possessed its funds, and if so he undoubtedly has against the respondent the Minister for India. The judgment of the Master of the Rolls therefore should be reversed. How much the appellant ought to recover then becomes a question. If the East India Company have kept an account of the number of annuities which they have granted out of the trust fund, and the duration of the lives of the annuitants, there will not be the least difficulty in ascertaining how much ought to be retained to satisfy these annuities, and how much to be paid to the appellant as the annuities drop. But if, as it is suggested, the Company have not kept such an account, there is a serious difficulty to be contended with. If the suit were at law as the number of the annuities was peculiarly within the knowledge of the defendants, the burden of proof would fall upon them, and if they could not satisfy it, and shew present charges on the fund to any given amount, I am much inclined to think that the plaintiff would recover the full amount. But as that is probably too strong

a view of the rights of the appellant, I entirely agree that the case should be disposed of in the manner suggested by the Lord Chancellor.

LORD CHELMSFORD. — My Lords, the questions which have to be determined in this case are—First, whether the event has occurred upon which the five lacs of rupees of which the directors of the East India Company were the trustees under the deed of the 6th of April 1770, is by the covenant contained in that deed to be paid to Lord Clive or his representatives. And, secondly, whether assuming the occurrence of that event the act of the 21 & 22 Vict. c. 106, “for the better government of India,” has deprived the appellant of the right to repayment.

Upon the first question, it is unnecessary to consider the circumstances which led to the creation of what is called the Clive Fund, or the motives which induced Lord Clive to institute it further than they are disclosed by the deed itself. By the recitals in the deed he declares his intention to be “to establish a provision for such of the officers and private men employed in the company’s service as should be disabled by age, war, or disease contracted during their service,” and that this provision was intended to apply exclusively to the Company’s troops appears most clearly from the proviso and covenant for its cesser, in the event of the Company ceasing to employ a military force, “in their actual pay and service.” Have the Company then within the meaning of the covenant ceased to employ such military force? It is unnecessary to consider the bearing upon this question of the 3 & 4 Will. 4. c. 85, because it appears to have been conceded in argument that after that act the East India Company still continued to have troops in their pay and service, and that the employment of a military force by the Company did not terminate until the passing of the 21 & 22 Vict. c. 106. By that act the military and naval forces of the East India Company were converted into the Indian military and naval forces of Her Majesty, and the Company had no longer any military force in their actual pay and service.

The event contemplated by the deed has thus arisen. But it is contended that this event has been brought about by means

entirely different from those which the parties had in view and which are not within the spirit and meaning of the covenant. It is said that the evident intention was, that the five lacs of rupees should be repaid, only, if the Company, retaining the same authority and position which they possessed at the time of the execution of the deed, should by a voluntary act cease to employ a military force, but that it was the act of the 21 & 22 Vict. c. 106. which deprived the Company of all their former authority and powers of government and transferred their military force to the Crown by the will of parliament, and not the voluntary cesser of the employment of that force by the Company.

But the answer to this argument seems to be, that if this were the intention of the parties it has not been expressed. The words of the covenant are plain and without any qualification, “in case it shall happen that the said United Company shall cease to employ a military force in their actual pay and service.” To “cease” does not necessarily import an act of free will. The East India Company have ceased to employ a military force because they have no longer any military force to employ. And the words of the covenant are fully satisfied by the event in whatever manner it has been produced. The question then is, whether the act of parliament which occasioned the event on which the liability under the covenant arises, has also taken away the benefit of it from the representatives of Lord Clive? The Master of the Rolls was of opinion that, according to the construction of the deed of 1770 the five lacs of rupees were a trust fund in the hands of the East India Company; and that according to the plain construction of the 39th section as explained by the rest of the act, and by the general scope and purport of it, this trust fund in common with all other trust funds held by the East India Company for the Government of India passed to Her Majesty to be applied to the same purpose. Now upon this it must be observed, that his Honour’s judgment proceeds altogether upon the foundation of there being a specific trust fund which could be transferred by the act of parliament to the Crown; whereas, as it was rightly stated in argument, there was

no such distinct and separate fund, but a mere charge upon the revenues of India to be applied to the payment of the pensions according to the trusts of the deed, and the amount to be repaid in a certain event; the 39th section of the act, therefore, seems hardly applicable to the case. There is no fund which, under the words "real and personal estate of the Company subject to the debts and liabilities affecting the same," can become vested in Her Majesty. It is to the 42nd section, providing for contracts and covenants existing at the time of the passing of the act, that this question properly belongs. That section enacts, "that all debts of the Company and all sums of money" (to take the most general expressions) "which, if this act had not been passed, would have been payable by the Company out of the revenues of India in respect or by reason of any covenants (*inter alia*) then existing shall be charged and chargeable upon the revenues of India alone."

It was argued for the respondent that, as the act itself produced the event upon which the liability on the covenant arose, it is not the case of a debt or sum of money which, if the act had not passed, would have been payable by the Company; but a liability which arises by the passing of the act. This argument, however ingenious, cannot prevail against the obvious intention of the legislature to keep alive all covenants and contracts and liabilities of the Company upon them, and to make them chargeable upon the revenues of India alone, as the same would have been if the act had not passed.

But it is said that, although the 67th section of the act would have given a remedy for the enforcement of the covenant against the Secretary of State, yet by the provisions of the act the five lacs of rupees cannot now be reclaimed, but must be retained to satisfy pensions in favour of future claimants whose rights are expressly secured to them by the act. By the covenant the repayment of the five lacs of rupees is to be subject "to the payment of all such pensions and annuities for the lives of the persons then entitled thereto only as shall, at the time such event shall happen, be payable out of or chargeable upon the said trust fund," words which prevent the possi-

bility of any future claimants upon the fund.

But it is contended that, by the 56th and 58th sections of the act, the rights of future claimants are reserved. I omit any particular consideration of the 38th section, which was supposed to aid this view, because it seems to me to be clear that the words "the benefit of all contracts, covenants and engagements" in that section merely mean that these contracts, &c. may be enforced by the Crown, as they might have been by the Company if the act had not passed. The parts of the 56th and 58th sections relied upon are, in the 56th section, the words "That the military and naval forces of the East India Company shall be deemed to be the Indian military and naval forces of Her Majesty, and shall be entitled to the like pay, pensions, allowances and privileges, and the like advantages as regards promotion and otherwise as if they had continued in the service of the said Company;" and in the 58th section the words "and the transfer of any person to the service of Her Majesty shall be deemed to be a continuance of his previous service, and shall not prejudice any claims to pension, or any claims on the various annuity funds of the several Presidencies in India which he might have had if this act had not been passed." The word "pensions" in both these sections was a good deal dwelt upon in the course of the argument. On one side it was asserted that there was nothing to which this word could apply, except the Clive Fund. On the other it was said, that there were pension funds in the Company's military service to which the word would be more properly applicable. I am not disposed to lay much stress upon this word, whatever the disputed fact may turn out to be. I have no doubt that the word was introduced not with reference to any particular fund, but as one of several general words intended to continue to the East India Company's Forces when transferred to the service of Her Majesty, all the benefits of whatever description which they previously enjoyed.

The first part of the 56th section applies to the existing military and naval forces of the East India Company, and secures them against any prejudice which might otherwise arise from their change of service.

The latter part relates to persons thereafter enlisting, and makes them subject to the laws, regulations and provisions relating to the East India Company's military and naval forces.

I did not quite follow the argument upon the words "shall be deemed to be the Indian military and naval forces of Her Majesty," and "the transfer of any person to the service of Her Majesty shall be deemed to be a continuance of his previous service, and shall not prejudice any claims to pension." But it seemed to me to be insisted that they, in some manner, perpetuated the right of the Company's troops transferred to the Crown upon the Clive Fund against the express words of the deed of 1770; and, under the 56th section, that persons thereafter enlisting into the Indian Company would also have a claim upon this fund. I think this latter view of the effect of the section was afterwards abandoned, but reliance was still placed upon the word "provisions" as sufficiently pointing to the Clive Fund in case the word "pensions" in the previous part of the section did not apply to it; but looking to the section in which the word "provisions" is found it seems clearly to relate to matters connected with the discipline and regulation of the troops, and, at all events, not to stipulations contained in private deeds and covenants, and besides this word "provisions" is found in that part of the section which applies to persons "thereafter enlisting," who are now admitted not to have any claim upon the Clive Fund, and therefore it is of no importance to ascertain the exact meaning.

The question is whether, allowing as wide a meaning to the general words of the act, as they ought properly to receive, and regarding the manifest intention of the legislature, that the military forces of the East India Company, when transferred to the service of Her Majesty, should be secured in the enjoyment of every benefit and advantage of whatever description which they previously possessed, it can be held, that against the express words of a covenant providing that upon a given event which has occurred a fund shall cease with respect to all, except those who were at the time enjoying the benefit of it; that fund was intended to be perpetuated, and must

now continue to subsist for the satisfaction of future claims, which would never have arisen under the covenant. I think that, looking to the whole scope and object of the act, it cannot be said that the legislature intended to interfere with the rights of the representative of Lord Clive under the deed of 1770, and that the event has occurred upon which he is entitled to the five lacs of rupees, subject to the rights of the existing annuitants and pensioners upon the fund.

Undoubtedly this must give rise to an inquiry attended with some difficulty. It was contended, for the appellant, on the authority of *Lupton v. White*, that as the Company had confounded the five lacs of rupees with their own funds, and applied them together, so as to be undistinguishable, the proper course would be to charge the respondent with the whole of the five lacs of rupees, leaving him to shew what specific pensions were charged upon the Clive Fund, which probably would be wholly out of his power. But the course thus suggested is at variance with the argument of the appellant, that there never has been what was called an ear-marked Clive Fund. For the principle which was sought to be applied in *Lupton v. White* was stated by Lord Eldon to be "that if a man having undertaken to keep the property of another distinct, mixes it with his own, the whole must, both at law and in equity, be taken to be the property of the other until the former puts the subject under such circumstances that it may be distinguished as satisfactorily as it might have been before that unauthorized mixture on his part." The case of the appellant is in part founded upon the fact that there was no undertaking on the part of the Company to keep the five lacs of rupees distinct from their own property, and, therefore, that there was no unauthorized mixture of property upon which the equity contended for could arise.

I agree with my noble and learned friend on the woolsack as to the mode of disposing of this case, and as to the inquiries generally which ought to be directed consequent upon the declaration of the rights of the appellant.

The LORD CHANCELLOR moved, that this decree be reversed, and that, subject to the declarations and directions referred

to the appellant be entitled to the payment of five lacs of rupees, with interest, from the respondent, the Secretary of State for India.

Decree reversed, with declaration and directions.

ROMILLY, M.R.
April 17, 20, 22.
LORDS JUSTICES.
June 9, 10.

JACOMB v. KNIGHT.

Easements—Tenant from Year to Year—Injunction.

A tenant from year to year filed a bill against adjoining tenants holding under the same landlord to restrain the erection of new buildings interfering with the free access of light and air to the premises occupied by him. The landlord thereupon gave the tenant notice to quit, and, at the time of the hearing, only eight months of the tenancy were unexpired:—Held, by the Master of the Rolls, that the slender extent of the plaintiff's interest constituted no sufficient reason for denying him the protection of the Court; and, it appearing that the plaintiff had remonstrated with the defendants previously to the erection of the new buildings, a mandatory injunction was awarded compelling the defendants to pull them down.

Upon appeal, the Lords Justices held, that though the extent of the plaintiff's interest did not necessarily disentitle him to relief, yet it was a material ingredient for consideration; and as it was not clear that the plaintiff had sustained material injury, and as the inconvenience to the defendants of compelling them to pull down their buildings would be far greater than any which the plaintiff could endure if the buildings were allowed to stand and he were left to bring an action for damages, the bill ought to be dismissed without costs, without prejudice to any action the plaintiff might be advised to bring.

This bill was filed, by Frederick William Jacomb, as tenant from year to year of the premises, 27, Buxton Road, Huddersfield, in the county of York, against William Elias Knight, Samuel Hardy and Allen Jackson, and Messrs. Thomas and James Holroyd, who were tenants and sub-lessees

of the adjacent messuage and premises, to restrain the defendants from raising the height of some new buildings over a yard adjacent to the plaintiff's yard, and from permitting the same to remain of their present height, or of any height which would interfere with the free access of light and air to the plaintiff's windows as the same were enjoyed before the erection of the new buildings, and from obstructing or interfering with such access of light and air. The bill also prayed that Messrs. Knight, Hardy and Jackson might be restrained from interfering with the plaintiff's use of a right of way over the yard as the same was enjoyed before its recent obstruction. The bill also asked for damages.

The whole of the premises belonged to the trustees of the will of William Johnson, deceased, and on the 1st of December 1845 they let the messuage and premises, No. 27, Buxton Road, to William Jacomb, the plaintiff's father, as tenant from year to year. The premises so let consisted of a messuage, with a yard and gardens behind the same; there was also a right of footway from the yard and garden across the yard behind the adjacent messuage, into a back street, running at right angles into the Buxton Road.

The plaintiff's father left Huddersfield in 1857; he transferred his interest in the premises to the plaintiff, who had ever since occupied them as his residence, and enjoyed not only the right of way, but also the light and air which had come through the windows for a period of twenty years and upwards before the commencement of the suit without interruption.

The adjoining messuage and premises during the tenancy of the plaintiff and his father, and for twenty years and upwards before the commencement of this suit, had been occupied by other tenants wholly unconnected with the plaintiff or his father.

On the 13th of October 1862 the trustees of the will of W. Johnson demised these adjoining premises to the defendants Knight, Hardy & Jackson, carvers and gilders, for a term of twenty-one years, and they gave them the right of altering the same, and of converting the premises into a shop.

In November 1862 Messrs. Knight, Hardy & Jackson, with the consent of the lessors, began to build on the yard behind the

messuage demised to them, and to raise the wall which separated the plaintiff's yard and garden from their premises, so as to add an additional story to their new building which was to be let as a photographic studio to the Messrs. Holroyd.

The plaintiff remonstrated against the alterations, as interfering not only with the free access of light and air to his windows, but also with his right of way across the yard of the adjacent premises; and on the 16th of December 1862 he filed this bill.

The lessors immediately afterwards served him with a notice to quit, so that his tenancy would expire on the 1st of December 1863.

The claim to the right of way was not distinctly established, but that relating to the light and air to the windows of his house was fully substantiated.

On the 23rd of January the plaintiff applied for an injunction in accordance with the prayer of the bill; it was, however, arranged that the whole case should be disposed of upon a motion for a decree.

Mr. Southgate and Mr. Bagshawe, in support of the claim of the plaintiff, cited

Bower v. Hill, 1 Bing. N.C. 549; s. c. 1 Sc. 526; 4 Law J. Rep. (N.S.) C.P. 153.

Moore v. Rawson, 3 B. & C. 332, 339; s. c. 3 Law J. Rep. K.B. 32; 5 Dowl. & Ry. 234.

Mr. Selwyn and Mr. G. L. Russell, for the defendants. — It is not every trivial right that entitles a plaintiff to ask relief in this Court; the plaintiff was only tenant from year to year. No permanent right of way had been granted. If any way had been used, it was permissive only; his right of enjoyment of the light and air coming to the windows of the premises was confined within the agreement to let; it could confer no legal or permanent right to an easement. He was bound by the acts of his landlord, who saw no reason for interfering with the work which was being done on the adjoining premises; if any was done, the Court could award the plaintiff damages. The plaintiff was not entitled to the decree asked for.

The Attorney General v. Nichol, 16 Ves. 338; s. c. 3 Mer. 687.

Clayton v. Illingworth, 10 Hare, 451.

Harbidge v. Warwick, 3 Exch. Rep. 552; s. c. 18 Law J. Rep. (N.S.) Exch. 245.

THE MASTER OF THE ROLLS.—If a landlord lets a house with a given number of windows, it follows that he grants the right of light coming into those windows, and during the tenancy it would be impossible to say that the landlord could darken the windows or obscure the light. It is obvious that he can grant the light, and when he demises a house by parol he must be assumed to grant with it all such easements as are usually expressed in the general words inserted in leases. If the right contended for by the defendants is correct, it is not merely the lower windows that might be darkened, but if they were the lessees of all the land adjoining they might raise a wall as high as they pleased on both sides, and erect another house at the end of the garden, and shut up the plaintiff's garden and turn the place into a well. No case will be found in the books to support any such a claim; what the authorities undoubtedly mean is, that when A. is owner of one freehold and B. is owner of another freehold adjoining, and both these are let to one tenant, then during his occupation one of these freeholds cannot acquire the right of easement over the other. The tenant, as he had possession of both, cannot confer any rights upon the one in derogation of the rights of the other; and it is impossible to hold that a person is not entitled to the light coming to his windows or that the owner of adjoining premises can shut it out on every side. In this case the landlords had the power to grant the light when, in 1845, they put the plaintiff's father in possession.

Has the plaintiff then sustained any damage? In consequence of his complaining and filing this bill he has received notice to quit, and it is now said that his interest in the premises is so small—a bare eight months, though it was about twelve months when the bill was filed—that he is not entitled to the relief he asks, and that this Court will not interfere. But this Court cannot take into consideration, when there is an interference with a party's rights, whether it is for a greater or less continuance of time; if so, the injury would have

to be measured by the damage he had sustained by being turned out of a house which he and his father had enjoyed for eighteen years, and which for anything that appears the plaintiff might have enjoyed for eighteen years more without his being interfered with.

It will be necessary to look at the evidence with respect to the damage. In a case like the present no issue can be directed, neither can it be tried here with a jury; at the same time it will be difficult to make any one believe that the raising a wall originally six feet high to twenty feet will not interfere with the light to the premises whatever the aspect of the house may be. My present impression is, that the plaintiff is entitled to relief, that is, since *Rankin v. Huskisson* (1), by mandatory injunction directing the defendants not to permit the nuisance to continue. It is unfortunate that the order, if made, must direct the building to be pulled down for a period of eight months, in order that it should then be rebuilt; if, however, parties will not ask the person whose lights are to be interfered with if he will consent, or accept a compensation, but instead take the law into their own hands, they must take the consequences. As to Messrs. Holroyd, they claim under Messrs. Knight, Hardy & Jackson, and can be in no better position. This Court cannot allow any person to have his rights put an end to at once by parties who say, We choose to do this, and if you will not consent we will turn you out of a house though you have resided there for eighteen years, and as your interest will be so small, it will make any complaint too frivolous for you to expect redress from the Court of Chancery. The Court, however, will give redress, though the rights are small, if they are wantonly interfered with. I will, however, mention the case again on the question of damage after reading the evidence.

THE MASTER OF THE ROLLS.—This case has arisen, no doubt, from the plaintiff's objecting to the defendants making the alterations without consulting him; it has been the cause of his receiving notice to

quit: his interest in the messuage therefore will terminate on the 1st of December next. Still, at whatever period it may terminate, no person can be permitted to interfere with his rights, and no person can do so with impunity, and the Court of Chancery is bound to protect them. Whatever may be the term, I should find it totally impossible to draw the line between a fee simple and the term of a year, or even a few months. To be sure, if it were only a few days, there might be a postponement, and if the right were over, it would be merely a question of the amount of damage which he has sustained; but here there is a period of eight or nine months to continue still, and I am of opinion that the plaintiff is entitled to the injunction which he asks—a mandatory injunction to prevent the obstruction from remaining. I shall give liberty to any of the parties to apply, as it is possible there may be some arrangement by which the matter may be settled.

Mr. Selwyn.—The bill will be dismissed so far as regards the right of way.

THE MASTER OF THE ROLLS.—Yes, with costs; it is but a small portion of the bill, but with respect to the other part, the plaintiff is entitled to the costs of the suit. One set of costs may be set off against the other.

From the above decision the defendants appealed; and the appeal was heard, before the Lords Justices, on the 9th and 10th of June, the same counsel appearing as at the Rolls.

Mr. Selwyn and *Mr. G. L. Russell*, for the appellants, contended that, even assuming any damage had been done to a tenant from year to year who was under notice to quit in December next, but which damage they by no means admitted, still the injury was so minute and of so trivial a nature that the Court ought not to interfere by injunction, but ought to leave the plaintiff to his remedy in an action, and referred to the cases of

The Fishmongers' Company v. the East India Company, 1 Dickens, 163.

The Attorney General v. Nichol, 16 Ves. 338; s. c. 3 Mer. 687.

Elmhurst v. Spencer, 2 Mac. & G. 45.

(1) 4 Sim. 18.

The Mayor, &c. of Liverpool v. the Chorley Waterworks Company, 2 De Gex, M. & G. 852.

Clayton v. Illingworth, 10 Hare, 451.

Back v. Stacy, 2 Russ. 121.

Walter v. Selfe, 4 De Gex & Sm. 315; s. c. 20 Law J. Rep. (N.S.) Chanc. 433.

Statute 25 & 26 Vict. c. 42.

Mr. Southgate and Mr. Bagshawe, for the plaintiff, cited *Simper v. Foley* (2) in support of the proposition that a tenant from year to year was entitled to the protection of the Court by injunction, in defence of his right to the non-interception of light and air.

Mr. G. L. Russell was heard, in reply, contending that the premises in their present deteriorated condition might now be let for a rent much higher than was being paid by the plaintiff for them.

LORD JUSTICE KNIGHT BRUCE.—This is a dispute between two next-door neighbours, and also between landlord and tenant. The defendants have erected upon their side of the boundary a building which is alleged by the plaintiff to interfere prejudicially and wrongfully with the light and air of his house, and the plaintiff has obtained an injunction which renders it necessary that the building should be pulled down. The fact that the injunction in the case is mandatory is not so important as it might sometimes be in other cases, because in the present instance the building had not been completed until after objections to its erection had been taken by the plaintiff. The building was begun in October or November of last year, the objection was taken in the latter part of November, and the bill was filed on the 14th of December. A considerable portion of the work was, in fact, done by the defendants after their knowledge that the plaintiff objected to it, and there only remains the question upon the merits, as to the extent and nature of the plaintiff's interest. When the works were begun he was tenant from year to year, and his interest might have continued for a long period; but soon after these disputes had commenced he received a notice to quit from the defendants, a notice which he was throughout

liable at any time to receive, and which will expire in December next. Beyond December next he has, therefore, no possibility of interest, and it is in respect of that interest that this building is ordered to be taken down. In such a case, considering the nature and extent of the interest (I say it not at all as deciding the question generally, for there are cases in which a tenant under notice to quit may be entitled to immediate protection, but it is a circumstance which cannot be disregarded), especially when the balance of inconvenience on the one side and the other is also considered (and this is a consideration of which the Court never loses sight in injunction cases), there is not, in my judgment, any plain case which would render an injunction necessary, especially as the plaintiff can recover compensation in damages. As I have said during the discussion, the nuisance might be of such a nature as to interfere with health and comfort, and to render it the duty of the Court to interpose. But is that the case here? In my opinion it is not. There is much conflicting evidence on each side, and the effect of the whole is to leave considerable doubt upon my mind whether any substantial damage has been done, or will be done, to the plaintiff. But if any such damage has been done as would entitle the plaintiff to recover in an action, I am of opinion that, considering the inconvenience on the one side of granting the injunction, and the inconvenience on the other side of not granting it, the consideration in favour of refusing to interfere by injunction greatly preponderates. There may have been damage entitling the plaintiff to recover in an action, but upon the evidence as it stood before the Court, the damage is not serious, is not considerable, and is not likely to become serious or considerable. It appears, on the whole, a case in which the bill should be wholly dismissed, without prejudice to any action which the plaintiff may be advised to bring; and the defendant must undertake to accept service of process for trial at the next Assizes at any time within six days.

LORD JUSTICE TURNER.—The real question is, whether there is such material injury to the plaintiff as will induce the Court to interfere by injunction. I am of

(2) 2 Jo. & H. 555.

opinion that the plaintiff has failed to make out such a case. It is true that the original application started with the allegation that there was such material injury; but my opinion, after reading the last affidavit filed by the plaintiff, being the sixth filed by him in this cause, is, that the case set up is not one which would justify the interference of this Court. It is, no doubt, true that the plaintiff's light and air are slightly diminished by the building which the defendant is raising, but it is not every slight diminution of light and air that the Court ought to be called upon to restrain by an injunction. Some weight must be given to the fact, upon which Mr. Russell has insisted in his reply, that the premises in their present deteriorated condition might now be let for a higher rent than the plaintiff is paying for them at this moment. It is, therefore, improbable that there can be any substantial or material injury by the defendants' proceedings. I think, on the whole, that the bill ought to be dismissed, though without costs.

LORDS JUSTICES. }
June 11. } MOORE v. MOORE.

*Will—Statute 17 & 18 Vict. c. 113.
—Mortgage—Exoneration of Mortgaged Estate.*

A testator gave his residuary personal estate to trustees, upon trust, to sell and convert the same into money, and thereout, in the first place, to pay all his "just debts, funeral and testamentary expenses," and after full payment and satisfaction thereof, to hold the residue upon certain trusts therein declared:—Held, reversing a decision at the Rolls, that this was a sufficient expression of "a contrary or other intention," under Mr. Locke King's Act, to make the personal estate primarily liable for the testator's mortgage debts.

This was an appeal, by the defendants, against a decision of the Master of the Rolls.

The suit of *Moore v. Moore* was instituted, by the next-of-kin of Fielding Moore, deceased, to administer his personal estate. By the decree in July 1861 the usual ac-

counts were directed, and also an inquiry whether the testator's real estate was charged by way of mortgage, and under what circumstances, with the payment of his debts: such inquiry being without prejudice to any question as to the true construction to be put upon his will.

The chief clerk, by his certificate, allowed to the administratrix a sum of 470*l.* 8*s.* 8*d.* which she had paid in satisfaction of a debt due from the testator on an overdrawn banking account: to secure which debt the testator had deposited with his bankers deeds of certain real estate belonging to him; but there was no formal mortgage, nor any memorandum of deposit. The plaintiff objected, that this sum had been improperly allowed out of the personal assets. The question, therefore, was, whether the testator had upon his will manifested a sufficient intention to relieve the real estate from the mortgage debt.

That will was dated the 2nd of November 1860; and after devising a portion of his real estates, and giving to his wife his household furniture and effects, and devising his remaining real estates to her for life, with remainder to other persons, he gave all his ready money, securities for money, and all other his goods, effects and personal estate whatsoever and wheresoever to trustees, upon trust to sell and convert the same into money, and stand possessed thereof, upon trust thereout, in the first place, to pay all his just debts, funeral and testamentary expenses, and the expenses of proving his will, and after full payment and satisfaction thereof to hold the residue upon the trusts thereby declared.

It was contended, by the plaintiff, at the Rolls, that the provisions quoted were not a sufficient expression of "a contrary or other intention," under the act, to exonerate the mortgaged estate from payment of the 470*l.* 8*s.* 8*d.*; and the defendants contended that they were, and that the allowance out of the personal estate was properly made; and his Honour was of that opinion, and made an order in conformity with it. This decision was acquiesced in until after their Lordships' decision in the case of *Eno v. Tatam* (1), upon which the present appeal was brought.

(1) *Ante*, p. 311.

Mr. Baggallay and *Mr. Archibald Smith* supported the appeal, relying on *Ewo v. Tatam*, ubi suprâ.

Mr. W. Pearson admitted that the cases could not be distinguished.

Their LORDSHIPS reversed the decision of the Master of the Rolls, and made a declaration that the personal estate was primarily liable for the payment of the amount due on the mortgage.

LORDS JUSTICES. { LADY MARY ELIZABETH
June 20. { TOPHAM v. THE DUKE
OF PORTLAND.

Practice—Stay of Proceedings pending an Appeal—Costs.

The costs of a motion to stay proceedings under a decree, pending an appeal to the House of Lords, must be paid by the party applying, whether successful or unsuccessful on the appeal.

The hearing of the appeal in this case is fully reported *ante*, p. 257. Under the order then made a sum of 22,710*l.* 18*s.* 8*d.*, 3*l.* per cent. consols, standing in the names of the Duke of Portland, Lord Henry Bentinck, and Lady Harriet Cavendish Bentinck, was directed to be sold, and the produce paid to Lady Mary Elizabeth Topham, and the sum of 3,811*l.* 0*s.* 9*d.* to be paid by Lady Elizabeth Harriet Bentinck to Lady Mary Elizabeth Topham. An application was this day made, on behalf of Lady Harriet Cavendish Bentinck, that proceedings under the above order, so far as they affected the above sums, might be stayed pending an appeal to the House of Lords.

The question in the case was whether certain appointments made in exercise of certain powers created by the late Duke of Portland of appointing certain funds among the late Duke's younger children were invalid, the validity of the appointments being impugned on the ground that they were made in pursuance of a design to influence Lady Mary Elizabeth Topham as to her marriage, and the Lords Justices set aside the appointments as fraudulent and void on the above grounds.

It was arranged that the fund should be brought into court, and the income paid

to Lady Mary Elizabeth Topham, and that proceedings should be stayed.

Mr. G. M. Giffard and *Mr. T. Stevens*, for the motion.

The Solicitor General, Mr. C. Hall and *Mr. Rowcliffe*, for the plaintiff, asked for the costs of the motion.

Mr. Giffard argued that the costs ought to abide the event of the appeal.

Mr. Leach (Registrar), on being consulted by their Lordships, said the rule was, that the party moving paid the costs whatever might be the result of the appeal; and

Their LORDSHIPS so ordered.

STUART, V.C. }
Jan. 20; }
March 21. } SISSON v. GILES.
WESTBURY, L.C. }
July 21, 30. }

Re-conversion—Married Woman.

Land which, from being impressed with an absolute trust for sale, is personal estate in equity, cannot be re-converted into real estate by persons having only a defeasible title to the proceeds of sale. To effect a re-conversion, there must be the concurrence of the absolute owners.

A testator devised and bequeathed real and personal estate to trustees upon the usual trusts for sale and conversion, and directed them to hold the proceeds in trust for A. (a married woman) and B, as tenants in common; and declared that, if either died without leaving issue, the share of the one dying should go to the survivor; and that, if both died without leaving issue, the property should go to the testator's next-of-kin. The testator died in 1839. In 1851 A. and her husband and B. executed a deed (not acknowledged by A.), by which they professed to discharge the trustees from the trusts of the will, without prejudice to their right to require a conveyance of the real estate. The rents of the property were received by A. and B. in moieties until the death of B. B. died in 1858 leaving issue. At B's death A. was still a married woman:—Held, that there had been no re-conversion, and that the real estate had still the character of money, and

was subject to the trusts for sale contained in the will.

Marianne Chilton, by her will, dated the 8th of February 1836, devised all her real estate to John Bramwell and John Kipling, and their heirs, upon trust, as soon as conveniently might be after her death, to sell, convey and dispose of all the said premises thereinbefore devised, either entirely or in parcels, for the best price or prices which could be reasonably had or gotten for the same, either by public auction or private contract. She also gave all her personal estate to the same trustees upon trust to realize the same. She then directed that, out of the funds so arising, the sums of 2,800*l.*, 1,500*l.* and 400*l.* should be raised and applied in manner therein mentioned, and that the residue should be invested. The will then proceeded as follows: "And as to all the residue of the said principal money hereinbefore directed to be placed out at interest which shall remain after, and shall not be applied in or for the raising and paying of the said several sums of 2,800*l.*, 1,500*l.*, and 400*l.*, the same shall be in trust for the said Robert Hall Naylor and Mary Giles, in equal shares, their respective executors, administrators and assigns. Provided always that, if either of them the said Robert Hall Naylor and Mary Giles shall die without leaving any issue, then and in that case the share of such of them so dying of and in the said last-mentioned residuary trust money shall be in trust for the survivor of them, and the executors, administrators and assigns of such survivor. Provided nevertheless, that if both of them the said Robert Hall Naylor and Mary Giles shall die without leaving any issue, then and in that case the said last-mentioned residuary trust money shall be in trust for my next-of-kin." She then declared that, until sale, the rents and profits of the real estate should go in the same manner as the interest of the money to arise by such sales.

Marianne Chilton died in 1839, and her will was proved by Mr. Bramwell and Mr. Kipling. All her funeral and testamentary expenses and debts, and the sums directed by the will to be raised, were paid out of her personal estate.

M. Chilton, at her death, was entitled to some real estate at Fishbourne, in the

county of Durham, and the whole of this property became applicable to the trusts declared of the residue.

At the date of the will and of the deed of 1851, hereinafter stated, Mary Giles was the wife of John Giles.

A deed-poll dated April 9, 1851, was executed by Robert Hall Naylor and John Giles and Mary Giles. The deed recited Miss Chilton's will, and the payments made on account of her estate. It then stated that, by the payments aforesaid, the whole of the personal estate of the said testatrix had been exhausted, and that no part of her said real estate had been sold pursuant to the said will, the same having been retained unsold at the request of the said Robert Hall Naylor and John Giles and Mary his wife, and that they had for many years last past been allowed by the said trustees to occupy the real estate of the said testatrix, or to receive the rents and profits thereof, and generally to manage the same for their own use and benefit. The deed then recited that accounts of the personal estate had been made out and examined by or on behalf of the said Robert Hall Naylor and John Giles and Mary his wife and signed by them. The deed then witnessed that John Giles, Mary Giles, and the said Robert Hall Naylor, released John Bramwell and John Kipling in respect of the personal estate, and of the rents and profits of the real estate of the said testatrix, subject nevertheless, and without prejudice to the right of the said Robert Hall Naylor and John Giles and Mary his wife, and their respective heirs and assigns, to require a conveyance of the said real estate of the said Marianne Chilton, deceased, when and so soon as they or their respective heirs or assigns should be absolutely and indefeasibly entitled to the same. This deed was not acknowledged by Mrs. Giles.

Mr. and Mrs. Giles and Mr. Naylor received the rents of the real estate in moieties until the death of Mr. Naylor.

Mr. Naylor died in September 1858. Mr. Naylor, by his will dated the 15th of September 1856, gave all his personal estate to trustees therein named upon trust to realize the same and invest the money arising therefrom. He then devised all his real estate situated at Fishbourne and elsewhere to the same trustees. The testator then

declared that his trustees should hold the real estate and the said investments on trust for his daughters Mrs. Sisson and Mrs. Kilburn, for their lives, with remainder for their children in manner therein mentioned.

The bill in this suit was filed by Mrs. Sisson and Mrs. Kilburn and the children of Mrs. Sisson, against Mr. and Mrs. Giles and Mr. Bramwell (then the surviving trustee), praying for an account of the real estates to which Miss Chilton was entitled at the time of her death, and that such real estates might be sold, and that the purchase monies might be invested and applied according to the trusts of the will.

Mr. B. L. Chapman, for the plaintiffs.

Mr. Roberts, for Mr. and Mrs. Giles.

Mr. Eddis and *Mr. Nottidge*, for other parties.—Vice Chancellor Stuart held that Mr. and Mrs. Giles had elected to take the real estate as real estate, and that the property had been converted, and dismissed the bill with costs.

This was an appeal from his Honour's decree.

Mr. Malins and *Mr. B. L. Chapman*, for the plaintiffs. — *Mr. Naylor* was clearly at his death entitled to half this property, either in the character of real or personal estate. The persons now entitled to this moiety being tenants for life and two classes of children, it became important to have the question decided whether this property is real or personal estate and to have it realized. On Miss Chilton's death it had of course the character of personal estate. The plaintiffs allege that nothing has been done since that time to change this character. It is for Mr. and Mrs. Giles to shew that such character has been changed.

Mr. Greene and *Mr. Roberts*, for Mr. and Mrs. Giles.—It is admitted that in 1851, the property had the character of personal estate. The effect of the deed of 1851, connected with the events which have subsequently happened, have changed that character. Where it is directed that land shall be sold, and that the purchase-money shall be paid to a married woman, the husband may elect to take the land as land—*Oldham v. Hughes* (1). A married woman has also the power of making such election. There are cases in which the

acts of a married woman have been held to be conclusive as to land—*Ardesioffe v. Bennett* (2) and *Barrow v. Barrow* (3).

[The LORD CHANCELLOR pointed out the clause in the will by which, in the event of both Mr. Giles and Mr. Naylor dying without issue, the land would go to the next-of-kin of the testatrix in the character of personal estate.]

The way in which the case may be put is this: before and at the date of the deed of 1851, the property was absolutely vested in Mrs. Giles and Mr. Naylor as personal estate, subject to the gift over to the next-of-kin of the testatrix in the event mentioned. The deed of 1851 amounted to an election. The effect was, that the property became vested in Mrs. Giles and Mr. Naylor as tenants in common in fee, subject to an executory devise over to the next-of-kin in the same event. The property has been regarded as land from 1851 until 1863. Mr. Naylor in particular has treated it so, and devised it by his will in that character. The plaintiffs claim under Mr. Naylor, and they cannot contravene his acts.

Mr. B. L. Chapman, in reply.—There can be no such thing as a contingent conversion, or a conversion for some purposes and not for others. In order to make out a case of conversion that which had the character of money must become land for all purposes, or cannot become land at all. Mrs. Giles had two interests. Mrs. Giles had half the money subject to a gift over if she should die without issue, and had a contingent interest in the other half if Mr. Naylor should die without issue. Mr. and Mrs. Giles could do nothing with these interests as against Mrs. Giles surviving her husband; and even, if they had any power over these interests, they could not change or affect the contingent gift to the next-of-kin.

The LORD CHANCELLOR (July 30) said, the question was, whether certain real estate directed to be sold retained the character originally impressed upon it by the will, or had been reconverted into real estate. The Vice Chancellor had treated the property as reconverted, but in order to effect

(2) 2 Dickens, 463.

(3) 4 Kay & J. 409; s. c. 27 Law J. Rep. (N.S.) Chanc. 678.

(1) 2 Atk. 452.

a reconversion it was necessary that the parties should be absolutely entitled to it. Without that there could be no reconversion nor any effectual discharge of the trustees. Now, at the time of the execution of the instrument under which the reconversion was supposed to have taken place, the deed-poll of the 9th of April 1851, neither Mr. Naylor nor Mrs. Giles had an indefeasible interest, and Mrs. Giles had a contingent reversionary interest in one moiety of the property which could not be dealt with in any way. It was impossible to hold that the marital right of Mr. Giles extended over that interest. There was not in these parties, at the time of executing the deed, such a dominion over the property as enabled them to reconvert it or to discharge the trustees. The character of personalty, therefore, remained impressed upon the property, and it was still liable to be sold under the trusts of the will.

LORDS JUSTICES. }
March 4. } WATKINS v. WESTON.

Will—Absolute Gift—Separate Use—Gift over.

A testator gave real and personal estate to trustees upon trust to receive the rents of certain leasehold premises, and pay the same to his daughter E. upon her sole receipt, for her separate use, but in case of the death of E. before the expiration of the lease then upon trust to invest and accumulate the rents and profits for the benefit of the children of E. living at her decease. E. died before the expiration of the lease, without children:—Held, affirming a decree of the Master of the Rolls, that E. was absolutely entitled to the leasehold premises.

This was an appeal from a decision of the Master of the Rolls, reported *ante*, p. 396. The appeal was that of Joseph Kay, one of the sons of the testator in the cause, Joseph Kay, who by his will, dated the 23rd of December 1847, made the following disposition:

"I give, devise and bequeath all my real and personal estate whatsoever and where-soever, and of what nature or kind soever, unto Charles Turpin and William Leonard

NEW SERIES, 32.—CHANC.

Watkins, my executors and trustees herein-after named, their heirs, executors, administrators and assigns, upon the trusts, as to leasehold property at Kingston, &c. And as to all that my estate and interest in the three several leasehold houses situate at Bolingbroke Row, Walworth, in the county of Surrey, &c., upon trust to receive the rents and profits thereof subject to the payment of the rent and performance of the covenants contained in the lease under which I hold the same, and to pay the same to and for the sole and separate use and benefit of my said daughter Emma, now the wife of Thomas Wheeler; and I hereby declare that the same shall not be subject or liable to the debts, order, control or management of her present or any future husband, and that her receipts alone shall be sufficient discharges to my executors for the same; but in case my said daughter shall depart this life before the expiration of the lease under which I hold the said premises, then upon trust to invest such rents and profits in the public securities of Great Britain, and to allow the same to accumulate for the benefit of all and every the child and children of my said daughter who shall be living at her decease, the same to become payable to them upon their attaining their respective ages of twenty-one years, share and share alike."

There was a bequest of the residue in the following terms: "I give, devise and bequeath the same unto and equally between all and every of my said sons Joseph and Edwin, and my said daughter Emma, or such of them who shall be living at the time of my decease, and attain their ages of twenty-one years. And I do hereby declare that in case either of my said sons and daughter shall depart this life previously to my decease, or without leaving a child or children then surviving, the share or shares of such of them so dying shall be equally divided between and amongst the survivor or survivors of them my said sons and daughter, share and share alike."

The testator's daughter Emma, who, at the date of the will, was the wife of Thomas Wheeler, survived her first husband, and afterwards married one John Weston, but she died without issue. Her husband, John Weston, was also dead, and his executors were made parties to the suit; as they con-

tended that the gift to Emma Wheeler gave her the leasehold houses absolutely, and that their testator was now entitled to them. Joseph Kay was living and had children. Edwin Kay was also living, and had children also, but he had become bankrupt, and his assignees were before the Court. It was the contention of these parties that the gift to Emma Wheeler only conferred on her a life-interest. They claimed to be entitled to the leaseholds in question under the residuary gift.

The Master of the Rolls, as reported *ante*, p. 396, decided that Emma was absolutely entitled; and Joseph Kay appealed; but the assignees of Edwin Kay did not.

Mr. Baggallay and *Mr. Nalder*, for the appellant, cited *Gompertz v. Gompertz* (1).

Mr. Selwyn and *Mr. Kay*, in support of the decree, in addition to the cases referred to at the Rolls, cited

Eaton v. Barker, 2 Coll. C.C. 124.

Mytton v. Boodle, 6 Sim. 457.

Bentley v. Meech, 25 Beav. 197.

Mr. Druce appeared for the trustees of the will.

Mr. Cotton, for the assignees of Edwin Kay, who had not appealed, was not allowed to be heard.

LORD JUSTICE KNIGHT BRUCE said he concurred with the Master of the Rolls in the construction which he had put upon this will. His Lordship was of opinion that, according to its true construction, an absolute interest was given to the daughter Emma Wheeler, which was only subject to be cut down upon the happening of an event which never did happen. As that event did not happen, the absolute interest remained in her. An argument which was not without plausibility against her taking an absolute interest was founded upon the trust for her separate use. But that argument appeared to his Lordship to be one more of form than of substance, especially as the will contained similar gifts to the sons, with similar gifts over to their children in the same terms as the gift to the daughter, omitting only the trust for separate use. His Lordship thought, therefore, that as the daughter had survived the testator, and

then died without ever having had a child, the leasehold interest remained her own absolutely. The construction placed upon the will by his Honour must be upheld. The deposit would be returned to the appellant, and there would be no costs of the appeal.

LORD JUSTICE TURNER said, although he had felt some doubt as to the construction of this will, he was satisfied with the judgments of his learned Brother and the Master of the Rolls.

ROMILLY, M.R. }

April 18;

May 4, 23. }

FLOYER v. BANKES.

Income Tax—Succession Duty—Jointure Rentcharge.

By a marriage settlement, made in 1810, certain hereditaments were limited to the use that the intended wife might, upon the decease of her husband, receive a jointure rentcharge in lieu and bar of dower, thirds, and freebench; and the rentcharge was to be payable without any deduction in respect of any taxes already imposed, or thereafter to be imposed, upon the hereditaments, or the yearly rentcharge, or the intended wife in respect thereof:—Held, that assuming the terms of the deed to amount to an express provision that the jointure should be paid free of income tax (which it would seem they did), still the income tax must be paid by the jointress, the 103rd section of the 5 & 6 Vict. c. 105. prohibiting any contract to that effect.

Succession duty having been claimed by the Board of Inland Revenue as upon a succession accrued on the death of the husband, which occurred in 1856,—Held, that having regard to the abandonment by the jointress of her dower and thirds, the settlement was clearly a contract "for valuable consideration in money or money's worth" within the 17th section of the 16 & 17 Vict. c. 51, and that no succession duty was payable.

Semble—the decision must have been the same if there had been only the consideration of marriage.

By an indenture, dated the 28th of June 1810, certain hereditaments of which

(1) 2 Phil. 107; s. c. 16 Law J. Rep. (N.S.) Chanc. 23.

Henry Bankes was then tenant for life in possession, and William John Bankes, his eldest son, was tenant in tail in remainder immediately expectant on such life estate, were, upon a recovery then suffered, limited to such uses as H. Bankes and W. J. Bankes should by deed jointly appoint, and in default of such appointment to the use of H. Bankes for life, with remainder to such uses as W. J. Bankes should, in the event of his surviving H. Bankes, by deed or will appoint, and in default of such appointment to such uses as the same hereditaments stood limited previous to the execution of the said indenture.

By an indenture of appointment, dated the 2nd of June 1821, made in pursuance of the power contained in the last-mentioned deed, the said hereditaments were limited to such uses as the said H. Bankes and W. J. Bankes should jointly appoint, and in default of such appointment to the use of H. Bankes for life, remainder to use of W. J. Bankes for life, remainder to the use of his first and other sons in tail male, with remainder to the use of G. Bankes (the second surviving son of H. Bankes) for life, remainder to his first and other sons in tail male, with divers remainders over.

By a settlement dated the 7th of June 1822, and made upon the marriage of G. Bankes with Georgina Charlotte Bankes, then G. C. Nugent, spinster, H. and W. J. Bankes in exercise of the joint power reserved to them by the indenture of the 2nd of June 1821 appointed that after the said marriage the said hereditaments should remain and be to the use that G. C. Bankes might, in case she should survive G. Bankes, receive, during her life for her jointure, and *in lieu and bar of dower or thirds and freebench at common law, or by custom or otherwise*, a yearly rentcharge of 800*l.* to be issuing out of the said hereditaments, payable quarterly in every year *without any deduction or abatement whatsoever on account or in respect of any taxes, charges or impositions or assessments already taxed or imposed, or thereafter to be taxed, charged, assessed or imposed on the said messuages, hereditaments and premises, or on the annual sum or yearly rentcharge of 800*l.*, or on the said G. C. Nugent or her assigns* in respect

thereof by authority of parliament or otherwise howsoever, with the usual powers of distress and entry in case the annuity should be in arrear.

The same hereditaments were also limited in case of the death of H. Bankes and W. J. Bankes in the life of G. C. Bankes; and in case of failure of issue male of W. J. Bankes during the joint lives of G. Bankes and G. C. Bankes, and in case G. C. Bankes should survive G. Bankes (which events happened), to the further use that G. C. Bankes might, after the death of her husband, receive the further yearly rentcharge of 700*l.* in addition to the previous rentcharge of 800*l.* to be issuing out of the same hereditaments, to be paid quarterly, without deduction for present or future taxes, charges, impositions or assessments in such manner as thereinbefore mentioned and appointed for the payment of the said annual sum or yearly rentcharge of 800*l.* with the like powers of distress and entry.

By the same deed, and for the purpose of better securing payment of the two rentcharges of 800*l.* and 700*l.*, the hereditaments upon which the same were charged were limited to trustees for a term of 200 years upon trust, in case the yearly rentcharges or either of them should fall into arrear, out of the rents and profits of the hereditaments comprised in the term or by demising or mortgaging the same to raise and pay the rentcharges and all arrears thereof, and all costs, damages and expenses which G. C. Bankes or the trustees should sustain by reason of the non-payment thereof or of the recovering thereof, or otherwise relating thereto.

There was issue of the marriage between G. Bankes and G. C. Bankes, Edmund George Bankes, who was the first son, and seven other children.

Henry Bankes died, in December 1834, leaving his sons W. J. Bankes and G. Bankes and his daughter-in-law Georgina C. Bankes him surviving.

W. J. Bankes died, in April 1855, without ever having been married. Upon his death G. Bankes became tenant for life in possession of the hereditaments comprised in the term of 200 years, with remainder to his eldest son E. G. Bankes in tail.

By an indenture, dated the 2nd of July

1855, G. Banks and E. G. Banks executed a disentailing deed, and re-settled the estates.

G. Banks died in July 1856. His widow G. C. Banks survived him, and became entitled to the jointure rentcharges of 800*l.* and 700*l.* a year.

This suit was instituted on the 15th of January 1859, by John Floyer and Henry Ker Seymer, for the management of the settled estates, and they now presented this petition, asking the Court to determine by whom and out of what funds the property or income tax and the succession duty were to be paid in respect of the two rentcharges of 800*l.* and 700*l.*

Georgina C. Banks insisted that the rentcharges were payable to her without any deduction either for succession duty or property or income tax, and that under the trusts of the term of 200 years created by the indenture of the 7th of June 1822, a sum was to be raised in each year of such varying amount as after payment thereof of the instalment or instalments of succession duty and property or income tax respectively for the time being due or payable in respect of the yearly rentcharges and other outgoings and expenses, would leave a clear surplus of 1,500*l.* in each year to be received by her.

This petition was not served upon the trustees of the term for 200 years, neither was it served upon the Commissioners for Inland Revenue.

The MASTER OF THE ROLLS said the case might proceed upon the question of income tax; but the question of liability to succession duty could not be argued in the absence of the Commissioners.

Mr. Baggallay and *Mr. C. Hall*, for the petitioners.

Mr. Hobhouse and *Mr. Freeling*, for Mrs. Banks.—The right of Mrs. Banks to receive the rentcharges arose upon a settlement made on her marriage. They were to be paid out of the rents of real estate, free from all deductions. If any direct contract had been made for payment of the income or property tax, it would have been void under the 5 & 6 Vict. c. 35. s. 103; indirectly, however, the object might be effected. The provision made

by this section was copied from the original Income Tax Act. The purpose of its insertion was not easily divined. One person, however, was not permitted to contract that he would pay the income tax of another. It had been suggested, that it was inserted in consequence of the usury laws, but these had been repealed. If there was any ostensible public policy in such a restriction, this Court would carry it out. This case, however, arose upon a fiscal act, which must be construed strictly; and no interference with the private arrangements of families could be supported, unless necessary to carry out a particular public policy. A landlord might reserve a fluctuating rent, subject to increase or diminution, according as the property tax, or any other burden that might be placed upon his land, increased or diminished. Here the settlement gave a clear sum of 1,500*l.* payable out of rents. The act allowed a deduction to be made from the rents, and by the deed the rentcharge was to be paid clear of all deductions. The tenant for life, therefore, must pay the income tax, and hand the full amount of the rentcharge to the jointress.

Festing v. Taylor, 32 Law J. Rep. (N.S.) Q.B. 41, reversing 31 Law J. Rep. (N.S.) Q.B. 36.

Lord Lovat v. the Duchess of Leeds, 2 Dr. & Sm. 62; s.c. 31 Law J. Rep. (N.S.) Chanc. 503.

Colbron v. Traversa, 31 Law J. Rep. (N.S.) C.P. 257.

Davies v. Fitton, 2 Dru. & W. 225.

Mr. Selwyn and *Mr. Lovell*, for the tenant for life of the estate, were not heard.

The MASTER OF THE ROLLS (April 18).—I think the words of the act of parliament and the decided cases all concur on this subject. The words of 5 & 6 Vict. c. 35. s. 103. are these—not only there is a peremptory refusal to allow any deductions, but it states—"and all contracts, covenants, and agreements made or entered into, or to be made or entered into for the payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void." There is in the contract which this lady enters into for her jointure an express contract, which I read (and it is impossible

that it can be put more favourably to the jointress) exactly as if the words "income tax" had been introduced into it—as if the words had been "in case any income tax shall be imposed, the jointress shall not be liable to pay it." Then the act of parliament says—whether reasonably or not is not for me to inquire into, but here is an act which binds me, and which is plain and unambiguous in its terms—and it says, a contract made for the payment of such income tax is absolutely void. The words are distinct and plain. It is obvious I cannot get over them upon a sort of attempt at some species of technical reasoning on the ground of there being a trust to raise the total amount. The trust term which is created is created only for this purpose—as a security for the due enforcement of the contract entered into between the jointress and her husband at the time when the contract of marriage was entered into.

All I find in the cases of *Festing v. Taylor* and *Lord Lovat v. the Duchess of Leeds*, is, that where the case is not one of contract, the prohibition does not apply, and the Court holds that if a person by will chooses by way of bounty to say, I will give you something, and direct another person to pay the income tax upon it, he is at liberty to do so, for there is no contract between them. If it is a matter of pure bounty, if one person chooses to give an annuity to another person, he may give that annuity free from income tax if he thinks fit. But as a matter of contract this is absolutely void, and the income tax cannot be paid by reason of contract by any other person than the person who receives the annuity. The cases of *Colbron v. Travers* and *Davies v. Fitton* make this clearer; they shew that a contract to pay the income tax is absolutely void. That cannot be done; but this may be done. You may say—if the income tax is put on, you shall pay me 20*l.* a year more, or if it is taken off, you shall pay me 10*l.* a year less; but that is not a contract that the amount of the rent shall be either augmented by the increase of the tax in the one case, or diminished by the deduction of the tax in the other. In the case of *Colbron v. Travers* there was an agreement to pay 10*l.* a year more in case the income tax was taken off; and in the case of *Davies*

v. Fitton, it was suggested by the Lord Chancellor in Ireland, that an agreement to pay 100*l.* a year rent, and, in consideration of the tithe-rentcharge, 5*l.* a year more, would be a good agreement. But in cases like these the only reference to income tax is by possible anticipation or guess of what the income tax may be—it is not a contract for an increase of rent, to vary from year to year at the rate of 7*d.* in the pound, or 9*d.* in the pound, or 1*s.* in the pound, or 1*s.* 2*d.* in the pound, and then to be reduced, but merely a bargain that in the event of an income tax being put on, so much a year more shall be paid.

I am clearly of opinion this is a contract, and nothing but a contract, for payment of an annual sum, without allowing income tax, and that the trusts are merely in aid of the contract; and I am of opinion that the jointress must, therefore, pay the income tax. I shall give the infants and the trustees their costs of this application, and make them costs in the cause; but I shall not give the jointress her costs.

The case was afterwards argued on the claim made to succession duty.

The Solicitor General and *Mr. Hanson*, for the Commissioners of Inland Revenue.—It has already been decided that the estate of George Bankes was derived from his elder brother William John Bankes as predecessor, he being tenant in tail. It has further been decided, that when estates are created under a power for the benefit of one not within the 16 & 17 Vict. c. 51. s. 10, the estate of the appointee is to be read as if it was inserted in the instrument creating the power. There was, however, a distinction between the two annuities: the one was limited to Mrs. Bankes in the event of her surviving her husband; the other was limited to her in like manner upon the failure of other limitations. This might give rise to a question of a divided predecessor as to one annuity, or a part might arise out of the estate of William John Bankes, and the other, or a part, might arise out of the estate of George Bankes: it might also in one case give a duty of 1*l.* per cent. and 3*l.* per cent. on the other. The material question was, however, whether there was any distinction by reason of the jointure being created

on marriage? The act made no distinction between settlements for value and settlements not for value. Section 17. alone applied to contracts for value, and it only related to parties in the position of debtor and creditor, which was not the case here. The appointment of the 7th of June 1822 fell within the words and the spirit of section 2; it was a disposition which created a succession. It certainly was neither a bond nor a contract for value in money or money's worth, or for the payment of money or money's worth.

A jointure was a charge upon land: it was further secured by an interest in land; and as soon as it was payable it became a succession: it could not be dealt with in one form as land, and in another as money. It was very clear that section 17. had no reference to a settlement of real estate or to a succession in real estate: it related only to payment of money upon a bond or contract. The present case arose upon one of a series of uses: it was a succession, and liable to the duty.—

The Attorney General v. Floyer, 9 H.L. Cas. 477; s. c. 31 Law J. Rep. (N.S.) Exch. 404.

Lord Braybrooke v. the Attorney General, 9 H.L. Cas. 150; s. c. 31 Law J. Rep. (N.S.) Exch. 177.

The Attorney General v. Yelverton, 7 Hurl. & N. 306; s. c. 30 Law J. Rep. (N.S.) Exch. 333.

Re Jenkinson, 24 Beav. 64; s. c. 26 Law J. Rep. (N.S.) Chanc. 241.

In re Ramsay, 30 Beav. 75; s. c. 30 Law J. Rep. (N.S.) Chanc. 849.

Pickard v. the Attorney General, 6 Mee. & W. 348; s. c. 9 Law J. Rep. (N.S.) Exch. 329; 3 Mee. & W. 552; 7 Law J. Rep. (N.S.) Exch. 188.

Lord Henniker v. the Attorney General, 8 Exch. Rep. 257; s. c. 22 Law J. Rep. (N.S.) Exch. 41; 7 Exch. Rep. 331; 21 Law J. Rep. (N.S.) Exch. 293.

Sweeting v. Sweeting, 1 Drew. 331; s. c. 22 Law J. Rep. (N.S.) Chanc. 441.

Mr. Hobhouse and Mr. Freeling.—This jointure was contracted for upon marriage: it was a purchase for value within the meaning of section 17. It was no bounty arising upon a devolution of law. This was an exception to the cases enumerated in section 7; and it was not within section 10,

which fixed the scale for raising the duties upon the principle of "the nearer the relationship the lower the duty." This could never apply to contracts for value: if no benefit or bounty was taken, no duty could arise. The act never contemplated a predecessor in any case of contract; if it did, the purchaser must be predecessor, but he was not liable to any duty. Marriage alone, and *à fortiori* marriage with a release of dower, had always been a valuable consideration. In a contract it would support a covenant to pay or a bond to secure. Before any rate of duty could be fixed, it was necessary to find the predecessor; the person taking the bounty was immaterial. In *The Attorney General v. Floyer* there was clearly a succession, and the only question was as to the rate of duty. In the present case, however, there was neither a succession nor a party to tax. No ambiguity in a fiscal act could be pressed against a subject; it was passed in derogation of his general right; it was an interference with his property, and he was entitled not only to the benefit of every doubt, but also to the benefit of having the words of the act construed most strictly against the Crown.—

The Attorney General v. Baker, 4 Hurl. & N. 19.

Lord Saltoun v. the Lord Advocate, 3 Macq. Scotch App. Cas. 659.

Oldfield v. Preston, 31 Law J. Rep. (N.S.) Chanc. 256.

Mr. Selwyn and Mr. Lovell, for the tenant for life.—The contract made for Mrs. Bankes was an immediate purchase of a deferred annuity. The consideration was good: had it been secured by a bond or covenant, no pretence could have been raised to a claim for duty, and none could be raised because it was secured on real estate. Section 17. applied equally to the case of security on real estate as to that of a covenant or bond. The cases on legacies could have no application to the present: they were voluntary gifts, and were so considered.

Mr. Baggallay and Mr. C. Hall, for the trustees.

The Solicitor General, in reply.

THE MASTER OF THE ROLLS (May 23).—The question in this case, which arises upon the construction of the Succession Duty Act,

and relates to the jointure payable to Mrs. Bankes, is, whether succession duty is or is not payable on that jointure?

The question, in my opinion, is solely this: whether the 17th section applies. The 17th section is in these words: "No policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the assured, or between the insurers and any assignee of the assured; and no bond or contract made by any person *bond fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made; but any disposition or devolution of the monies payable under such policy, bond or contract, if otherwise such as in itself to create a succession within the provisions of this act, shall be deemed to confer a succession." The general effect of this clause is, that no contract for value for payment of money after the death of any other person shall create the relation of predecessor and successor. In the first place, it is clear here that this is a contract for value, by which two annuities are payable to Mrs. Bankes in the event of her surviving her husband and her father-in-law and her brother-in-law. *Prima facie* this would appear to come within the clause. This is not an annuity created and existing prior to the death of the lady's husband. It is an annuity, or rather two annuities, which spring into existence immediately on his decease, charged on the family property by virtue of a contract for value entered into by her on her marriage. I think it is impossible to say that it does not come within the strict words of this clause. But if it does so, still it is argued that it does not fall within the general scope and object of the clause, to be gathered from the whole of the statute; and reliance is placed on the words, "valuable consideration in money or money's worth." Against this it is justly argued that, being a statute which imposes a burden on the subject, it must be construed liberally towards the subject, and strictly

towards the Crown, as is laid down in a series of cases, of which it is only necessary to refer to the following: *Williams v. Sangar* (1), *Denn d. Manifold v. Diamond* (2), and *Brandling v. Barrington* (3). It is argued, for the Crown, that this is not the species of contract contemplated by the statute; for that, under this contract, no "money or money's worth" was paid, nor was any person liable to pay any money. But, in my opinion, this makes no difference. The contract would not have been more completely a contract for value if the father of this lady, or if the lady herself, had paid 10,000*l.* expressly in consideration of her having an annuity of 1,500*l.* a year on the death of her husband. Suppose, in order to test the principle, no marriage at all had been contemplated, but that the lady had paid 10,000*l.* to Henry Bankes and his two sons, in consideration of having an annuity of 1,500*l.* per annum settled on her for her life after the death of the survivor of these three persons, could it have been argued for a moment that this 17th section did not apply, and that it was not intended to meet such a case? I am of opinion that such a contention would have been impossible. Proceed, then, one step further, and suppose that in addition to the 10,000*l.* paid by the lady, the consideration of the marriage is superadded, could that additional valuable consideration affect the construction of the act or defeat the application of this section? It is obvious that it could have no such effect. Proceed further to the third and last step, and suppose that marriage alone and not money, is the sole consideration for the purchase of this annuity, could it be gravely argued that this statute intended (for the purpose of levying succession duty) to create so fundamental a change in the law of this country as to enact that marriage in some cases, at least in this, is a less valuable consideration than money, or that money must be superadded in order to give it its full force? And what is more, that the legislature intended to do this, not by

(1) 10 East, 66.

(2) 4 B. & C. 243; s. c. 3 Law J. Rep. K.B. 211; 6 Dowl. & Ry. 112.

(3) 6 B. & C. 467; s. c. 5 Law J. Rep. K.B. 181.

express words, but simply by inference to be founded on the strict interpretation of the words "money or money's worth"? It is impossible to foresee the extent of the evils that would flow from such a construction, that "money and money's worth" is not to include the consideration of marriage, contrary to all principle, and contrary to every previous decision both at law and in equity; and this on a statute where the words "money and money's worth" are to be construed most liberally for the subject. But the argument in this case goes much further; for her dower, freebench and thirds are relinquished by the lady as an additional consideration. Surely, no one can argue that dower, freebench and a widow's right to one-third of the personal estate of her husband on intestacy are matters not worth money.

Many cases were cited, but none of them have a very material bearing on this subject. As far as they go they seem indirectly to oppose the contention on the part of the Crown; but, in truth, as far as I have been able to judge, this case is untouched by the decision of any reported case. Whether that arises from the circumstance that the point has not been contested before, I am unable to say; but I must on the present state of facts express my unqualified opinion that the words of the clause itself exactly cover this case, and that I observe nothing in the rest of the statute to prejudice or affect that construction. And, even if I did, I should rather abide by the observations of Lord Tenterden in *The King v. the Inhabitants of Barham* (4), who observes, "Our decision may perhaps in this particular case operate to defeat the object of the statute; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act in order to give effect to what we may suppose to have been the intention of the legislature." I repeat, however, that I see nothing in this act to require the application of the principle so laid down by Lord Tenterden. My opinion is, that no succession duty is payable to the Crown under the statute of the 16 & 17 Vict. c. 51, in respect of these two annuity charges,

amounting together to 1,500*l*. As I have decided this case solely on the effect of the 17th section, I have thought it unnecessary to express any opinion on the construction of the other clauses on which much argument was addressed to me. It is sufficient for me to express my opinion that the 17th section applies in express terms, and that this appears to be confirmed by the general scope and spirit of the act.

Generally, costs are not given against the Crown, and I am not disposed to do so in this case. The costs of all parties, except those of the Commissioners of Inland Revenue, must be paid out of the estate.

STUART, V.C. }
May 28.

ELSEY v. ADAMS.

Practice—Injunction, Ex parte—Office-copy Affidavits.

Injunction obtained ex parte dissolved, with costs, it appearing that when the order for it was made the office-copy of the affidavits in support of it had not been delivered out of the office of the clerk of records and writs.

Mr. Malins moved to dissolve an injunction which had been obtained, *ex parte*, on the 8th of May 1863, upon the ground that when the order for the injunction was made the office-copy of the affidavit in support of it had not been delivered out of the office of the clerk of records and writs. He referred to—

Jackson v. Cassidy, 10 Sim. 326; a c. 10 Law J. Rep. (N.S.) Chanc. 356.

The Attorney General v. Lewis, 8 Beav. 179.

Mr. Bacon and *Mr. Hardy*, for the plaintiffs.

STUART, V.C. said that the authorities referred to were conclusive upon the point, and made an order dissolving the injunction, with costs.

(4) 8 B. & C. 99; a c. 6 Law J. Rep. M.C. 78.

[IN THE HOUSE OF LORDS.]

1863. { CROSSLEY AND OTHERS v.
March 6, 13. { DIXON.

Patent—Licence to Use—Estoppel.

The licensee under a patentee is estopped from disputing the validity of the patent during the continuance of the licence.

The appellants were the owners of patents for the manufacture of carpets. The respondent applied for a licence to use the patents, and it was agreed that certain machines, embodying the inventions of the appellants, should be prepared under their superintendence, the respondent paying for the machines, and also paying certain agreed royalties upon the carpets manufactured therewith. This agreement was acted upon, and whilst being acted upon the respondent obtained, from a different quarter, other machines, which also embodied the appellants' inventions, and used these machines as well as those supplied by the appellants. The appellants filed a bill in Chancery for an account of royalties in respect of the user of both sets of machines, whereupon the respondent, by way of defence to the appellants' claims in respect of the machines not obtained from them, disputed the validity of the appellants' patents:—Held, that the agreement constituted the respondent a licensee of the appellants, and that, so long as he thought fit to claim the benefit of the agreement in respect of the machines supplied by the appellants, he was estopped from denying the validity of the patents, and must pay royalties in respect of the user of both sets of machines.

Held, also, that no term being stipulated for the continuance of the agreement, the respondent might, if he chose, decline to pay royalties thereunder altogether, leaving the appellants to their remedy for infringement in respect of the use of any of the machines.

This was an appeal from an order of the Lords Justices of appeal of the Court of Chancery.

The appellants were carpet-manufacturers at Halifax, carrying on business there under the style of "John Crossley & Sons," and the respondent was a carpet-manufacturer at Kidderminster, and from the year 1852 to the 24th of June 1859 was in partnership with a Mr. James Shoolbred, with whom he carried on business under the

style of "Henry Jecks Dixon & Co." The appellants had, for the purposes of their business, become the owners of letters patent for inventions applicable to the manufacture of carpets, and it was their custom to grant licences for the use of their inventions to other manufacturers in consideration of the payment of a royalty upon the fabrics made under such licences, and they had generally supplied to their licensees looms embodying their latest inventions, and the various apparatus used therewith, as their licensees required. The appellants did not manufacture such looms themselves, but they employed certain firms of machinists at Halifax to make the looms required by their licensees, which the appellants supplied to the latter at cost price, not looking for profit upon the looms, but from the royalties payable under their licences.

About the month of March 1852, the respondent's then firm applied to the appellants for the terms of a licence to use their patent inventions for making carpets, and various communications took place between the appellants and the respondent upon the subject of such proposed licence, and it was ultimately verbally agreed, that the appellants should supply the respondent's firm with such looms as they should from time to time require from the appellants for the purpose of manufacturing Brussels and velvet pile carpets; the respondent repaying to the appellants the price of such looms. It was also agreed that upon the purchase of the looms the respondent's firm should pay to the appellants royalties upon the carpets manufactured by the aid of such looms, and should render quarterly accounts to the appellants of the goods manufactured by means of the same looms.

In pursuance of the said agreement, the appellants at various times in the years 1854, 1855, 1857 and 1858, supplied the respondent and his partner with looms for the manufacture of carpets, and they paid to the appellants the prices of the looms and the apparatus supplied therewith, and after the dissolution of his partnership, which happened in 1859, the respondent used, and up to the time of the filing of the appellants' bill in 1860, was still using forty-one of such looms, and paying royalties thereon.

In the year 1854, certain engineers and machinists at Manchester, carrying on business under the name of "Sharp, Stewart & Co.," who manufacture looms for the weaving of carpets and other pile fabrics, sent to the respondent's firm a letter, in which they stated that they purposed at once constructing a loom which should produce both quality and quantity equal to those then used, with the latest improvements, and that they would guarantee the users of it against the cost of any action for infringement of any other patent; and that it was their intention to offer this loom to carpet-manufacturers on advantageous terms. This letter was communicated by the respondent's firm to the appellants, who wrote in reply that it was quite out of the question Messrs. Sharp & Co. being able to work the loom without infringing their patents, and that any one putting it into operation would not only be liable for royalty, but profits too.

Some further communications took place between the respondent's firm and the appellants upon the subject of the said Messrs. Sharp & Co.'s looms, the appellants repeating that the loom manufactured by Messrs. Sharp & Co. was a direct infringement on their patents. The respondent's firm, notwithstanding, between January 1856 and December 1859, purchased from Messrs. Sharp & Co. eighteen of their looms and used the same.

In 1859, the said J. Shoolbred retired from the respondent's firm, and the respondent afterwards carried on, and at the time of filing the appellants' bill was carrying on the said business, and had manufactured and was then manufacturing carpets, by means both of the looms supplied by the appellants and of the looms purchased of Messrs. Sharp & Co.

The respondent's firm for a time included in the return made to the appellants of carpets manufactured by means of the appellants' inventions, the carpets manufactured by means of the looms purchased of Messrs. Sharp & Co., without making any distinction between the carpets manufactured by the looms supplied by the appellants and by the looms supplied by Messrs. Sharp & Co.; but having ceased to make any returns of carpets made with the looms supplied by Messrs. Sharp & Co., the appel-

lants, on the 23rd of August 1860, filed their bill (which was afterwards amended), against the respondent, praying a declaration that the looms purchased of Messrs. Sharp & Co., and used by the respondent, were constructed according to or upon the principle of the appellants' patent inventions, or some or one of them, and that the respondent was bound to account for and to pay royalties to the appellants in respect of all fabrics manufactured by means thereof by his said late firm or himself according to the terms of the licence granted to the respondent's late firm, and for an account of all carpets and other fabrics manufactured by the respondent's late firm, or the respondent, by means of such looms and of the royalties payable in respect thereof; or, if the Court should be of opinion that the licence granted by the appellants and acted upon by the respondent's late firm, and by the respondent, did not extend to the looms purchased of the said Messrs. Sharp & Co., that the respondent might be restrained by injunction from manufacturing any fabrics the subject of the appellants' said letters patent, or any or either of them, by means of the looms, and from infringing the appellants' patents, or any or either of them, by means of the said looms or otherwise; and for an account and payment of the profits made by the respondent's late firm and the respondent in respect of fabrics manufactured in infringement of the appellants' letters patent, and for general relief.

The respondent, by his answer, denied that the agreement as to the use of the appellants' looms, constituted him a licensee, and alleged that no licence had been granted, or agreed to be granted; and he submitted whether the appellants' letters patent were valid, and denied that he had done or agreed to do any act whereby he was estopped from questioning the validity of the appellants' patents. He also alleged that the looms purchased of Messrs. Sharp & Co. did not infringe the appellants' alleged inventions. He further submitted, that the agreement under which he purchased and made use of the looms supplied by the appellants, extended to all carpets manufactured by means of looms which embodied their inventions so far as the appellants were entitled to the exclusive use or application of such inventions, and whether such looms were

constructed by the appellants or any other person; and that no sum was due to the appellants for royalties in respect of carpets manufactured by means of the looms of Messrs. Sharp & Co., either on the footing of the agreement, or for profits in respect of such carpets.

By the decree of Vice Chancellor Wood, dated on the 13th of November 1861, it was declared that the respondent and his late partner, and the respondent since the termination of the partnership, became accountable to the appellants for the several royalties agreed to be paid to them as being royalties due in respect of the user of the several inventions secured, or purporting to be secured, by letters patent, to which the appellants were entitled, and which were employed in the construction of the several machines supplied by the appellants to the respondent and his late partner; and that the respondent and his late partner were not entitled, and that the respondent was not entitled, to use any machine in the construction of which the same inventions, or any of them, or any inventions only colourably differing therefrom, should have been employed, without paying the same royalty as if the carpets or fabrics manufactured by such user had been manufactured by a machine supplied by the appellants, and inquiries were directed as to—first, which of the inventions secured or purporting to be secured by the several letters patent to which the appellants were entitled, were employed in the construction of the several machines supplied by the appellants to the respondent and his late partner; secondly, whether any, and which of such last-mentioned inventions, or any inventions only colourably differing therefrom, had been used in any and what other machines used by the respondent and his late partner, or by the respondent himself, in the manufacturing of any and what quantity of carpets or other fabrics in respect of which royalty would be payable if the same had been manufactured by the machines supplied by the appellants; and, thirdly, an account was directed on the footing of the above declarations of all monies due to the appellants in respect of royalties for carpets or other fabrics produced by the respondent and his late partner, or either of them.

The respondent appealed from this order,

and the Lords Justices, by their order dated the 22nd of February 1862, directed that the appeal should stand over, with liberty for the appellants, within two months from the date of the said order, to bring such action or actions at law as they should be advised.

From this order of the Lords Justices the present appeal was brought.

Sir Hugh Cairns and *Mr. Cracknall*, for the appellants, contended that it was within the jurisdiction of a Court of equity to decide the question whether the respondent was or was not a licensee of the appellants, and that the decision of the Lords Justices was wrong. That the evidence was conclusive that the appellants had granted and the respondent accepted a licence to use the inventions, the subject of the appellants' patents; and that such licence was not determined. That the looms purchased of Messrs. Sharp & Co. were infringements of the appellants' patents. And that if any action was proper to be brought by the appellants, it ought to have been limited to the trial of the fact of the identity of the looms supplied by Messrs. Sharp & Co. with those supplied by the appellants. They further submitted that the respondent, being a licensee of the appellants, was estopped from questioning the validity of their letters patent.

Hall v. Conder, 2 Com. B. Rep. N.S. 22;

s. c. 26 Law J. Rep. (N.S.) C.P. 138.

Taylor v. Hare, 1 Bos. & P. N.R. 260.

Lawes v. Purser, 6 E. & B. 930; s. c. 26 Law J. Rep. (N.S.) Q.B. 25.

Noton v. Brooks, 7 Hurl. & N. 499.

Bowman v. Taylor, 2 Ad. & E. 278;

s. c. 4 Nev. & M. 264; 4 Law J. Rep. (N.S.) K.B. 58.

Mr. Rolt and *Mr. W. R. Fisher*, for the respondent, contended that he was not a licensee from the appellants; that the agreement was simply to pay for certain looms and the goods manufactured by them. That the respondent was not estopped from denying the validity of the appellants' patents. That the looms purchased from Messrs. Sharp & Co. were not infringements of the appellants' patents; and that the order of the Lords Justices was right. They referred to

Carpenter v. Buller, 8 Mee. & W. 209;

s. c. 10 Law J. Rep. (N.S.) Exch. 393.

The appellants were not called on for a reply.

The LORD CHANCELLOR.—My Lords, the case presented to your Lordships by the present appeal is one upon which I think you will agree with me that no reasonable doubt can be entertained. The appellants are the owners of divers patents granted for improvements in the manufacture of carpets. The respondent is a carpet-manufacturer at Kidderminster. In the year 1854 the respondent applied to the appellants for the grant of a licence to use their inventions. It was ultimately agreed verbally that certain machines should be prepared and made under the superintendence of the appellants, embodying their inventions, and for which the respondent should pay, and accordingly forty-two machines were manufactured under the superintendence of the appellants for the use of the respondent. The respondent paid for those machines, and he also agreed to pay, and has paid, and is now paying royalties for the use of the inventions embodied in those machines. It is very material to observe that the respondent bought the machines altogether. It is not a case, therefore, in which the appellants, being the owners of machines, hired them out to the respondent, but it is a case in which the respondent according to the agreement began the transaction in question by purchasing and paying for the machines that were prepared for him under the superintendence of the appellants. It consequently follows that the royalties which have been regularly paid *eo nomine* by the respondent must of necessity have been paid by the one party and received by the other in respect of the right to use the patent inventions that were embodied in the machines so supplied. That agreement subsists at the present moment, and the respondent is using the machines which he so bought and is recognising his relation as licensee of the appellants by paying the appellants the royalty, a payment that can be attributed to nothing but to the patent rights in respect of which these machines have been constructed.

Now, the first contention on the part of the respondent is this, that notwithstanding that relation continues, he is at liberty to deny the title of the appellants to the

ownership of the inventions for the use of which he is thus paying a royalty. We are all very well aware that that is a proposition inconsistent with the law, as it would be equally inconsistent with the ordinary reason and good sense of mankind. But then, it appears that the respondent, being at liberty in point of fact under the agreement to have made for him as many machines as he pleased in conformity with the appellants' patents so long as he paid to the appellants a royalty for their use, has obtained from a different quarter other machines which are apparently, according to the evidence, identical in construction and principle with the machines supplied to him by the appellants. And in respect of the user of these latter machines, it is contended on the part of the respondent that he is at liberty to affirm that those machines are no invasion of the appellants' patent: First, because he denies the validity of the patent: and secondly, because he affirms that the machines are different in construction and principle from the machines so made and supplied to him by the appellants.

Now, assuming that the second set of machines are identical in construction with the first, it would be impossible to hold that the obligation, not to deny the appellants' patent right, would not extend to the second set of machines so long as he continues to use the first set of machines, which is the fact at present. That is equally a question of law, and a question of ordinary principle. It is a question upon which I apprehend your Lordships will have no doubt, namely, that the obligation to recognize and admit the validity of the patent right of which the licensor has granted the use in the one case, extends also to the other set of machines, assuming them to be identical in point of construction. Now, upon the subject of the identity of the two sets of machines, the whole of the evidence which has been adduced in the cause is in reality in favour of the proposition of the appellants. But that is a point upon which it is unnecessary for your Lordships to come to any conclusion, because that has been made the subject of an inquiry in the decree of the Vice Chancellor. The only question of fact, therefore, namely, the identity of the two sets of machines, is

made the subject of inquiry, and the rest of the case resolves itself into a mere question of law, whether the licensee can deny the patent right of the licensor, and whether the obligation of the licensee not to dispute that right must not extend also to machines obtained by him from another quarter which are constructed in violation of that patent right.

I advert to this in the outset particularly with reference to the judgment upon which this case is brought by way of appeal, because if that question of law is a question admitting of no dispute, and if, also, there be no doubt or uncertainty with regard to the facts under which that question of law arises there can be no reason for the alteration of the decree of the Vice Chancellor by sending the plaintiffs (that is, the present appellants) at large into a Court of law.

I think that there must have been some misapprehension as to the facts of the case, when it was before the Lords Justices, because I find from the judgment of those learned Judges, that one of them says that he does not mean to give any opinion as to the validity or the invalidity of the appellants' patent rights—a question, in fact, which could not by possibility arise, and which the learned Judge would have seen in a moment could not arise if he had been aware that the original agreement in respect of the first set of machines, and in respect of the user of the inventions embodied therein, was still in actual continuance, as between the appellants and the respondent. And I find the other learned Judge speaking of the plaintiffs being at liberty to bring an action for an infringement—an observation that could not have been made if the learned Judge had been aware equally of the same fact, because it is palpable that so long as the agreement made by the appellants with the respondent, that the respondent should be at liberty to use the inventions, paying certain royalties, continued, there is no limit to the extent of the respondent's user, and it would, therefore, have been impossible for the appellants to bring an action for an infringement against the respondent. There could be no infringement pending the licence—the licence continues; and the extent of the remedy, therefore, can only be that which

is sought by this bill, namely, an account of the royalties claimed by the appellants in respect of every machine used by the respondent, whencesoever derived, which embodies in it these inventions in respect of which the agreement to pay royalty was originally made between the appellants and the respondent, and is now subsisting (1).

Therefore, the law being clearly in favour of the plaintiffs (the present appellants),

(1) The judgment of the Lords Justices was as follows:—

LORD JUSTICE KNIGHT BRUCE.—In this case questions of the existence of a licence, and the character and extent of the licence, if any, from the plaintiffs to the defendant, have been treated, and probably in a sound exercise of discretion been treated by the learned counsel for the plaintiffs as the main, though not the only questions in the suit. Of those two questions the latter, namely, as to the character and extent of the licence, if any, appears to me to be left by the evidence in a state of much obscurity, and I am unable to accede to the proposition that this Court on the pleadings and testimony before us, ought to act without a judgment at law. I consider, therefore, that the decree should be discharged, without prejudice to any question: that the plaintiffs should be at liberty within two months to bring against the defendant such action as they may be advised, touching the matters, or alleged matters, in the bill mentioned, or any part of them; that if such an action should be so brought, it should be admitted at law to have been brought on some day before the present, to be now fixed; that this cause should stand over, with liberty to apply; that the deposit should, for the present, be retained in court, and the costs of the appeal to the present time be costs in the cause. It is perhaps unnecessary, but it may be right, to add, that I have not meant, and do not on the present occasion mean, to intimate any opinion as to the validity or invalidity of any of the letters patent mentioned in the pleadings.

LORD JUSTICE TURNER.—This is a bill by patentees in the alternative for an account of the royalties, or the profits on the footing of an infringement, and the Vice Chancellor Sir William Page Wood, has given a decree which proceeds on the footing of royalties. It is not without much hesitation that I ever venture to differ from Sir William Page Wood's opinion, but after having given this case very careful consideration, I find myself unable to satisfy my mind that the plaintiffs have proved a case entitling them to such decree; and I think the proper course now to be taken would be, to let this appeal stand over, with liberty to the plaintiffs to bring such action at law as they may be advised. They may either proceed for royalty, or they may proceed on the infringement, or they may proceed on both, or they may take whatever course they like. I purposely abstain from stating the particular reasons which have led me to this conclusion, as the question or questions which may be raised at law might be prejudiced by the statement of my reasons.

and the question of fact being one upon which out of consideration for the defendant, the Vice Chancellor directed an inquiry, I think your Lordships will concur with me in thinking that the judgment of the Lords Justices suspending the decree of the Vice Chancellor, and sending the plaintiffs at large into a Court of law, is a judgment which is wholly inapplicable to the facts of the case when they are properly understood.

I have hardly anything more to detain your Lordships upon, except the observation that I think that a greater amount of accuracy ought to have been introduced into the decree in one particular, although it was not made a subject of complaint by the appellants. You will observe that in the decree of the Vice Chancellor, there is a declaration that the defendant and his partner were not entitled, "and that defendant is not entitled to use any machine in the construction of which the same inventions, or any of them, or any inventions only colourably differing therefrom, shall have been employed without paying the same royalty," &c. The whole decree is of course founded upon the continuance of the existing relation of licensor and licensee; for it is an idle distinction which is attempted to be set up by the respondent that he made an agreement and did not take a licence. In the instruments to which he is a party, made between himself and those persons who are defendants in the action at law, namely, Sharp, Stewart & Co., he describes this very agreement as being a licence; but that licence being the foundation of the claim, and being of course determinable by the defendant at pleasure if he chose to put an end to that licence, it follows that the present appellants, if he continues to use the machines, must treat him only as a person infringing their patent right; and I would, therefore, submit to your Lordships that this general declaration, which is unlimited in point of time and not confined to the duration of the licence, ought to have been qualified by the introduction, after the words that the defendant is not entitled, of some such words as these, "whilst he continues to use the machines bought of the plaintiffs under the agreement, or during the continuance of the agreement between the defendant and the plaintiffs." That

alteration will, I think, limit the declaration under that decree within its proper confines; but that alteration ought not, as I humbly submit to your Lordships, to affect the question of costs. Therefore I submit to your Lordships that the order of the Lords Justices ought to be discharged, and the petition of re-hearing presented to the Lords Justices by the respondent be dismissed, with costs.

LORD CHELMSFORD.—My Lords, your Lordships are under the disadvantage in this case of not knowing exactly the reasons which induced the Lords Justices to come to the conclusion, that the decree of the Vice Chancellor ought to be suspended, with liberty to the plaintiffs to bring such action as they might be advised; but of course they must have been of opinion that the case was not ripe for such a decree as the Vice Chancellor had pronounced. Whether their Lordships were right or wrong in that conclusion must of course depend upon what was the nature of the question to be determined between the parties, and what was the evidence before the Vice Chancellor upon the hearing.

Now it is unnecessary to consider very closely what was the exact character of the agreement between the parties, whether it was, as the appellants allege, a grant of a licence, or, as the respondent alleges, an agreement to use the looms to be supplied by the appellants, and the patent inventions embodied therein. It will be quite sufficient to take the admission of the respondent himself, as found in paragraphs 14. and 23. of his answer. In the 14th paragraph he says, "I have since carried on and am now carrying on the said business, and have manufactured and am now manufacturing carpets by means of the said looms supplied to my said late firm by the plaintiffs as aforesaid, and according to the principles of their alleged patent inventions so far as their said looms embody the same, and also by means of looms purchased by my said late firm and by myself, and now used by me, of the said Messrs. Sharp, Stewart & Co." And in the 23rd paragraph he denies that he is acting under such licence, and he says, "I submit that the agreement under which I purchased, and make use of the looms so supplied by the plaintiffs as aforesaid, extends to all carpets manufactured by means

of looms which embody the inventions embodied in the plaintiffs' said looms, so far as the plaintiffs are entitled to the exclusive use or application of such inventions, and whether such looms are or were constructed by the plaintiffs or by any other person or persons."

The question, I apprehend, is not whether the respondent is at liberty to dispute the right of the appellants to their patent inventions, but whether being under an agreement to pay certain royalties for goods manufactured by the appellants' looms, and any other looms embodying their inventions, he is, while that agreement is subsisting, at liberty to use those inventions; and to refuse to pay the royalties. Now I apprehend that he cannot do so. He cannot act under the agreement, and at the same time repudiate it. He may, if he pleases, put an end to the agreement, and he may use the machines which he has purchased from the appellants, but he must do so at his peril; he must do so under the liability to be treated as an infringer, and to be subject to an action for damages for that infringement. That being the case, I apprehend that the only question which is in dispute between the parties is, whether the machines of Sharp & Co., which are used by the respondent, are identical with the machines which embody the patent inventions of the appellants. Now upon that subject the evidence is clear and conclusive, and it consists of a very few steps. It appears that there was a Mr. Talbot, who was a licensee of the appellants' inventions, and who also used Sharp & Co.'s machines. An action was brought against him by the appellants for royalties in respect of the use of Sharp & Co.'s machines. That action was referred to arbitration, and before the arbitrator a model was produced, which was proved to be an exact model of the machines of Sharp & Co., which were used by Mr. Talbot, the defendant. An award was made against Mr. Talbot, and he was ordered to pay royalties to the amount of between 900*l.* and 1,000*l.* Upon the hearing of this case before the Vice Chancellor, that very model which had been produced before the arbitrator in the action against Mr. Talbot, was again produced, and it was proved that it was a model of the machines of Sharp &

Co., which the respondent was using; and there was scientific evidence given to shew that those machines of Sharp & Co. were imitations of the appellants' machines in several particulars. Now, to this evidence there was no answer whatever given. The respondent stated that he had not scientific knowledge sufficient to say, whether Sharp & Co.'s machines were in principle, and in mode of operation similar to the appellants; but he said that he was using those machines of Sharp & Co. under the patent of a person of the name of Weild. Weild made an affidavit in the case, but he merely stated that the apparatus in his machines in one particular did not resemble the appellants' patent machines, although it had been proved that in four or five different particulars, Sharp & Co.'s machines were similar to those of the appellants.

But in addition to this, I think it becomes most important when we have to consider what is the evidence before the Vice Chancellor, to look at the terms of those licences that were granted by Sharp & Co. to the respondent, because Sharp & Co. are the real defendants in this case. Now in those licences of Sharp & Co. the respondent admits that he is working under certain patent inventions, the property of Messrs. Crossley & Co., and he agrees to pay a certain royalty to Sharp & Co. for the use of their machines, so long as the appellants continue to have the right under their patents, and it is also agreed that the amount of that royalty shall be diminished to the extent to which the appellants from time to time may diminish the royalty payable by the respondent to them. Now can it be doubted for one moment that here was ample evidence, evidence uncontradicted, that there was an exact similarity between the machines of Sharp & Co. and the machines of the appellants?

Then I cannot help thinking that that which was stated by the learned counsel for the appellants is perfectly correct. That they were entitled to a declaration by the Vice Chancellor that there was this perfect resemblance between the machines, and that an account might be taken upon that footing without any inquiry. But the Vice Chancellor, although he admitted that the evidence was very strong if not conclusive, and was evidence which he said was uncontradicted, yet stated that he thought it

would be safer to direct an inquiry. Therefore an inquiry was directed. But it is an inquiry which the respondent certainly has no right to complain of, because it is one entirely for his benefit.

I therefore agree in the opinion which has been expressed by the noble and learned Lord on the woolsack that the decree of the Lords Justices cannot be confirmed, and that the decree of the Vice Chancellor must be affirmed with the alteration which has been suggested by the noble and learned Lord.

LORD KINGSDOWN.—My Lords, I quite agree in the judgment which has been proposed, and I have nothing to add to the observations which have been made.

Order appealed from reversed.

ROMILLY, M.R. }
March 20, 21 ; } ELLICE v. ROUFELL.
April 15. }

Bill to perpetuate Testimony — Discovery—Answer—Exceptions.

On a bill to perpetuate testimony, as in other suits, the plaintiff is entitled to such discovery only as is material to the relief asked or the order required, and as the only relief which can be prayed is the perpetuation of testimony, and as the answer put in by the defendant cannot be used against him in any further proceedings, the plaintiff can only require the defendant to answer such facts as will entitle the plaintiff to file a replication, and examine witnesses on the issues stated in the bill.

Consequently, where a plaintiff had already obtained from a defendant an answer entitling him to proceed to examine witnesses, exceptions for insufficiency were overruled with costs.

A bill to perpetuate testimony cannot be converted into a bill of discovery.

The distinctions between bills of discovery proper, bills to perpetuate testimony, and proceedings to obtain the examination de bene esse of a single witness or of aged or infirm witnesses, pointed out and explained.

A bill was filed to perpetuate the testimony of witnesses to prove the execution of a deed, which the defendants alleged to have been forged. The plaintiffs amended the bill before they served the defendants

with interrogatories. The defendants put in a full answer to the bill ; the plaintiffs then re-amended the bill, and served the defendants with other interrogatories. One of the defendants put in a plea, stating that the case could be immediately made the subject of judicial investigation, and that the plaintiffs had actually filed a bill for relief in the same matter in another branch of the court. This plea, upon argument, was directed to stand for an answer, with liberty for the plaintiffs to except (1). The plaintiffs filed exceptions for insufficiency, which now came on for argument.

Mr. Rolt, Mr. Hobhouse and Mr. Cotton, for the plaintiffs, in support of the exceptions.—The plaintiffs have interrogated the defendants, and they are entitled to an answer to the amended bill. Discovery was absolutely necessary in aid of the examination ; without it, the points in issue could not be understood. It was most desirable to have in detail a statement of what transpired between the parties. It was from the answers alone that the dispute between the parties could be ascertained. A defendant, when he answers the bill, must answer fully. This applied both to the original and amended bill. In suits to perpetuate testimony, a defendant could not admit the right to examine, and by that means avoid giving answers to the interrogatories. A bill to perpetuate testimony is also, of necessity, to some extent a bill of discovery. If a bill was filed for discovery and relief, the defendant, by consenting to the relief, could not avoid the discovery ; for instance, in the case of a suit for an account, the defendant could not submit to account and avoid the discovery, or, in a case of partnership, admit the partnership, and refuse the account of the dealings and transactions. The defendant's answers and admissions might be of the greatest consequence at a future time. Under the old practice, the bill must pray leave to examine witnesses thereto, to the end that their testimony might be preserved and perpetuated, and process of *subpoena* to the parties interested to shew cause, if they could, to the contrary ; and upon an affidavit of the probability of the testimony being lost, an order was made for their exa-

(1) *Ante*, p. 563.

mination *de bene esse*. Upon a bill to perpetuate the testimony of the witnesses to a bond in the plaintiffs' possession charged to be usurious, the defendant demurred, on the ground that the bill sought to subject him to a penalty; but the Court said that the plaintiff sought to establish a plain fact, the consequence of which was another consideration; it therefore overruled the demurrer and enforced the discovery, and left him to protect himself by his answer from making any disclosure of the usury charged—*The Earl of Suffolk v. Green* (2)—which would have been useless if the suit could not have been made available for the purposes of discovery, which was incidental to relief. The defendants had already answered the original bill; the amended bill raised no new issues, and they could not refuse to answer it.

Knight v. Knight, 4 Madd. 1.
Bartlett v. Hawker, cited 4 Madd. 9.
King v. Allen, *Ibid.* 247.
Angell v. Angell, 1 Sim. & S. 83.
Beavan v. Carpenter, 11 Sim. 22.
Thorpe v. Macauley, 5 Madd. 218.
The Earl of Belfast v. Chichester, 2 Jac. & W. 439.
The Citizens of London v. Levy, 8 Ves. 399.
Cardale v. Watkins, 5 Madd. 18.
Cresset v. Mitton, 1 Ves. jun. 449; s.c. 3 Bro. C.C. 481.
Mitford's Pleadings, 53, 54, 4th ed.
Moodalay v. Morton, 2 Dick. 652; s.c. 1 Bro. C.C. 469.
Lord Dursley v. Fitzhardinge Berkeley, 6 Ves. 251.

Mr. Selwyn and *Mr. Swanston*, for Sarah Roupell.—The defendants by answering the bill had done all that was necessary; all the issues raised had been answered; the object of the suit was attained. The bill could not be amended and no supplemental bill could be filed, neither could any further answer be required. A bill to perpetuate testimony could pray no other relief than the examination of witnesses and perpetuation of testimony. It was an original bill; but it was wholly distinct from a bill of discovery. The answer was only material as a step towards filing the replication.

(2) 1 Atk. 450.

NEW SERIES, 32.—CHANC.

Whether the answer was full or not, an order would be made to examine the witnesses; the suit was then at an end, as it was the only relief that could be given; the defendants were then entitled to the costs, and by the old practice the evidence remained sealed up until it was wanted, unless the parties consented to the publication. It was a mistake to suppose that the plaintiffs could amend the bill or that they could require a further answer. The exceptions therefore ought to be disallowed.—

Lord Dursley v. Fitzhardinge Berkeley, 6 Ves. 251, 263.

Scott v. Mackintosh, 1 Ves. & B. 504.

Agar v. the Regent's Canal Company, G. Coop. C.C. 212.

Hirst v. Peirse, 4 Price, 339.

Wyatt's Prac. Reg. 31, 74.

Mr. Cotton, in reply, said that the plaintiffs were entitled to all material information which went to the relief asked.

THE MASTER OF THE ROLLS.—The plaintiffs have filed this bill to perpetuate the testimony of the due execution of a deed which constitutes the title to the property under which they are mortgagees in possession. The defendants put in an answer to this bill as amended, answering it fully. The plaintiffs then re-amended their bill, asking for an answer to more searching interrogatories. To this the defendant *Mrs. Roupell* pleaded that the plaintiffs had already commenced a suit in equity to determine the validity of that deed, and that consequently the plaintiff could not maintain a suit to perpetuate testimony. That plea was disallowed and ordered to stand for an answer, with liberty for the plaintiffs to except. The exceptions having been filed and argued, the defendants contend that the plaintiffs are not entitled to any further or better answer than they have already got. This involves the consideration of matters which, owing to the recent changes in the practice and procedure of the Court, have in a great measure become obsolete. The first question is, whether this is a bill of discovery in the proper and technical sense of that word? I speak of the technical sense of the word "discovery," because, as *Lord Redesdale* observes in his work on

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Pleading, "Every bill is in reality a bill of discovery, but the species of bill usually distinguished by that title is a bill of discovery of facts resting in the knowledge of the defendant, or of deeds or writings or other things in his custody or power, and seeking no relief in consequence of the discovery, though it may pray the stay of proceedings at law till the discovery shall be made" (*Mitf. Pl.* 53, 4th edit.). Is this, then, a bill of discovery in that technical sense, as distinguished from other bills? I think it is not. A bill of discovery proper is in aid of the jurisdiction of some other Court to enable the plaintiff to prosecute or defend such proceedings, and it usually, if not necessarily, states the existence of such proceedings as the title of the plaintiff to insist on discovery; that is not done in the present case. A bill to perpetuate testimony is treated by Lord Redesdale as a species of bill separate and distinct from a bill of discovery, properly so called. Lord Redesdale in the same work says (p. 51, 4th edit.), "Original bills, not praying relief, have been already mentioned to be of two kinds: first, bills to perpetuate the testimony of witnesses; and, secondly, bills of discovery," by which latter words bills of discovery properly so called are obviously meant. Lord Eldon confirms this view in *Lord Dursley v. Fitzhardinge Berkeley*, where he says that a bill to perpetuate testimony calls for no discovery from the defendant, but merely prays to perpetuate that testimony, which might be had at that time, if the circumstances called for it. Whether the two bills can be united together and pray the perpetuation of testimony, as to one matter, which cannot be the subject of legal proceedings, and also discovery as to another matter, which is the subject of legal proceedings I express no opinion. It is not necessary to decide that, as such union does not occur in the present bill, in which it is one and the same subject-matter, respecting which it is sought to perpetuate testimony, and to obtain discovery; and as no relief is prayed in the bill, the discovery, if at all, must be in aid of the jurisdiction of some Court other than the Court of Chancery, to further the prosecution of some proceeding existing or possibly impending in that Court. If this be so, and if the subject be the same respecting which

both discovery and the perpetuation of testimony is sought, then the bill is defective, so far as it asks for the perpetuation of testimony: which cannot be afforded, if the matter is ripe for decision in any Court, and the evidence could be given there. The result is, that, as collateral to the perpetuation of testimony, the discovery in the proper sense of the term would be wrong, and that this is in truth a bill to perpetuate testimony and nothing else; and it cannot be converted at the option of the plaintiff into a bill of discovery such as Lord Redesdale defined.

The case of *The Earl of Suffolk v. Green* is not opposed to the views of Lord Eldon and Lord Redesdale. The bill in that case was not properly one to perpetuate testimony; it was a bill of discovery in aid of proceedings relating to a bond then in force, with a prayer to be at liberty to examine *de bene esse* a witness who was alleged to be very old and infirm. There is no doubt but that a bill of discovery may ask for the examination of a single witness on whom the whole case or defence depends; and may, in so doing, ask to perpetuate his testimony; and also, in like manner, for a commission to examine witnesses abroad; but it is essential to distinguish between a bill to perpetuate testimony, properly so called, and one of discovery, in which—as in a bill for relief in this Court—an order may be obtained to examine a witness *de bene esse*, and thus to perpetuate the testimony of that particular witness. In both cases, it is true, witnesses are or may be examined *de bene esse*, but in a bill to perpetuate testimony, it is because the matter cannot be tried in this or in any other Court. In a bill of discovery proper, the witness is also examined in like manner, but this is lest he should happen to die before the time comes for giving his evidence in court, and this is in aid of some Court other than the Court of Chancery where proceedings are pending or about to be instituted. But in a suit to perpetuate testimony, properly so called—as in the case of *Lord Dursley v. Fitzhardinge* and the present—the existence of such a suit in another Court would be a good ground of demurrer or plea. Again, in an ordinary suit in this Court, an order may be obtained to examine an aged and infirm witness *de*

bene esse, lest his evidence should be lost at the hearing; but such a proceeding is quite distinct from a bill to perpetuate testimony, where the evidence is or ought to be sealed up till the time arrives when, if the deposing witness is dead, the evidence may be used. Hence, the case of *The Earl of Suffolk v. Green* does not decide anything in the present plaintiff's favour, and on searching the record in that case it appears that no further answer was put in.

I have requested the gentlemen of the Record and Writ Office to assist me by examining the records of the court. I gave them a list of twenty-eight cases relating to the perpetuation of testimony, which are in the books. In all these the records have been examined, and in one only of them, viz., *Brandlyn v. Ord* (3), a further answer was put in, but that does not appear to have been brought to the attention of the Court, and I cannot consider that as governing this case, but I mention it as favourable to the plaintiffs, as far as it goes.

Considering this case therefore as belonging to the class of bills to perpetuate testimony properly so called, and not to that of bills of discovery, I have to determine whether in that view the plaintiff can insist on the interrogatories being answered. A bill to perpetuate testimony is, to a certain extent, a bill of discovery, but it is only so to the extent of enabling the plaintiff to obtain the relief asked by the bill, viz., the examination of witnesses as to the matters and issues stated in the bill—*Scott v. Mackintosh*, *Agar v. the Regent's Canal Company*, *Hirst v. Pierce*. If this were not so the plaintiffs might in such a suit go into all the past life of the persons examined. What is it, then, that the plaintiff in a bill to perpetuate testimony requires? It is this, and only this, that the defendant should admit his title to examine such witnesses as he should think fit on the various matters and issues stated on the bill. Beyond this the inquiry is idle and fruitless. The answer of the defendant cannot be used against him in any future proceeding, and if the bill were brought to a hearing it would be dismissed, with costs. That is established in *Hall v. Hoddesdon* (4), *Welby v. the*

Duke of Rutland (5) and *Anon.* (6). It is true that such dismissal does not prejudice the evidence already given; but all this shews that in this case, as soon as the first answer was put on the file, the plaintiff, on filing a replication, had full power to examine what witnesses they pleased on the issues raised in their bill. Unless the plaintiffs were confined to the case made by the bill, the Court could not tell where to stop the plaintiff in his examination of the defendant on interrogatories. Everything except the admission or denial of the plaintiff's right to examine witnesses was equally immaterial. It is said that by the modern practice the parties themselves can be examined, and that this is a mode of examining the defendant; but the answer is obvious. The proper mode of examining the defendant is the same as that of examining all other witnesses, and as it is only by so examining them that the depositions can be made evidence at a future period, so it is only by examining the defendant in like manner that his evidence can be perpetuated in common with that of other witnesses. On the fullest consideration of this case, I am of opinion that it would be contrary to the principles of pleading if I permitted the plaintiffs to convert a bill which is, properly speaking, a bill to perpetuate testimony into a bill of discovery in the technical sense. The discovery sought by these interrogatories is not material to the only relief that the plaintiffs can obtain in this suit, viz., the examination of witnesses and the perpetuation of their testimony. The circumstance that a full answer has not been put in to them is, therefore, immaterial, and the exceptions must be disallowed, with costs.

KINDERSLEY, V.C. } SCHOLEFIELD v. RED-
Feb. 24, 25. } FERN.

Annuities to Executors—Tenant for Life and Remainderman as to First Year's Income—Apportionment of Proceeds of Sale of Stock sold with the Current Dividend.

A testator leaving large property, real and personal, gave, by his will, elaborate directions as to realisation, and gave to

(3) 1 Atk. 571.

(4) 2 P. Wms. 162.

(5) 2 Bro. P.C. 39.

(6) 2 Ves. sen. 497.

his executors and trustees 400*l.* a year each for five years after his decease, which he called "annuities or allowances," a sufficient sum to be set apart for that purpose. He then directed a general conversion of all his personally not specifically given, and investment in government funds or upon mortgage, to be divided into thirteen parts, which parts he gave to persons therein named for life, with remainder to their children. And the testator gave power to his trustees to retain any part of his property in the same form as at his decease, and directed the income of the part retained to be applied in the same manner as the income of the proceeds of sale:—Held, that the gifts to the executors were to be regarded as annuities payable out of income: Also that the tenants for life were entitled to the actual income accruing due during the first year after the testator's decease on property remaining unconverted.

Where stocks are sold between dividend days, the Court will not apportion the proceeds of sale, so as to give a tenant for life the value of the current dividend included in the sale monies. And the rule is the same though the subject-matter sold may consist of debentures or securities carrying interest *de die in diem*.

Semble—The practice of the Court in declining to recognize the equity to an apportionment is governed by considerations of convenience and saving of expense.

This was an administration suit.

Thomas Cotterill, the testator in the cause, made his will, bearing date the 12th of April 1856, and thereby devised all his real estate and various chattels, therein particularly mentioned, to his sister. The testator then gave and bequeathed to William Scholefield (the plaintiff) and Thomas Samuel Girdler, whom he appointed thereby his executors, and whom he designated as his "general trustees," all his English and foreign stocks, shares and securities, of or to which he should be possessed or entitled at the time of his decease, and which were not in his said will specifically bequeathed to his sister, upon trust to convert the same in such manner as they should think expedient, and out of the monies to arise by such conversion and his ready money, to pay his just debts, funeral and testamentary expenses and the

legacies thereafter bequeathed by that his will; which said legacies he thereby directed should be paid as soon after his decease as his general trustees should think proper; and also upon further trust to set apart a sufficient sum for providing the annuities or allowances given to his executors. The testator then gave to each of his said executors and general trustees the sum of 400*l.* during the term of five years after his decease in consideration of the very great time and attention required from them in the discharge of their duties, "which will be much more during that period than afterwards"; and if during that period either of them should from any cause cease to be a trustee, such allowances and annuities to cease; and he thereby gave such and the same yearly sum which such trustee so ceasing to be a trustee as aforesaid would have received to his successor, for the remainder of the said period of five years or so much thereof as he may act as trustee. The testator then directed that monies to arise by conversion of his estate, when so realized, should be invested in government stocks or funds, to be placed in the names of the said William Scholefield, Thomas Samuel Girdler and William Redfern (the defendant), whom he designated as his special trustees, or upon mortgage, upon trust to divide all his personal estate and effects into thirteen parts, each of which he gave to a different person named for life, with remainders over to their children, with gifts to his nephews (other than Joshua Scholefield), and to his nieces and grand-nieces. The will then contained powers to the trustees of advancing portions of shares at their discretion, and to grant leases of the premises and hereditaments which might be purchased with the monies to arise by the conversion of his property into money, with discretionary powers to discharge his debts, by way of payment or composition, as they might see fit, and to wind up and settle his accounts, with the usual power to appoint new trustees. The testator made seven codicils to his will. By the first he urged his trustees to proceed with caution and care in the realization of his estate, and not to proceed to realize it until or unless the best results could be obtained, it being otherwise easy to foresee that a great dimi-

nution of the value might follow of the property thus committed to their stewardship. The other codicils contained various directions upon which no question turned, except that other trustees were appointed, and the division which had hitherto been made into thirteen parts was now made into twelve parts. The testator died on the 12th of August 1860, and left very large property of upwards of one million and a half sterling in value, consisting of English and foreign securities and of real and personal estate and effects. On the 12th of September 1860 the will was proved, but as it was found to involve several doubtful questions, and the trustees experienced great difficulties in the management of the estate, eventually, in July 1861, this bill was filed, and the usual administration decree made shortly afterwards. Under that decree no less a sum than 800,000*l.* had been distributed to the parties entitled, and the greater part of the rest of the testator's property had been realized, and the chief clerk had made his certificate finding these facts, and the cause now came on upon that certificate upon further consideration.

Mr. Baile and *Mr. Speed* appeared for the plaintiffs, the trustees.—There were four questions to be determined. First, whether the sums of 400*l.* given to each of the executors for five years, were to be considered as legacies and payable out of corpus, or as annuities and payable out of income? Secondly, how the income of the estate accruing during the first year after the testator's decease, was to be dealt with as between those entitled for life and those having only estates in remainder? Thirdly, whether the tenants for life were entitled to any portion of the proceeds of sale of stock and shares sold by reason of the same being sold with the current dividend? And lastly, whether any such apportionment ought to be made as respects proceeds of sale of property yielding income *de die in diem* such as debentures and mortgages?

Mr. Osborne and *Mr. Sargent*, for the tenants for life.

Mr. Shapter and *Mr. Osler*, for parties entitled in remainder.

Mr. Glasse, *Mr. Hobhouse*, *Mr. Waller* and *Mr. Bristowe*, for legatees.

Mr. Glasse was heard in reply.

Authorities cited:

Yates v. Yates, 28 Beav. 637; s. c. 29 Law J. Rep. (N.S.) Chanc. 872.

Greisley v. Earl of Chesterfield, 13 Beav. 288.

1 *Jarm. on Wills*, last edit., 572.

Vickers v. Scott, 3 Myl. & K. 500; s. c. 3 Law J. Rep. (N.S.) Chanc. 223.

Douglas v. Congreve, 1 Keen, 410; s. c. 6 Law J. Rep. (N.S.) Chanc. 51.

Sitwell v. Bernard, 6 Ves. 520.

Gibson v. Bott, 7 Ibid. 89.

Dimes v. Scott, 4 Russ. 195.

Angerstein v. Martin, Turn. & R. 232.

Hewitt v. Morris, Ibid. 241.

Caldecott v. Caldecott, 1 You. & C. C. C. 312, 737.

Hume v. Richardson, 31 Law J. Rep. (N.S.) Chanc. 713.

Re Llewellyn's Trust, 29 Beav. 171.

Taylor v. Clark, 1 Hare, 161; s. c. 11 Law J. Rep. (N.S.) Chanc. 189.

Lord Londesborough v. Somerville, 19 Beav. 295, 298; s. c. 23 Law J. Rep. (N.S.) Chanc. 646.

In re Rogers's Trust, 3 Dr. & Sm. 113; s. c. 30 Law J. Rep. (N.S.) Chanc. 153.

Wilson v. Harman, 2 Ves. sen. 672.

Robinson v. Robinson, 1 De Gex, M. & G. 247; s. c. 21 Law J. Rep. (N.S.) Chanc. 211: overruling 11 Beav. 371; s. c. 18 Law J. Rep. (N.S.) Chanc. 73.

KINDERSLEY, V.C.—In this suit, which now comes on upon further consideration, certain questions have arisen, which may be divided under four heads. The first is a question upon the construction of the will of the testator, whether certain annual sums which are given by him to his executors and trustees are to be considered as annuities payable out of the income of the property, or are to be considered as so many legacies of gross sums postponed in payment from time to time, and payable out of corpus. It appears to me, upon looking carefully at the will, that they must be considered, as, in fact, the testator has described them, to be annuities. The testator seems to have been a gentleman of very large estate, particularly of personal estate, consisting of foreign investments, and property of a kind requiring great care, and perhaps no inconsiderable amount

of time and business habits in order to realize them successfully. Having appointed, in the first instance, two persons, Messrs. Scholefield and Girdler, to whom he afterwards added another, his executors, and what he calls his general trustees, and after giving to his sister certain real estate, and also giving her certain specific chattels, he proceeds, in the third paragraph of his will, to give and bequeath all his personal estate and effects (not specifically bequeathed to his sister) to trustees, upon trust to convert, and out of his ready money and the proceeds of the conversion, to pay his just debts, funeral and testamentary expenses, and the legacies thereafter bequeathed, and which legacies were to be paid as soon after his decease as his general trustees should think proper, and also upon trust to set apart a sufficient sum for providing the annuities or allowances bequeathed to his executors. Now, of course, it will not follow from the testator's calling the gift in question an annuity, and not calling it a legacy, that that would necessarily and conclusively decide that it was to be so considered; but still we have, thus far, the testator saying, "My first trust is to pay debts and funeral expenses, and the legacies;" he speaks of legacies thereafter given, which legacies, he says, are to be paid as soon after his decease as the executors and trustees shall think fit, and then also to pay what he describes as annuities, that is, to set apart a sufficient sum for providing the annuities or allowances bequeathed to his executors; therefore so far at least as the testator thought of the application of the words, he considered that he was applying the term "legacies" to those sums which were to be paid immediately or as soon as convenient after his death in gross sums; he was distinguishing them from the gift in question to the executors, which he speaks of as something besides the legacies, and which he calls "annuities or allowances." Then immediately follows the gift of those annuities or allowances. "I give," he says, "to each of my said executors and general trustees the sum of 400*l.* a year during the term of five years after my decease." If we stop there for a moment, we shall find that he does not, in that passage, use the term "annuities"; but

if there was nothing more than that, it is quite clear that a sum of 400*l.* given to a person during a certain period, whether it be the indefinite period of his life or whether it be a period of some years, long or short, is equally an annuity. Then the will goes on: "In consideration of the very great time and attention which will be required from them in the discharge of their duties, which will be much more during that period" (that is, during the five years from the testator's death) "than afterwards;" and he adds, "if during that period either of them shall from any cause cease to be a trustee, the allowance or annuity shall cease; and I give the same yearly sum he would have received to his successor for the remainder of the said term of five years, or so much thereof as he may act as a trustee." Now, it appears to me, I confess, quite impossible upon that gift to regard the gift as a gift of anything but an annuity. It is suggested and argued, no doubt very naturally and strongly, that what the testator was doing was remunerating his trustees for their trouble; no doubt he was, and of course he might remunerate his trustees for their trouble by an annuity either for their lives or for a temporary period, or during so much of the temporary period as they might respectively act. There is nothing to prevent that being made the subject of remuneration; and it appears to me that to treat it as a legacy would be introducing for what is natural and simple that which is purely artificial and complex, for it must be that each trustee is to have five legacies of 400*l.* each, the first legacy payable at the end of a year, the second payable at the end of the second year, and so on, that is a very artificial condition of things, very unnatural, and not at all that which accords with the testator's intention. He has himself told us, as I have observed, "I do not call these gifts to the executors and trustees legacies, I call them annuities." Then why is the Court, for no reason that I can see, to introduce a complex idea of there being so many different legacies? Why is it to be introduced in this case and not in any other case of a gift of an annuity by will? I really see no reason. I feel no hesitation in coming to the conclusion that these gifts are annuities in the proper

sense of the term, in distinction from legacies of gross sums.

The next question will also turn upon the construction of the will, and it is this: the testator having directed that his assets shall be realized and invested in government funds or mortgages, inasmuch as with regard to what we may call a moiety of his property, he has given it to certain persons as tenants for life, with limitations over to their children, and to others after them, a question arises between the tenants for life and those entitled in remainder or reversion as to what is to be done with the income during the first year, or during the period which elapses between the death of the testator and the realization and investment of the assets, to answer those gifts. It is a question which has been the subject of much discussion, has been involved in much difficulty, and upon which there are no less than four distinct views, each supported by one or more Judges of the first eminence. The difficulty is in knowing in what way the property is to be dealt with. Suppose the simple case of a testator giving his residuary property to A. for life, and after A.'s death to his children; what is to be done upon the death of the testator, supposing the property is to be invested in consols, and it takes a year, or it may be two or three years, to realize; at all events, what income is the tenant for life to have during the first year or until realization? One view has been that he shall have no income at all. Now of all the four views, that is the very last I should ever think of arriving at. Take the common case of a man, who has a wife and children, disposing of his property; he leaves it to his wife for life, and after her death to his children; is it to be conceived that he had the least idea that for the first twelve months after his death his wife is to have no income at all? That is a conclusion I should never arrive at. Another suggestion has been, that he should have the whole of the income. *Prima facie*, that is reasonable enough; but supposing part of the testator's property consists of assets of a nature wearing out, as leaseholds for terms of years or Long Annuities, you would be actually giving to the tenant for life the whole *corpus*; and therefore that difficulty presents itself in a construction which would otherwise be not

unreasonable. If the thing were *res integra*, I confess I should be much disposed to adopt this view: that with regard to all property which is of a permanent character,—for example, bonds, monies in the funds, mortgages, &c.,—of those the tenant for life should have the income during the first year, and as to property which is of a terminable character, that should be realized, as in the case of residuary estates given to a tenant for life, with remainder over, and not intended to be specifically given to the tenant for life. Another conclusion, frequent in modern times, has been that adopted by Lord Lyndhurst in *Dimes v. Scott* (1), and followed in several cases; namely, to ascertain as well as you can what was the value of all the testator's property on the day twelve months after his death, and then to give the tenant for life during the first year the income of that; in other words, if the direction was to invest in a given stock, in the 3*l*. per cents. for example, you have to inquire how much 3*l*. per cents. the property would have bought, and then to give the tenant for life an income for the first year, equal to the dividend which would accrue thereon. And if no particular investment is directed, then you take the account, and give him 4*l*. per cent. The principal objection to that course appears to me to be the difficulty of it. In the first place, the tenant for life wants his income in the first year, and may be in difficulty whilst you wait to ascertain the value of the property; besides which it is a very difficult thing, two, three, four or ten years afterwards, to say what was the value on a given day, and it must be a rough conclusion that is arrived at. There is, however, an abstract justice in it; and I think if I were to decide upon the authorities, I should be much disposed to adopt that view, because I think it has received the most approbation of late years. But it appears to me that I am relieved from the necessity of deciding the question, because I think the testator himself has decided for the parties. As I have said, his property consisted of funds of a particular character, North and South American and various other funds, which he was quite aware would require great skill, judgment, patience and time in reali-

(1) 4 Russ. 195.

zation. It might be expedient to retain some portions of the securities *in specie*, not only temporarily, but permanently, and the testator wished the trustees to have that power. He says: "And the income of the part so retained shall, until it shall be sold, be applied as herein directed of the proceeds of the sale thereof"; but this is a mere inaccuracy of expression, for "the proceeds of the sale thereof" would be invested in stock, and it would only be the income of those investments which the tenant for life would have if that were the construction. Taking together the direction to allot to his nephews, other than Joshua Scholefield, and to retain for Joshua Scholefield and his nieces or grand-nieces, the meaning of the testator in the whole of this clause was not to alter the effect of what he had before done for the tenants for life; but simply to give such discretion and powers as should effect the most successful realization of his property. The testator has said, in effect, whatever remains unconverted, the tenants for life are to have the income of; and therefore I consider that the tenants for life of these respective twelfths are to have the income of the property *in specie*, except as to such parts as were converted and invested.

Then there is another question of a peculiar kind, and one which is novel to me. The testator has directed the sale and conversion of his securities, and the investment of the proceeds in funds of a certain description, that is, in government funds and mortgages. Take a security, say American stock of any kind, bearing interest or dividends payable at any given time, in January and July; if you sell it at any other time than precisely the period at which the dividend has just accrued payable, and there is therefore no dividend running upon it, only a dividend commencing to run, of course the money you get for the sale is so much more in proportion to the time which has elapsed between the last dividend day and the next dividend day; and if you are very near the next dividend day, you can get so much more for your stock than if you sell it *ex div.*, that is, without the dividend. Therefore, the price you get is compounded partly and chiefly of the value of the stock itself, independently of any dividend or portion of dividend, and partly of the value

of that portion of the dividend which may be considered to be apportioned to the period which has elapsed since the last dividend day. Then, it is said, why should not the tenant for life have that? It is rather remarkable that in the thousands of cases of administration of estates in modern times, where similar directions have been given, we have never been in the habit of regarding, or of thinking of administering, any such equity. When you consider it a little further, it is obvious that if the tenant for life is to have something out of the purchase-money when you come to invest that money, unless you invest it on the very day on which there is no dividend you are doing exactly the same thing the other way; and therefore you ought to take from the tenant for life something of his next dividend and add that to the capital, in order to make the thing equal; because it is clear if there is an equity one way there is an equity the other way. It is obvious that the reason why such an equity on either side has never been administered habitually by this Court is, that you can hardly conceive a more serious and grievous burthen imposed upon people's estates than having in every case such a complicated investigation as all that would lead to. The gain to one party or the loss to the other would be far more than compensated by a tenth part of the expense which might be incurred in a complex and difficult case in ascertaining it all; and for that reason, no doubt, the thing has never been done. I will not be the first to introduce a practice which, I believe, would be a terrible scourge upon persons interested in a testator's estate. But I must advert to this, that a case has been cited of *Lord Londesborough v. Somerville*, in which something of this sort of equity, no doubt, was administered; but when I look at that case, I find that it was decided evidently on special circumstances. A very large sum of consols was, for the convenience of a purchase, to be sold just before the transfer-books closed, and the rents would only be received in part by the purchaser. Putting these things together, the Master of the Rolls said that the tenant for life ought not to be deprived of that dividend. That would not justify me in saying that I should introduce a practice which I conceive to be very objectionable,

therefore, I do not think that any such equity ought to be administered.

Then, it was suggested that, though this may be very just and true with regard to property which is in the nature of stock, where the income consists of so many half-yearly payments payable at the end of each successive half-year, it is not properly applicable to the case where the investment is in property which is yielding interest *de die in diem*; for example, debentures, bonds, mortgages and property of that sort. I may say, with regard to that case, that the new practice suggested has never been applied; and it appears to me if I were to apply it in that case, I must apply it conversely with regard to purchasers; and therefore all I can do is, to adhere to the old practice, and say there is no such equity as that contended for on the part of the tenants for life.

STUART, V.C. }
April 30. } BULL v. WITHEY.

Practice—Feme Covert—Order to Answer separately—Attachment.

Where a married woman had upon her own application obtained an order to answer separately from her husband, and made default in answering, an attachment was issued against her.

This was a motion, *ex parte*, for an order for an attachment against Mrs. Withey, who, upon her own application, had, on the 20th of March 1863, obtained an order to answer separately and apart from her husband. Mrs. Withey had not put in her answer although her time for doing so had expired.

Mr. W. W. Cooper, in support of the motion, referred to—

Taylor v. Taylor, 12 Beav. 271; s. c. 19 Law J. Rep. (n.s.) Chanc. 304.

Home v. Patrick, 30 Ibid. 405; s. c. 31 Law J. Rep. (n.s.) Chanc. 424: see *Seton on Decrees*, 1256.

STUART, V.C., on the authority of the cases cited, made the order.

KINDERSLEY, V.C. } *In re THE BRITISH PRO-*
Feb. 20, 21; } *VIDENT LIFE AND*
May 25. } *FIRE ASSURANCE*
} *SOCIETY, re ORPEN.*

Joint-Stock Companies Act, 7 & 8 Vict. c. 110. ss. 13, 54.—Transfer after Call made, but before Time of Payment—Effect of Non-Return of Transfer—Costs of Appearance of Creditors' Representative.

The 54th section of the 7 & 8 Vict. c. 110. prohibits the transfer of his shares by a shareholder only if he shall not have paid the full amount payable as well as due, in respect of every share held by him. Therefore, in a case governed by that act, non-payment of a call made before, but not payable until after, the execution of a transfer, forms no objection to the validity of the transfer.

The non-return of a transfer to the Registrar of Joint-Stock Companies, under 7 & 8 Vict. c. 110. s. 13, though leaving the transferor liable for the debts of the company as between himself and the creditors of the company, does not leave him so liable as between himself and the other shareholders; and, consequently, the omission to make such return affords no ground for placing him on the list of contributories.

The creditors' representative has a right to appear on a contributory summons under a winding-up, and have his costs.

This case came on upon an adjourned summons from chambers upon the question whether Daniel Orpen was liable to be continued on the list of contributories in the winding up of this company. The facts were these: Previously to May 1857 Daniel Orpen was appointed agent for the company for the county of Oxford, and as such was required to take 200 shares, upon which he paid a deposit of 1*l.* per share. In that month the directors became dissatisfied with him, on the ground of inefficiency in his office of procuring insurances, &c., and were desirous of getting rid of him. He, on the other hand, having a like desire to retire, and also to sell his shares, applied to Mr. Sheridan, who was the managing director of the company, to dispose of his shares and take the agency off his hands, and a correspondence ensued between them, resulting in an offer from Mr. Sheridan to give him (Orpen) 50*l.* for his shares; and on

the 30th of May, Orpen, by appointment, met Mr. Sheridan at the company's office in Chatham Place, where he executed a transfer to Mr. Sheridan of the 200 shares, by the usual printed form filled up, and received a cheque from Mr. Sheridan on his (Sheridan's) private bankers for the money. On the 21st of May 1857 (that is, before the above transfer) a call of 10s. per share was made, payable on the 30th of June, which was not paid, and Orpen's name was never returned, as having transferred his shares, to the Joint-Stock Companies' Registry Office. Nothing further occurred, as regarded Orpen, until March 1861, when the society was ordered to be wound up on the usual petition, and the official manager placed Orpen's name on the list of contributories, of which when he had notice he contended that, having transferred his shares to Sheridan, he was not liable; but the deed of transfer, when produced, was found to contain in two places the interlineation, after the words "John Sheridan," of the words "on behalf of the British Provident Society," so as to make it appear that the transfer was to Sheridan as agent for the company merely. Orpen then made an affidavit, swearing that these interlineations were not in the deed of transfer when he executed it; and upon that question the chief clerk caused Mr. Sheridan and Mr. Knight, a clerk who was a witness to and had attested the transfer, to attend in his Honour's chambers and be examined *viva voce*; and the result was, that the chief clerk considered that the interlineations were in the deed of transfer when it was executed, and retained Orpen's name upon the list, on the ground that the transfer to the company was not valid under the 157th clause of the articles of association, which provided that although the directors might purchase shares under the 156th section, yet they could not do so, unless it was sanctioned by a general meeting, which was not done in this case. Orpen, not being satisfied with the decision of the chief clerk, requested to have the opinion of his Honour upon the point, and the summons was adjourned for hearing before the Vice Chancellor. When the summons came on to be argued, as it appeared to the Vice Chancellor that the whole turned upon the fact whether the interlineations were made at

the time the transfer was executed or not, and as the credibility of the witnesses on either side was in question, and as a similar interlineation appeared also in the books of the society, his Honour, under the powers vested in him by the recent statute, summoned a jury upon the issue whether the interlineations were made at the time the transfer was executed. The jury was summoned, and after hearing the evidence of Mr. Sheridan, Mr. Knight, Mr. Orpen and other persons, found that the interlineations were not in the deed of transfer when it was executed, and his Honour expressed his entire concurrence in the finding. The official manager, however, considered that there were other grounds upon which Mr. Orpen's name should be continued on the list, and the summons was now argued upon those grounds.

Mr. Karstlake appeared for the official manager.—There were two grounds upon which Mr. Orpen's name ought to be retained upon the list: first, that a call having been made, he was disabled from transferring his shares until he had paid that call, under the 7 & 8 Vict. c. 110. s. 54; and, next, that he was not returned to the Joint-Stock Companies' Registry Office, under the 13th section. The sections referred to were as follows: the 54th section enacted (*inter alia*), "that if at the time of such transfer, the shareholder shall not have paid the full amount due and payable to the company on every share held by him, then he shall not be entitled to transfer any share, unless there be a provision to the contrary in the deed of settlement." The 13th was, "That until the return of the transfer, or other fact or event whereby a person becomes the holder of any shares, be made, it shall not be lawful for such company, its directors or officers, to pay to any such person any part of the profits of the concern, nor for any such person to sue for or recover such profits, or in anywise to act as a shareholder; and that until the return of the transfer of any share shall have been made the person whose share shall have been thereby transferred, shall, so far as respects his liability to the debts of the company and reimbursement thereof, be deemed to continue a shareholder of such company"—*North American Colonial Association of Ireland v. Bentley* (1).

(1) 19 Law J. Rep. (N.S.) Q.B. 427.

Re Phoenix Life Assurance Company, ex parte Hatton, 31 Law J. Rep. (N.S.) Chanc. 340.

In re the Vale of Neath and South Wales Brewery Joint-Stock Company, ex parte Morgan, 1 Mac. & G. 225; s. c. 1 Hall & Tw. 320; 18 Law J. Rep. (N.S.) Chanc. 265.

In re Marylebone Joint-Stock Banking Company, Stanhope's case, 3 De Gex & Sm. 198; s. c. 19 Law J. Rep. (N.S.) Chanc. 389.

Mr. Shebbeare, for the creditors' representative, supported the argument of the official manager.

Mr. Day and *Mr. Phear*, for *Mr. Orpen*, contended that he was not liable. The call was not payable till after the transfer, and that was sufficient; and, moreover, there had been clear acquiescence.

Mr. Karslake was heard in reply.

KINDERSLEY, V.C. (May 25.)—The question in this case is, whether Daniel Orpen ought to be continued on the list of contributories of this society, which is being wound up. It appears that Daniel Orpen was at one time the holder of 200 shares; he had been appointed agent of the society for the county of Oxford, residing at Thame, and it seems to have been a condition that he should be a holder of shares, and accordingly he held 200 shares, and 1*l.* deposit was paid upon those shares. In May 1857, the directors of the company were dissatisfied with the efficiency of Orpen as an agent, and desired to get rid of him; and he also wished to determine his agency and get rid of his shares, and applied to *Mr. Sheridan*, who was the managing director, to relieve him from the shares and agency, and some considerable negotiation took place and some controversy, which ultimately ended in *Sheridan* agreeing to give Orpen 50*l.* for his 200 shares; and on the 30th of May 1857, Orpen executed a deed or instrument of transfer to *Sheridan*. In March 1861, an order for the winding up of the company was made, and the official manager in the usual way settled his list, including therein the name of Orpen. Orpen insisted that his name ought not to be upon the list of contributories, and that he had transferred his shares. On producing the deed of trans-

fer, it appeared that there were two interlineations, by means of which the transfer purported to be to *Sheridan*, "on behalf of the company." Orpen insisted that these interlineations were not in the deed at the time of its execution, and made an affidavit stating precisely to the same effect. *Sheridan*, the managing director, and *Knight*, a clerk of the company, were examined *videlicet* before the chief clerk; and, on their testimony, the chief clerk thought that the interlineations were in the instrument at the time of its execution, and that, therefore, Orpen's name must be retained upon the list, because the transfer to *Sheridan* was not valid as a transfer to the company. Orpen desiring to have the decision of the Judge himself, the matter was adjourned into court; and it appeared to me that the whole question turned upon the credibility of the evidence, the interlineations not only existing in the instrument of transfer itself, but there being other corresponding interlineations in the books of the company, and I thought therefore that the proper course was to have the question decided by a jury; and accordingly, there being two issues, because there were two interlineations, the question was, whether the interlineations were in the instrument when it was executed by Orpen. Those issues were tried before me by a jury, and the jury came to a conclusion in favour of Orpen; in other words, their opinion clearly was that the interlineations had been made subsequently to the execution of the instrument by Orpen; and, I must say, the verdict of the jury appeared to me to be a just and proper one, and that no twelve men of honesty and integrity could, upon such evidence, have come to any other conclusion. When the matter came on to be disposed of on this verdict, it was represented by counsel for the official manager that there were other grounds for continuing Orpen's name on the list, even supposing the interlineations were not in the instrument of transfer at the time of its execution; and I own that it took me by surprise, because I thought that the whole question turned upon the validity of the act of transfer, but I could not hold that the official manager was precluded from bringing forward other grounds; although if they had been brought forward in the first instance, it is obvious that it would

have been the most convenient course to discuss them first, and thus, perhaps, save the expense of the trial; but it signifies nothing; for the matter has been argued on the other grounds: and on the points now raised I am to give my decision.

The grounds upon which it is contended that Orpen's name should be continued on the list of contributories, are two: first, that shortly before the date of the transfer, a call was made on the shareholders, and that until that call was paid, Orpen was disabled by the terms of the 54th section of the 7 & 8 Vict. c. 110, from transferring his shares. The facts on which this contention rests are these: on the 21st of May 1857, a call was made, that is, before there had been any transfer, and the call so made, was made payable upon and not until the 30th of June, and in the interval between the date of the call and the day when it was made payable, namely, on the 30th of May 1857, the transfer took place and was executed. So that the transfer being made between the date of the call and the 30th of June, the question is, whether, on the construction of that section, the transfer is valid. The 54th section, after giving a general right to shareholders to transfer their shares and describing the form of transfer, and directing that every transfer should be entered by the directors in the books of the company called the "Registry of Transfers," contains the following proviso: "Provided always, that if at the time of such transfer a shareholder shall not have paid the full amount due and payable to the company on every share held by him, he shall not be entitled to transfer any shares, unless there shall be a provision to the contrary in the deed of settlement." Now, whatever construction ought to be put on the words "due and payable," one thing appears to me to be clear, namely, that the time to which the clause refers is the time of transfer—the time of executing the deed of transfer,—and this is not merely matter of inference, but by the express words of the statute, "if at the time of such transfer a shareholder shall not have paid the full amount, then," &c. The legislature clearly intended to point to the state of things existing at the time of the execution of the transfer; the intention was, that in order to enable a shareholder to make a

valid transfer, he must before he executes the deed of transfer, have actually paid the full amount due and payable, not merely on the shares about to be transferred, but on every other share held by him; and whatever meaning is to be attributed to the words "due and payable," it appears to me beyond all doubt, that the amount which the shareholder must have paid to the company in order to enable him to make a valid transfer, is the amount due at that time and up to that time. If anything is then due and payable, he must pay it before the transfer, otherwise it is invalid; if nothing is due and payable, the transfer is valid. It is obvious that if the words "due and payable" are held to mean not only then due up to that time, but at any time, that is, at any subsequent time, that would render it impossible for a shareholder to make any transfer, because they would embrace any future call; and it is therefore clear that the time referred to is the time of the execution of the instrument of transfer.

What is meant, then, by the words "due and payable"? What is their natural and primary meaning, irrespective of the context? The words are not due *or* payable, but due *and* payable, that is, not only due but also payable. Now, if a man is under a present obligation to pay a sum of money at a future day, it would be certainly using inaccurate language to say "the amount now due and payable." Take the case of a promissory note dated yesterday, but payable six months hence, would it be proper to say that such note was due *and* payable. I am assuming that it is now due: is it now payable? Most assuredly it is not, it is not payable till a future day, that is, it is "*debitum in presenti solvendum in futuro*," and that is not merely the popular but the strictly legal phraseology. If, therefore, that is the natural and primary meaning of the words "due and payable," irrespective of the context, let us see what light is thrown upon them by the context, because it may compel a different meaning to be put on the words, "if at the time of such transfer the shareholder shall not have paid the full amount due and payable." "If he shall not have paid," clearly refers to some amount of money which the shareholder ought to have actually paid, the legislature

providing for the case of a shareholder desiring to make a transfer being in default for not having made some payment to the company which at that time he ought to have made, and the intention was, in such a case, to withhold the right to transfer if he had not paid the full amount which at that time he ought to have actually paid; so that, it appears to me according to the natural and primary meaning of the words "due and payable," having regard to the context, it is clear that the intention of the legislature was, that where you are making a transfer, if at the time of the transfer a single shilling is due *and* payable, you cannot transfer. I may here observe on the contrast between the wording of this proviso and that used in the 16th section of the Companies Clauses Consolidation Act, (8 & 9 Vict. c. 16.) which was passed in the following year, after the act upon which this question turns, one being passed in 1844 and the other in 1845, that is the Companies Clauses Consolidation Act, which contains this 16th section. The language is, that "no shareholder shall be entitled to transfer any shares after any call shall have been made in respect of those shares, until he shall have paid such call, nor until he shall have paid all calls for the time being due on any share held by him." The words here is "due," and not "due and payable," and he is not to transfer "after call shall have been made." Now, this language is very different from that of the 54th section of the act of 1844; and if the Companies Clauses Consolidation Act of 1845 applies to this company, then, beyond all doubt, Mr. Orpen's transfer is invalid, because at the time of the transfer a call had been made; and although it was not payable, the call must under this section be paid before transfer, although the day of payment had not arrived. But that act does not apply to this company. The companies to which it applies are defined by the 1st section, by which it is enacted that "it shall apply to any company incorporated by any act subsequent to this act," and this company is incorporated under the act of 1844. I refer, however, to this 16th section for the purposes of pointing out how different is the language used, and how different the intention, from those of the 54th section of

the earlier act. If the language of the proviso of the 54th section of the act of 1844 expressed an object which it was intended to carry into effect by the 16th section of the subsequent act of 1845, why did the legislature frame a clause entirely different that did not preserve the same language? Simply because the 54th section did not express and enact that which they meant to enact by the act of 1845. The section in the act of 1844 means one thing, and the 16th section in the act of 1845 means another. I have endeavoured to discover whether there are any cases on the construction of these sections; but I have not been able to find any, and I assume that counsel could not, otherwise they would have been brought forward, and therefore it may be taken for granted that there are not any such. I may, however, mention that I have found a case of *The Aylesbury Railway Company v. Mount* (1), which turned upon a different act of parliament, the 6 Will. 4. c. xxxvii. (local and personal), the question in which was, not whether the transfer was valid or invalid,—the case in fact did not touch that question,—but whether, assuming the transfer to be valid, the shareholder who made the transfer by virtue of a peculiar clause of the act, still remained liable for a call made before the transfer was executed. That case is somewhat similar to the present on the question of the time, but the question did not arise upon the act which I have to consider, but upon a totally different one and on a totally different clause, and not as to the validity of the transfer, which was immaterial, but whether the call was valid.

The only other case I have been able to find was decided in the Court of Queen's Bench, and that is *The North American Colonial Association of Ireland v. Bentley*, and in that case the question was, not whether the transfer was valid or not, but whether the transferor remained liable for a call made before the transfer was executed, and that case turned upon the construction of another local and personal act with very different clauses from those now in question. That act is the 5 & 6 Vict. c. xcvi. s. 16, which enacts "that no share-

(1) 4 Man. & G. 651; s.c. 11 Law J. Rep. (N.S.) C.P. 258.

holder shall be entitled to transfer any shares until he shall pay all calls for the time being *due* on every share held by him," not "due and payable," and there are other clauses which are not material to the present question; but upon the whole, the Court came to the conclusion, that the transferor and shareholder remained liable to a call made previous to the transfer, although the day of payment had not arrived. Mr. Justice Patteson, in giving judgment, said that the meaning of the words "all calls for the time being due" was the same as that which we find in the Companies Clauses Consolidation Act, "shall not transfer shares when any call is due." In the absence, therefore, of any direct authorities on the point, and reasoning on the language and construction of the act, it appears to me that the transfer by Mr. Orpen to Mr. Sheridan was not invalid by reason that at the time of the transfer a call had been made which was not payable until afterwards.

The other ground upon which it has been contended that Mr. Orpen was not entitled to have his name taken off the list was, that it had not been returned to the Office of Registry of Joint-Stock Companies, as it ought to have been, so that Mr. Orpen's name remained on the list of shareholders of the company. As a matter of fact, that was so, and the question is, what is the effect of it? and that depends on the 13th section of the 7 & 8 Vict. c. 110, and I may refer for a moment shortly to the two preceding sections. By the 11th section the directors of the company are required twice in every year, that is, in the months of January and July, to make a return to the Office of Registry, of all persons who since the last half-year have become shareholders "*otherwise than* by transfer," that is, legatees, &c.; and the 12th section provides that any party to a transfer may require the directors, without waiting for the next half-year, to return, and upon proof of the transfer and request, a party may himself make a return which is to be duly registered, as if it had been made by the directors. Now comes the 13th section, which enacts, "that until the return of the transfer or other fact or event whereby a person becomes the holder of shares be made, it shall not be lawful for such company, its directors or officers, to

pay to any such person any part of the profits of the concern, nor for any such person to sue for, or recover any part of such profits, or in anywise to act as a shareholder; and that until the return of the transfer of any share shall have been made the person whose share shall have been thereby transferred shall, so far as respects his liability to the debts and engagements of the company, and the reimbursement of any loss he may incur thereby, be deemed to continue a shareholder of such company." It was contended that by virtue of this clause, a transfer of shares until a return had been made was invalid, and that until such transfer was returned it did not operate as a transfer. Now, I cannot say that I see anything in this clause to that effect. If that was the intention of the legislature, why was it not expressed in plain terms? Why this circumlocution? Why not have said that no transfer of shares shall have any operation until it has been returned to the Office of Registry, and add something to the effect that notwithstanding such transfer the person purporting to transfer should, until a return of the transfer to such office, continue to all intents and purposes to be a shareholder," in respect of such shares of which such transfer shall have been made? Why not have done this, instead of using what I may really call a complicated circumlocution? So far from this clause having declared that the omission to make a return of the transfer of the shares should render it void, it appears to me to be just the contrary. The clause speaks of an omission to make a return of the transfer "or other fact or event whereby a person becomes the holder of shares"; not only therefore does it apply to a transfer, but any "other fact or event," thereby importing that the transfer, though not returned, is one of the events whereby a person becomes a shareholder, that is, putting it upon the footing of the case of a legatee, &c. Further the language of the 13th section in the case of a transfer is, as to the transferee, not that he shall not thereby become a shareholder, but that he shall not be entitled to participate in the profits and to act as a shareholder; and as to the transferor, not that he shall continue a shareholder, but be deemed to be a share-

holder, not for all purposes, but only for certain limited purposes, namely, so far as regards his liability to the debts and engagements of the company, in which case he would have a right to be reimbursed for costs incurred in consequence; that is, he is to continue liable to the creditor of the company, as if he was still a shareholder, and if he pays debts may recover them back from the company; but though he is still to continue liable to the debts, he is not liable to contribute with the other shareholders to the payment of those debts; that is, a creditor may compel him individually to pay, but he is not liable to the other shareholders. It is to be remembered that by the terms of the Winding-up Acts a contributory is not defined to be a person liable to pay the debts of a company, but liable to contribute to the payment of those debts with the other shareholders. For these reasons, I am of opinion that with respect to the second ground, the transfer from Mr. Orpen to Mr. Sheridan was not invalid; and the result will be, that Mr. Orpen's name must be struck out of the list of the contributories in the winding up of this company, and he must have all his costs paid out of the estate. With regard to the official manager, he has only been doing his duty; he had no reason to mistrust the representations of Mr. Sheridan, but it has turned out that the jury did not believe him, and I must say I think very justly. The official manager therefore must have his costs also out of the estate.

Mr. Shebbeare then asked for the costs of the appearance of the creditors' representative upon this summons.

KINDERSLEY, V.C.—Why is the appearance of the creditors' representative necessary?

Mr. Shebbeare.—It has now been settled that the creditors' representative is entitled to appear upon these summonses. There are a number of cases in which it has been so decided, but the most recent is that of *Re Era Assurance Society* (*Williams's case*) (2), in which Lord Justice Turner went into the question, and so laid it down.

(2) 2 J. & H. 400; s. c. 30 Law J. Rep. (N.S.) Chanc. 137.

KINDERSLEY, V.C.—If that is the case of course he must have his costs.

LORDS JUSTICES. }
April 15, 16, 18; } GRAHAM v. WICKHAM.
June 27. }

Debtor and Creditor—Specialty Debt—Covenant in Marriage Settlement to bequeath—Appointment in satisfaction.

James W, by the settlement made on the marriage of his son *Charles*, covenanted with trustees to bequeath by his will to his son, if living, or to his then intended wife if he were dead, a legacy or sum of not less than 2,500*l.* to be held upon the trusts of the marriage settlement. By his will, *James W*, after reciting a power of appointment he had over a sum of 10,000*l.* comprised in his own marriage settlement in favour of his children, (which sum, in default of appointment, was settled upon the children in equal shares), appointed to *Charles* 2,500*l.* in full discharge of his (the testator's) covenant for payment or bequest of that sum contained in the settlement:—Held, first, that the appointment made by the testator in exercise of the power contained in his own settlement could not operate as a satisfaction of the personal liability created by his covenant; and, secondly, that the covenant did not merely confer a right to receive a legacy of the amount named after payment of simple contract debts, but created a specialty debt in favour of those claiming under the settlement.

This was an appeal from a decision of the Master of the Rolls dismissing a summons to vary his chief clerk's certificate. The appeal was that of *Mr. Rawlings*, a simple contract creditor, who had proved his debt in a suit of *Rawlings v. Wickham* (1), instituted by him for the administration of the real and personal estate of *James Wickham*. The material facts and the questions arising upon them are so fully stated by Lord Justice Turner in his judgment, that a statement of them here would be superfluous.

(1) 28 Law J. Rep. (N.S.) Chanc. 188; s. c. 3 De Gex & J. 304; 1 Giff. 535.

Mr. Rolt, Mr. J. H. Palmer and Mr. Welford supported the appeal.

The Solicitor General and Mr. G. L. Russell opposed, on behalf of *Mr. Charles and Mr. John Wickham*.

Mr. Selwyn and Mr. Swanston, for the plaintiff in *Graham v. Wickham*, who was a creditor of *Mr. James Wickham*, the testator.

Mr. Rolt was heard in reply.

The following were the authorities referred to—

Logan v. Wienholt, 1 Cl. & F. 610; s. c. 7 Bligh, N.S. 1.

Fortescue v. Hennah, 19 Ves. 67.

Bailey v. Lloyd, 5 Russ. 330; s. c. 7 Law J. Rep. Chanc. 98.

Eyre v. Monro, 3 Kay & J. 305; s. c. 26 Law J. Rep. (N.S.) Chanc. 757.

Eccles v. Cheyne, 2 Kay & J. 676.

Carver v. Bowles, 2 Russ. & M. 301; s. c. 9 Law J. Rep. Chanc. 19.

Blacket v. Lamb, 14 Beav. 482; s. c. 21 Law J. Rep. (N.S.) Chanc. 46.

Griffiths v. Gale, 12 Sim. 327, 354; s. c. 13 Law J. Rep. (N.S.) Chanc. 286.

LORD JUSTICE TURNER (June 27).—This is an appeal in a suit instituted by a creditor of *James Wickham the elder*, against his executors, *James Wickham (who is since dead)*, *John Wickham and Charles Wickham*, and other parties, for the administration of his estate. The appeal is brought by one of the simple contract creditors of the testator who has come in under the decree, and it complains of an order made by the Master of the Rolls upon a motion to vary the chief clerk's certificate, and upon the hearing of the cause upon further consideration. By this order his Honour, as respects the motion, refused to vary the certificate in so far as it found each of the defendants *John Wickham and Charles Wickham* to be specialty creditors of the testator's estate for a sum of 2,500*l.*; but varied the certificate by striking out so much thereof as charged the defendants *John Wickham and Charles Wickham* with the sum of 250*l.* received by them from the trustees of the testator's marriage settlement, and so much thereof as found the defendant *John Wickham* to be indebted to the testator's estate in the sum of 531*l.*

19*s.* 1*d.*, the defendant *Charles Wickham* to be so indebted in the sum of 137*l.* 4*s.* 8*d.*, and the estate of the late defendant *James Wickham* to be also so indebted in the sum of 1,440*l.* 0*s.* 8*d.*; and, so far as respects the further consideration, his Honour gave directions for the distribution of the assets in conformity with what he had decided upon the motions. Questions as to the rights and liabilities of the defendants *John Wickham and Charles Wickham* in respect of the sums of 2,500*l.* and 250*l.*, and as to their liabilities and the liability of the estate of the late defendant *James Wickham* in respect of the several other sums, arise under wholly different circumstances. As to the two sums of 2,500*l.*, it appears that *James Wickham the elder*, under the settlement made upon his marriage in the year 1818, had a power of appointment amongst his children over a sum of 4,000*l.*, increased afterwards by other additions of the settled property to the sum of 9,500*l.*, to which *James Wickham the elder* himself had added a further sum of 500*l.*, so that upon the whole there was a power of appointment over a sum of 10,000*l.*; and, in default of appointment, that sum was to go equally amongst the children, according to the provisions of the settlement made upon the marriage. I take those facts from the deeds which I desired to be furnished with, in order that I might see how they stood, for I could not make out from the documents before me, although there is no doubt of the fact, that the limitation in default of appointment was amongst the children equally. In that state of circumstances, upon the marriage of *Charles Wickham* in the year 1851, a settlement was made by which the lady's property was entirely brought into settlement, and the father, *James Wickham the elder*, joined in the settlement and entered into a covenant, which it is necessary to state. After reciting, "in consideration of the natural love and affection which he had for *Charles Wickham*, his son, and in consideration of the marriage, he had consented to make provision on behalf of *Charles Wickham* and the intended wife, by allowing *Charles Wickham* during his life, and upon his decease by allowing the wife, should she survive him, an annuity of 150*l.*; and he had also consented and agreed

with the trustees of the settlement that he would, in and by his last will and testament, give and bequeath unto and in favour of his son Charles Wickham, or his wife in case Charles Wickham should then have departed this life, the sum of 2,500*l.* sterling money, and that the sum of 2,500*l.* and any additional legacy or sum or sums of money which he should give and bequeath to Charles Wickham, should be so given and bequeathed to Charles Wickham, subject to and upon and for the trusts, intents and purposes, with, under and subject to the powers, provisoes, declarations and agreements therein declared and contained of and concerning the present trust fund; it was witnessed, and in consideration of the marriage he covenanted with the trustees of the settlement, first, for payment of 150*l.* a year, and, secondly, that he the said James Wickham should and would, in and by his last will and testament, give and bequeath unto and in favour of Charles Wickham, and in case the said Charles Wickham should have departed this life at the time of the decease of the said James Wickham leaving the said Clara de Havilland Dobree him surviving, then unto or in favour of or for or in trust for the said Clara de Havilland Dobree, a legacy or sum of money not less than the sum of 2,500*l.*, and that the said sum of 2,500*l.*, and any additional or further legacy, or sum or sums of money which he the said James Wickham should give and bequeath to the said Charles Wickham or the said Clara de Havilland Dobree, should be given and bequeathed to the said Charles Wickham, or unto or in trust for the said Clara de Havilland Dobree, subject to, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, declarations and agreements hereinbefore declared and contained of and concerning the present trust fund in favour of the said Charles Wickham and Clara de Havilland Dobree, and the issue of their said intended marriage, save and except that the said Clara de Havilland Dobree should have no separate and exclusive estate therein, nor should she have power to bring any portion of the same into settlement in case of her second or subsequent marriage; but, nevertheless, she should have only a life-interest

absolute in the same in the event of her surviving the said Charles Wickham. Then, upon the marriage of John Wickham immediately following, in the year 1852, another settlement was made by the testator, reciting the settlement upon his own marriage, and the additional sums which had been provided by that settlement; and the testator covenanted for himself, his heirs, executors and administrators, with the trustees of the settlement in manner following: that in case the intended marriage should take effect, the executors or administrators of James Wickham, the testator, should and would within the period of six months after his decease pay or cause to be paid to the trustees of the settlement the full sum of 2,500*l.* sterling, with interest from the time of payment at 4*l.* per cent., and from his decease, that the trustees should stand possessed of the said 2,500*l.* and the interest thereof when the same should be paid under the covenant aforesaid, upon and for the trusts declared of and concerning the same; and then the trusts are declared for the benefit of the husband and wife and the issue of the marriage. Those settlements having been made by the testator upon the marriages of the two sons, the testator, by his will, recited the powers contained in the settlement made upon his own marriage, and the additions which had been made to that fund; and he appointed the several sums of 2,000*l.* and 2,000*l.* mentioned in the indenture of settlement, and those sums which had been added to them, making altogether 10,000*l.*, should "from and immediately after his decease go, remain and be as after mentioned; that is to say, as to the sum of 2,500*l.* sterling, part of the five several sums hereinbefore mentioned and settled as aforesaid, unto and for the absolute use and benefit of my said son, James Wickham; as to the sum of 2,500*l.*, other part of the said several sums, unto and for the use of my said son John Wickham, in full discharge of my covenant for payment or bequest of the said sum contained in the indenture of settlement made on the marriage of my said son John with his present wife; as to the sum of 2,500*l.*, other part of the said several sums, unto and for the use of my son Charles Wickham, in full discharge of my covenant for payment or

bequest of that sum contained in the indenture of settlement made on the marriage of my said son Charles Wickham with his present wife." And then, by his will, he appointed David Cockerton (who, I believe, has not proved the will), and his sons James, John and Charles, to be the executors of his will. The testator died soon after the date of the will, namely, in October 1855. His will was proved by his three sons. Some short time after his death the two sums of 2,500*l.* appointed by the will were paid over by the trustees of the testator's marriage settlement, with the consent of John Wickham and Charles Wickham respectively, to the trustees of their respective marriage settlements, and long subsequently, by deed dated, I think, in 1861, the trustees of the marriage settlement assigned to the sons the benefit of the covenants which had been entered into with the trustees by the settlor in the marriage settlement. These are the circumstances under which the question has arisen whether the defendants John Wickham and Charles Wickham are entitled to stand as specialty creditors upon the estate of the testator for these sums of 2,500*l.* The covenants contained in the settlements on the marriages of the defendants Charles Wickham and John Wickham are, it is to be observed, different. In the former settlement the covenant is, that the testator will give and bequeath the sum of 2,500*l.*; and in the latter settlement it is, that the trustees, executors and administrators will within a limited time after his death pay that sum of 2,500*l.* mentioned in that settlement. The claim upon the former of those covenants seems to me open to more difficulty than the claim upon the latter of them, and I shall therefore first deal with the case depending upon the former covenant, contained in the settlement of Charles Wickham, that the testator will give and bequeath to him the 2,500*l.*

It was argued for the appellant, first, that this covenant was satisfied by the appointment made by the will; secondly, that if it was not satisfied by the appointment, the defendant Charles Wickham having assented to the 2,500*l.* being paid to the trustees of his settlement, could not afterwards claim that sum against the testator's estate; and, thirdly, failing both

these points, that this sum of 2,500*l.* ought to be considered to be payable only out of such assets as would be properly applicable to the payment of legacies—in effect, that it ought to be postponed to simple contract debts.

As to the first of these points, the question as to whether the covenant is satisfied by the appointment, two positions were advanced in argument on the part of the appellant. First, that the covenant being simply to give and bequeath, the covenant was satisfied by the gift and bequest being made without regard to the question whether there were or not assets to satisfy the gift or bequest; and assuming it to be necessary, in order to satisfy that covenant, that there should be assets to answer it, there were in this case such assets, for that it was competent to the testator to subject the fund over which he had the power of appointment to the payment of the sum which he had covenanted to give and bequeath. Now it cannot, I think, be doubted that the object and purpose of this covenant were to secure the sum of 2,500*l.* to be held upon the trusts of the settlement; and this being the purpose of the covenant, it is of course the duty of the Court so to construe it, if it can be so construed, as to give effect to this purpose. In my opinion it may well be so construed. The words to "give and bequeath" contained in this covenant are not free from ambiguity. They may mean to give and bequeath in point of form, or to give and bequeath in point of substance; and, looking to the purpose of this covenant, there can, I think, be no reasonable doubt that the latter and not the former meaning ought to be attached to the words. In my opinion, therefore, this covenant could not be satisfied unless there were assets sufficient to answer the sum covenanted to be given and bequeathed. I am of opinion, also, that it was not competent to the testator to subject the fund, over which he had the power of appointment, to the payment of the sum which he had covenanted to give and bequeath. This fund was not the property of the testator. It belonged to his children, and he had no more than a power of distributing it among them. To hold that he could satisfy the covenant by an appointment of any part of this fund

would be to hold that he could pay his own debt out of his children's property. That it was not intended that the fund subject to the power of appointment should be resorted to for the payment of this sum of 2,500*l.* is, I think, evident. Had it been so intended, the power, if not at once exercised, would, at all events, have been recited or referred to. The case of *Bailey v. Lloyd*, so much relied upon, on the part of the appellant, in the argument on this part of the case, does not seem to me to assist the appellant's contention. What was said by Sir John Leach in that case may well have meant, and, as I think, really meant, no more than this, that so much of the fund, subject to the power, as would satisfy the covenant in the daughter's settlement, so far as it applied to that fund, might well be appointed to her. The first point, therefore, on which the appellant relied against the defendant Charles Wickham's claim to stand as a specialty creditor for this sum of 2,500*l.* cannot, as it seems to me, be maintained.

As to the second point, the cases cited in the argument shew that the defendant Charles Wickham became absolutely entitled to the 2,500*l.* under the appointment. There was no contract, no liability on his part to prevent this sum from being applied to the satisfaction of the covenant. Either he knew or he did not know that he was absolutely entitled to this sum. If he did not know it, he cannot be held bound by his assent to the application of the money; and if he did know it, he would still, as I apprehend, be entitled to be repaid the money out of the testator's estate, unless he made the payment with intent to discharge that estate. The trustees to whom the payment was made would, by virtue of the payment, become trustees for him, and would be entitled to maintain an action or suit against the testator's estate as such trustees. In this view of the case, the question would be, whether the payment was made with intent to discharge the estate, and in my opinion the evidence fails to shew that it was made with any such intent.

As to the third point, it is sufficient to say that to decide it in favour of the appellant would be to hold that the covenant created no debt: a position which cannot

of course be maintained, and which, as it seems to me, would be in direct contradiction to the authorities. For these reasons, my opinion is that the appellant's case fails as to the 2,500*l.* for which the defendant Charles Wickham has been admitted to be a creditor, and certainly it does not the less fail as to the defendant John Wickham's 2,500*l.* Then, as to the next sum in question, the 250*l.*, I see no pretence for charging the defendants with this sum. It is clear that the sum of 500*l.* of which it formed part, had been added by the testator, long before his death, to the trust fund held under his marriage settlement, and formed part of that trust fund. The testator's estate, therefore, had no right to or interest in the capital of the fund. As to the other sums, the debts due from the testator's sons which were paid by him, I think it clear upon the evidence that the testator made these payments by way of advancement or gift to his sons. In my opinion, therefore, this appeal is wholly groundless, and ought to be dismissed; but my learned Brother being of opinion that there should be no costs of the appeal, it will be dismissed without costs.

LORD JUSTICE KNIGHT BRUCE.—I agree that the appeal fails.

An order was then made that the appeal be dismissed; no costs against any party; the deposit to be returned; the plaintiff to have his costs out of the estate.

ROMILLY, M.R. }
Feb. 11, 12; } DOWNES v. JENNINGS.
March 17. }

Settlement—Feme Sole—Pending Marriage—Marital Right.

F, a widow, who was entitled to an annuity determinable in the event of her re-marriage in the lifetime of *E. B.*, to avoid the forfeiture of her annuity, consented to live with *D.* as his wife, under a promise of marriage. In 1857, *E. B.* died, and upon her death differences arose, owing to which *F.* and *D.* lived separate for about two years, though *D.* occasionally visited *F.* While living separate, *F.* made a settlement of property to which she had become absolutely entitled for the benefit of herself, her putative daughter, and a daughter by a

first marriage and her children, and other members of her family. About seven weeks afterwards D. married her, knowing of her property, and without having been informed of the settlement. Upon bill filed by D,—Held, that the settlement must be regarded as a fraud upon his marital rights, and it was set aside.

A delay of two years and a half from the time of discovery of the settlement to the filing of his bill, held, not sufficient to deprive D. of his right to relief, there being no suggestion that evidence had been lost in consequence of the delay.

Hunt v. Matthews (1) doubted.

This bill was filed, by Samuel Downes, on the 10th of January 1862, asking that a settlement, dated the 22nd of March 1859, made by his wife about seven weeks before their marriage, might be declared to be a fraud upon his marital rights, and asking that it might be delivered up and cancelled.

The bill was originally filed against James Beckett Jennings and John Wheatley, the trustees of the settlement, and Fanny Downes, the wife of the plaintiff; but it was afterwards amended, and all the parties claiming under the settlement were added as parties to the suit.

It appeared that Thomas Bygrave, by his will, dated the 5th of June 1849, gave an annuity of 70*l.* a year to the plaintiff's wife, then Fanny Marshall, the widow of his adopted son, John William Marshall, for her separate use for life, for the maintenance of herself and her daughter Kezia Sarah Marshall, during such time as they should live together; and he declared that if Fanny Marshall married again during the life of Elizabeth Bygrave, the testator's widow, the annuity should be reduced to 60*l.* per annum, and that 10*l.* per annum, part thereof, should be paid to Fanny Marshall, and the other 50*l.* to Kezia S. Marshall, during the remainder of the life of the testator's widow; and he gave his residuary estate equally between Fanny Marshall, Thomas Marshall and Kezia S. Marshall.

The testator died in May 1852, leaving his wife surviving.

The plaintiff and Fanny Marshall had formed an acquaintance before the death of Mrs. Bygrave, and were desirous to intermarry; but to avoid forfeiting the annuity, they mutually consented to postpone the ceremony of marriage, and to live together as husband and wife, and the result of their intercourse was the birth of a child named Jane Marshall.

Mrs. Bygrave, the testator's widow, died the 26th of October 1857.

Fanny Marshall, in June 1858, with the knowledge of the plaintiff, invested a portion of her share of the residuary estate of the testator in the purchase of a messuage and premises, being No. 41, Bloomsbury Square, which was held for the residue of a term of eighty years from Lady-day 1855, at a ground-rent of 14*l.* per annum. These premises were underlet at an improved rent of 120*l.* a year, leaving a net rent of 106*l.* a year.

The contract of marriage was not carried out immediately after the death of Mrs. Bygrave, in consequence of some differences which arose between the plaintiff and Fanny Marshall, owing to the intervention of her friends; and from 1857 to 1859 they lived separate, though they were each in the habit of visiting the other. Ultimately, however, a day was fixed, and on the 8th of May 1859 they were married.

Kezia Sarah Marshall had intermarried with James Beckett Jennings in February 1857, and after the purchase of the house in Bloomsbury Square he received the rents, and continued to do so up to the 24th of June 1859.

The plaintiff, between November 1859 and January 1860, for the first time, became aware that his wife, while a *feme sole*, had executed an indenture, dated the 22nd of March 1859, by which she had assigned the messuage in Bloomsbury Square to the defendants J. B. Jennings and John Wheatley, her brother-in-law, upon trust, after payment of the ground-rent and the repairs, to pay the improved rent to Mrs. Downes for her life, for her separate use, without power of anticipation, and, upon her death, to pay 20*l.* per annum, part thereof, to the mother of Mrs. Downes for her life, and 50*l.* per annum, other part thereof, to Jane Marshall, who also, upon the decease of the mother of Mrs. Downes, was to receive the

(1) 1 Vern. 408.

annuity of 20*l.*; and upon Jane Marshall attaining twenty-one, or on her marriage, the trustees were to transfer the whole of the property to her, subject, in the event of her marriage, to a power to appoint the same by will to such person as she might think fit, and subject thereto upon trust for the eldest son of K. S. Jennings at twenty-one, with power to apply the rents for his maintenance, notwithstanding his father might be competent to maintain him; and in case such son should die under twenty-one, then in trust for the children of K. S. Jennings equally, at their respective ages of twenty-one years, with a like power to apply the rents for their maintenance during their minorities, whether their father was able to maintain them or not; and in default of any such children taking vested interests, then in trust for K. S. Jennings, if then living, absolutely; but if dead, then upon trust to sell and divide the produce equally between the seven brothers of Mrs. Downes.

The plaintiff alleged, that when the settlement was executed a marriage was contemplated between himself and his present wife; that it was pending such contract, and in contemplation of such marriage, that the settlement was executed; and that it was unknown to him until after the marriage.

The evidence was conflicting; but the defendants alleged that there was no existing contract for marriage when the settlement was executed; that if there had been such an agreement previously it had been broken off; and that the plaintiff and Fanny Marshall had been living separate for a considerable time; they also stated that the plaintiff had said before his marriage that he knew his wife had settled her property upon herself and her daughter, and that he had acquiesced, but the plaintiff denied this.

The case was brought on upon a motion for a decree.

Mr. Selwyn and *Mr. Elderton*, for the plaintiff.—The settlement was made by the intended wife, pending a clear existing contract of marriage, without the knowledge of the intended husband: it was, therefore, a fraud on the husband's marital rights, and ought to be set aside; and as the plaintiff and his wife had informed the

defendants that they did not object to the Court making a settlement of the property, it was submitted that the defendants ought to pay the costs.

Carleton v. the Earl of Dorset, 2 Vern. 17.

The Countess of Strathmore v. Bowes, 2 Bro. C.C. 345; s. c. 1 Ves. jun. 22; 2 Cox, 28.

England v. Downs, 2 Beav. 522; s. c. 9 Law J. Rep. (N.S.) Chanc. 313.

Goddard v. Snow, 1 Russ. 485.

Taylor v. Pugh, 1 Hare, 608; s. c. 12 Law J. Rep. (N.S.) Chanc. 73.

Mr. Baggallay and *Mr. Nugent*, for Mrs. Downes.

Mr. Lloyd and *Mr. Shebbeare*, for the defendants claiming an interest in the property.—When the settlement was executed no treaty of marriage was existing—it had been broken off. It was, therefore, no fraud on the marital rights of a husband, as the contract and the marriage were subsequent. If the husband was ignorant of the deed, he must satisfy the Court that he was misled before it could be assumed that any fraud upon his marital rights was intended. The delay in filing this bill for two years and a half after he knew of the deed must prevent the husband from setting it aside.

St. George v. Wake, 1 Myl. & K. 610.

De Manneville v. Crompton, 1 Ves. & B. 354.

Mr. Elderton, in reply.

THE MASTER OF THE ROLLS.—Three questions have been raised in this case: the first is a question of fact, whether the settlement was executed in contemplation of marriage; the second is a question of law, whether it was a fraud on the marital right of the husband; and the third, whether, if the first two questions are answered in the affirmative, the husband's delay in instituting this suit has deprived him of his right to relief. The first question depends on three points: whether the plaintiff and his present wife were engaged to be married previously to the time when the settlement was executed; whether such engagement was subsisting at the time of its execution; and whether, if so, the contemplated marriage took place within a short time afterwards. Upon the

evidence it was clear that in 1852 the plaintiff and his present wife were engaged to be married, and that they continued to live together as husband and wife until 1857, when they separated. The plaintiff then visited her occasionally. In October 1858, Mrs. Downes was living alone, and she continued to do so until the end of that year. The evidence shewed that the engagement was not broken off, and that Mrs. Downes was aware at the time when the settlement was executed that she could require the plaintiff to fulfil his engagement to make her his wife. In truth, there was no reason why the settlement should be executed, unless it was her approaching marriage with the plaintiff. It was, however, executed at the instigation of her friends. Was it, then, a fraud upon the marital rights of the husband? Clearly it was, and it could not be permitted to have any force against him. *Hunt v. Matthews* went further than any other case on this subject in support of the settlement against the husband; it was difficult to reconcile it with the principles laid down in *Strathmore v. Bowes*. In *Hunt v. Matthews*, however, the Court sustained a settlement made by a widow after a treaty for a second marriage had commenced. The settlement was made in favour of her children by a first marriage. Here the case is not so favourable. The settlement by Mrs. Downes on her putative daughter could not be supported against the husband without his consent; and in addition, considering the value of the property, a great advantage was given to Mr. Jennings, as it made one-third of the income payable to him on a certain event for the maintenance of his children, whether he was able to maintain them or not. Ultimate benefits were also given to the brothers of Mrs. Downes. The settlement also omitted to give Mrs. Downes any control over the property either by deed or will. Two witnesses certainly stated that the plaintiff told them that he knew of the settlement before the marriage. The husband, however, positively denied such knowledge, and no person was brought forward to say that he gave the plaintiff any information as to the settlement before the marriage. It must, therefore, be considered as established that the plaintiff was

wholly ignorant that the settlement had been executed until after the celebration of the marriage. The engagement also having been established, it was impossible on the evidence to say that it had ever been broken off, or that the plaintiff, when he became her husband, did not believe that the property of the wife would assist him to support her, or that both the plaintiff and his intended wife, when the settlement was executed, did not contemplate a speedy realization of their engagement. I must, therefore, hold, that the settlement was a fraud upon the marital right of the husband, and that it must be set aside. Does the delay, then, in the institution of the suit, operate as a bar to the plaintiff's claim? After he was aware of the settlement, two years and a half elapsed before this bill was filed; but I do not think that it ought to deprive the plaintiff of the relief he asks. It had not been suggested that any evidence had, in consequence, been lost, and in such a case it would be pressing the matter too far to say that it was fatal to the plaintiff's right to relief, since the lapse of time had in no way altered the position of the parties. The result of the whole case, therefore, is, that the plaintiff is entitled to the relief asked for by the bill; and since the husband and wife both desire that the property should be settled, I will declare the trusts of the settlement, and make it a part of the decree. The defendants must pay the costs of the suit.

WOOD, V.C. }
July 1, 8. }

KING v. BELLORD.

Specific Performance—Infant Trustee—Disability.

A discretionary trust for sale cannot (as may a power simply collateral) be exercised by an infant.

R. devised real estate to trustees, one of whom was an infant, upon trust for sale as they should think expedient. The trustees sold to K, who, upon disputes arising, filed a bill for specific performance:—Held, that the contract could not be enforced.

This was a suit by a purchaser against vendors for specific performance of a contract for the sale of certain lands.

John Roche, by his will, devised certain lands unto and to the use of James Bellord, James Bellord the younger and James Abbott and their heirs, upon trust that they, or other the trustee or trustees of that his will, should, when it should seem to them or him expedient or necessary so to do, sell and dispose of the said lands, either together or in lots, and by public auction or by private contract, and generally, in such manner as they or he should think fit; and the will contained the usual trustee's receipt clause. In August 1862 the lands were accordingly put up for sale by public auction, and John King, the plaintiff in this suit, became the purchaser, signing a memorandum and paying a deposit.

An abstract of the title of the trustees was duly delivered; and in answer to certain requisitions made on behalf of the plaintiff, the trustees replied that J. Bellord the younger was a minor between seventeen and eighteen years of age. Some correspondence then took place between the solicitors of the parties, and, eventually, the trustees rescinded the contract under one of the conditions of sale. J. King, thereupon, filed a bill against the trustees, asking that the contract might be specifically performed.

Mr. Leigh Pemberton (Mr. Rolt with him), for the plaintiff, contended that an infant might exercise a power, even when coupled with an interest—*Sugden on Powers*, 8th edit. 177, 910. It must be assumed that the testator knew of the infancy of one of the trustees, and, therefore, intended to exclude the disability.

Mr. Giffard and *Mr. Ramadge*, for the trustees, submitted that the old authorities did not go beyond the case of a collateral power (except, perhaps, in the case of an infant jointuring his wife), and the execution of a collateral power might be looked upon as an act emanating from the testator himself; but this was not the case where an estate was vested in the infant, with a power attached.—

Hearle v. Greenbank, 3 Atk. 695, 710.

Lewin on Trusts, 4th edit. 30.

Would the Court make a decree for specific performance, when it could not compel the infant to convey? because the question

must be decided as if it had arisen before the Trustee Acts were passed—

In re Carpenter, Kay, 418.

In re Porter's Trust, 2 Jur. N.S. 349.

Wood, V.C. (July 8) said that the question before him was, whether this was such a contract as a Court of equity would enforce. There was a great difference between a mere power, and an estate, and the distinction was one that had always been upheld. Thus, if a testator directed that his estates should be sold by A, A, although an infant, could sell, because no estate was vested in him, but only a power. The authorities only shewed how far an infant could exercise a power; there was no authority for saying that an infant could convey estates vested in him (except in the case of gavelkind or other peculiar tenure). The nearest approach to such a doctrine was the opinion of Mr. Preston, cited without remark by Lord St. Leonards (Appendix to *Sugden on Powers*, p. 911), that an infant might execute a power coupled with an interest, if his infancy was dispensed with, or if, from the nature of the power, it was evident that it was in the contemplation of the author of the power that it should be exercised during minority. The principle on which all these cases had been decided was, that the infant, the donee of the power, acted as the agent of the donor, and was in fact, a mere conduit-pipe, and the law looked upon him from whom the authority was derived, and not upon the weakness of the person exercising it. As Bridgman, C.J. remarked in *Grange v. Tiving* (1), "If he who was owner of the estate had no disability upon him, he might make use of any hand, how weak soever, to reach out that estate." These cases were very different from the present. A testator could not enable an infant to do that which the law did not permit him to do. The case was too clear for argument, that a contract entered into by an infant for the sale of an estate vested in that infant, could not be enforced in this Court. The bill, therefore, must be dismissed.

(1) *Bridg.* 116.

KINDERSLEY, V.C.

1863.

April 22, 30;

May 2.

GOSSIP v. WRIGHT.

Mortgagor and Mortgagee—Sale with Right of Re-emption—Practice—Leave to amend—Dismissal without Prejudice.

There is no rule in equity which disables a mortgagee from purchasing or accepting a release of the equity of redemption of the mortgagor; and the circumstance that the purchase is made subject to a right of re-emption by the mortgagor within a given time makes no difference in this respect.

*The owner of a large estate, mostly moorland, in the vicinity of an old and dry river, for the purpose of dry-warping the moorland, borrowed various sums on mortgage, and ultimately conveyed the estate to the mortgagee for 42,000*l.*, and by a contemporaneous agreement, a right of re-emption was reserved if exercised within six years, on repayment of the purchase-money, together with all expenses and monies laid out on the property. The six years were, by consent of the mortgagee, extended for three years longer, and propositions made for carrying out the warping by means of a company having failed, the mortgagor, notwithstanding the expiration of the nine years, claimed a right to redeem, and filed a bill, alleging that the transaction was in fact meant to be a mortgage and not a purchase. At the bar the transaction was also impeached on the grounds, that as a general proposition a mortgagee could not purchase of his mortgagor, and that the 42,000*l.* was grossly under the value, advantage being taken of the mortgagor's necessitous circumstances:—Held, that the relation of mortgagor and mortgagee formed no objection to the purchase; and the Court having arrived at the conclusion that the allegations as to the intention of the parties and undervalue were not sustained, the bill was dismissed with costs.*

Where a substantial point is taken at the bar upon the evidence, but is not sufficiently raised by the pleadings, the Court may either give leave to amend or dismiss the bill without prejudice; but the practice of allowing a

cause to stand over for amendment should be very sparingly resorted to, and only upon special grounds.

This bill, which was filed on the 16th of March 1861, amended on the 8th of February 1862, and re-amended on the 29th of October 1862, prayed a declaration that certain indentures dated the 28th and 29th of May 1844, ought to stand as a security only for such amount, if any, as the defendants Charles Wright and Robert Wright could prove to be justly due thereon and for an account and reconveyance of the premises comprised in the deeds. The bill stated a mortgage dated the 13th of October 1838, between William Thorpe of the first part, Henry Broomhead, the younger, of the second part, the plaintiff John Hatfield Gossip and Frances his wife of the third part, and Robert Wright of the fourth part, whereby the plaintiff executed a mortgage in fee to Robert Wright of certain moors in Yorkshire, called "Hatfield Moors," and of a copyhold cottage and premises in Lincolnshire, to secure 15,000*l.* and interest. By a contemporaneous agreement, reciting that the 15,000*l.* was borrowed to enable the plaintiff to complete the purchase of Hatfield Moors, and pay off incumbrances and improve the lands by warping or laying alluvion, either dry or wet, on the land, from the old and dry river Idle in the immediate neighbourhood, and cultivating the lands; and that Charles Wright had agreed previously to advance 10,000*l.* and had advanced 8,652*l.* of that sum, and held certain deeds and documents as security, it was agreed that he should be repaid and deliver them up to Robert Wright, the difference to be laid out in warping and cultivating the lands at the plaintiff's discretion. And the agreement contained various other special stipulations respecting the warping and improvements. Subsequently, the plaintiff executed various other mortgages to the defendant Robert Wright. The bill, after stating various matters relating to the warping operations, alleged that in 1842, Robert Wright frequently proposed to purchase the equity of redemption for 6,000*l.*, which the plaintiff declined. The bill then stated that Robert Wright declared that he would

enter as mortgagee in possession, and would advance no more money unless the works were more economically executed; that the plaintiff at last with great reluctance executed a conveyance, dated the 29th of May 1844, of all the freehold and copyhold lands and hereditaments comprised in the several indentures for 39,370*l.*, having, by an assignment dated the day previously, assigned his personal estate, engines, chattels and warping plant for 2,630*l.* A memorandum of agreement was executed on the same 29th of May 1844, between Robert Wright of the one part and the plaintiff of the other part, reciting the indentures of even date, and that the aggregate monies amounted to 42,000*l.*, and other monies for expenses were due from the plaintiff to the defendant: And reciting that upwards of 3,000 acres of the moor land remained uncultivated, but capable of being greatly improved and made into land for agricultural and other purposes by covering the same with warp to be obtained from the old River Idle, or otherwise tilling and cultivating the same: And also reciting that on the treaty for the purchase of the freehold and copyhold hereditaments and steam-engines and personal estate, it was agreed that Robert Wright might, if he thought proper, improve the same, and whether he did so or not, the plaintiff should have a right of pre-emption of the said freehold hereditaments comprised in the said indenture of even date therewith and personal estate and effects from the said Robert Wright at any time within six years, on payment of the sum of 42,000*l.* with interest at 5*l.* per cent., and also the expense of the indentures of assignment and appointment and release thereinbefore recited, and of that agreement and the admission to the copyholds, and also all monies which Robert Wright might, subsequently to the date of this said indenture, expend on the warping or cultivating the said estates, with interest at 5*l.* per cent.: It was witnessed that in pursuance of the premises, Robert Wright agreed with the plaintiff that in case the plaintiff, his heirs, executors, administrators or assigns, should at any time within six years from the date agree to re-purchase the same, and tender and pay to Robert Wright, his executors, administrators or assigns, the sum of 42,000*l.*

with interest at 5*l.* per cent. and the expenses of the indenture of release and assignment, covenant to surrender, and surrender thereinbefore recited, and of that or any other agreement, and any monies which Robert Wright might thereafter spend in warping, tilling or cultivating, making hedges and ditches and improving the said estates, and in borrowing on mortgage, and in that case making out the title to the property mortgaged, or in building farm houses, homesteads, &c., or making roads, or employing contractors, engineers or workmen, or purchasing engine-gear, railroads or plant (describing it) to be used in warping and improving the estate, and his (Robert Wright's) own reasonable personal expenses in journeys and loss of time, &c. or in trying experiments or in any other matter, cause or thing whatsoever relating to the same moors and estates, with interest at 5*l.* per cent. from the time of laying out to the time of re-purchasing the same by the plaintiff, then he, the said Robert Wright, his executors, administrators and assigns, should and would at the costs, charges and expenses of the plaintiff, his heirs, executors, administrators and assigns, release, convey, and assign the said freehold and copyhold hereditaments and premises and personal estate and effects unto the plaintiff, his heirs, executors, administrators or assigns, or as he or they should direct or appoint. And it was further agreed that if such re-purchase was made by the plaintiff on the terms therein contained and the purchase-money tendered and paid as aforesaid, then he should be entitled to all the improvements made to the said estates, and all the engines, roads, goods, cattle and chattels then in use, and in and upon the said hereditaments and premises, and, in case any be sold, to have credit for the net amount which might, at any sale, be realized as well as to any rents or other monies the said Robert Wright might then have received. The agreement also contained the following clause: "Provided further, and it is clearly and well understood by and between the said parties hereto, that, for anything herein contained to the contrary he the said Robert Wright shall not in any respect be prejudiced, hindered or molested in the enjoyment, cultivation, improvement and managing of the

said estate, and in having and receiving the produce and rents and profits thereof, in the same manner as if this agreement or power to re-purchase on the terms herein contained had not been made, the object of the parties being to give to the said John Hatfield Gossip the preference of repurchasing within the period aforesaid; but that the said Robert Wright in the mean time, and at all times, shall peaceably have, hold, occupy, possess and enjoy the same freehold and copyhold estates, and hereditaments and premises, and personal estate, as his own absolute estates under the said recited indentures, and according to the uses, ends, intents and purposes therein contained, and the true intent, meaning and effect thereof, as and for his own freehold estates of inheritance in fee simple in possession and copyhold estates of inheritance, and the said personal estate as and for his own absolutely." The defendant Robert Wright took possession shortly after the execution of the deeds of 1844. The six years expired in 1850, and the term was extended by the defendant R. Wright from time to time until the 1st of January 1853. In November 1858 Robert Wright conveyed his interest in the estate to his brother, Charles Wright, whether for value, or if so, for what amount, did not appear.

The bill stated the foregoing and other facts in detail, the fact of the conveyance to Charles Wright being introduced by amendment, and relief being also prayed against him. The bill alleged that the mortgages were not extinguished by the deeds of May 1844, and that Henry Broomhead the elder was the only solicitor concerned in preparing these indentures; but this, by amendment, was altered to "was the solicitor mostly concerned"; and in the 22nd paragraph was this allegation: "The plaintiff, when he executed the said indentures of the 28th and 29th of May 1844, had no intention to assign thereby to the defendant his equity of redemption in the lands, hereditaments and premises therein comprised, nor did the defendant Robert Wright ever pretend that the plaintiff had done so previously to the institution of the suit of *Wilmer v. Wright* (which was a suit relating to certain trust monies secured on the Hatfield Moor estate), for it was well understood between the plaintiff and the defen-

dant Robert Wright that the indentures of the 28th and 29th of May 1844 were only intended as a further security for the monies advanced or to be advanced or borrowed by the defendant Robert Wright, for the purposes herein stated, as appears by the several matters herein mentioned." The bill stated that the plaintiff had valid reasons for believing that Robert Wright had still an interest in the estate; and that the plaintiff was ignorant what interest Charles Wright took in the said estate, but charged that, at all events, he took it with notice that Robert Wright was mortgagee only of the said estate; that Henry Broomhead the elder, throughout the various transactions, acted as the solicitor of Robert Wright, and died in 1857; that Robert Wright and Charles Wright had received large sums, by rents and otherwise, on account of the Hatfield Moor estate, and ought to account, the plaintiff being ready and willing to redeem the said mortgage, and to do all that ought to be done on his part. The defendant Robert Wright by his answer positively denied that the proposal for the transaction of 1844 came from him; and swore that he intended there should be a sale, and he had no doubt the plaintiff so understood the transaction. — It also appeared that from time to time accounts were made up, and signed by the plaintiff.

Mr. Jessel and *Mr. Jemmett*, for the plaintiff, contended, first, that the transaction of 1844 constituted a redeemable security, and not a purchase; secondly, that the plaintiff had no sufficient professional assistance, no draft of the deed ever having been sent to him; thirdly, that a mortgagor could not sell to his mortgagee; and, fourthly, that the sale was at a gross undervalue, the defendant taking advantage of the plaintiff's distressed circumstances. If the Court should, however, consider that the plaintiff's case failed on the first three grounds, and that the bill did not sufficiently raise the questions of undervalue and distress, it would give leave to amend, or dismiss it without prejudice.

Mr. Goren, for Susannah Augusta Gossip (to whom the plaintiff had executed a mortgage for 6,000*l.* in 1844), supported the plaintiff's contention.

Mr. Baily and *Mr. Hobhouse* appeared for Charles Wright, and argued that the transaction of May 1844 was what it

appeared to be, viz., a purchase with a right of re-purchase within six years; that the time had been extended by the favour of the defendant, who then became absolute owner of the property. Moreover, the accounts rendered and signed by the plaintiff were settled accounts, and conclusively bound him without more. There was no surprise upon the plaintiff, who was well advised by Mr. Baxter, as appeared by the correspondence, and Robert Wright had given the full value for the estate. All the statements as to value were merely hypothetical. With regard to the contention that no purchase could take place, as between mortgagor and mortgagee, there was no such general rule; indeed, it was the other way, but dependent always upon the exception that if there was unfairness or advantage taken, the Court would upset the transaction, as it would in any case. In this case everything was perfectly fair, and the plaintiff had every opportunity of considering what he was doing. This was not a case for indulgence, and upon that ground alone could any of the contentions be supported. The rule laid down by Lord Justice Turner in *Lord Darnley v. the London, Chatham and Dover Railway Company*(1) only applied to cases where amending the bill might take place with reference to matters which might fairly, at the hearing, be made subjects of amendments, but not in a case like the present, where every possible contention had been brought forward.

Mr. Anderson, for Robert Wright, was not heard.

Mr. Rasch, for Frances Gossip, the plaintiff's wife, took no part in the argument, and asked for the dismissal of the bill, with costs, as against her.

Mr. Jessel was heard in reply.

Cases cited—

Ensworth v. Griffiths, 5 Bro. P.C. 184; a.c. 15 Vin. Abr. 468.

Newcomb v. Bonham, 1 Vern. 7.

Talbot v. Braddill, Ibid. 183, 344.

Howard v. Harris, Ibid. 33.

Fulthorpe v. Foster, Ibid. 476.

Willett v. Winnell, Ibid. 488.

Manlove v. Ball, 2 Vern. 84.

Lawley v. Hooper, 3 Atk. 277, 278.

Pegg v. Wisden, 16 Beav. 239.

Paulett v. the Attorney General, Hardr. 465.

Douglas v. Culverwell, 3 Giff. 251; a.c. 31 Law J. Rep. (N.S.) Chanc. 65, 543.

Spurgeon v. Collier, 1 Eden, 55.

Seton v. Slade, 7 Ves. 265, 272.

Longuet v. Scawen, 1 Ves. sen. 410.

Davis v. Thomas, 1 Russ. & M. 506.

Sevier v. Greenway, 19 Ves. 412.

Vernon v. Bethell, 2 Eden, 110.

Williams v. Owen, 5 Myl. & Cr. 303.

Alderson v. White, 2 De Gex & J. 97.

Bellamy v. Sabine, 2 Ph. 425; a.c. 5 Law J. Rep. (N.S.) Chanc. 36.

KINDERSLEY, V.C. (May 2.)—The object of the plaintiff in this suit is to have it declared that a certain transaction which took place between him and the defendant Robert Wright, and which purported to be, and was in form, a conveyance by the plaintiff to Wright of certain premises absolutely, by way of sale, should be treated as a conveyance by way of security only, so as to entitle him to redeem—[His Honour referred to the instruments in question].—The purchase-money agreed upon for the purchase of the real estate and the purchase-money for the chattels, put together, made 42,000*l.* Contemporaneously with the deeds an agreement was executed between the parties, reciting the deeds—[His Honour stated the agreement].—The plaintiff is here allowed to have a right of pre-emption; it does not mean that if the property is ever sold, he is to have the first right of purchase, but it is an erroneous word for re-emption; he was to have a right of re-emption or re-purchase. Then he was to pay, if he re-purchased, 42,000*l.*, with interest at 5*l.* per cent., and whatever monies Wright had received, in case there was a re-purchase, he (Wright) was to account for; and, on the other hand, the plaintiff was to pay him all the expenses which he had been at, and the purchase-money which Wright might have advanced. Those deeds and that memorandum of agreement having been executed by the parties, Mr. Gossip was allowed, with monies advanced to him

(1) 11 W. Rep. 388.

from time to time by Mr. Wright, to continue the warping, which was carried on, but to a very limited extent, only 310 acres out of 3,000 having been warped. The matter went on until the six years expired on the 29th of May 1850. Mr. Gossip did not re-purchase or propose to re-purchase the premises, except that there were suggestions as to finding somebody to buy the right of re-purchase, and in 1858 Mr. Wright, treating and considering himself as the absolute owner, conveyed the estate to his brother, Charles Wright; he either gave or sold it to him; however, it became, in 1858, his property, and the relief sought is against Charles Wright, and it is now admitted at the bar that as regards Robert Wright there is, in fact, no relief asked against him, and that the bill as against him must be dismissed, with costs.

The plaintiff then files this bill, contending, first, that although the instruments of conveyance of 1844 are, on the face of them, absolute conveyances, that, in fact, the intention of the parties, not of himself only, but the intention of Robert Wright also, was, that these instruments should operate only by way of security for monies already advanced and to be advanced, and, in connexion with that, it is suggested that the plaintiff had not, in fact, sufficient professional assistance.

The second point upon which the plaintiff contends, or rather it has been contended for him, that the Court will treat this as a redeemable security, and not as a conveyance out and out by way of sale with a proviso for the right of re-purchase, is this: that even supposing the intention of the parties was that it should be an absolute sale and not a redeemable security, such intention is one which this Court will not allow to be carried out; that it is against the law of this Court for the parties to enter into such a transaction, and that if they do the parties making the conveyance may come at any time within which a mortgagee might come and redeem the estate.

It has further been contended, at the bar, by the counsel for the plaintiff, that there are circumstances attending the matter sufficient to induce the Court to give the plaintiff the relief which he asks. One is

that the purchase was made at a gross undervalue; and the second is, that advantage was taken of the distress and pecuniary circumstances of the plaintiff, that is insisted upon at the bar.

Now let me consider these grounds *seriatim*. First, as to the question of fact, whether it was the intention of the parties that the transaction should be what it purports to be, a conveyance by way of sale out and out, with a right of re-purchase within the six years, or a security, and redeemable therefore by the party who gave it. It is not contended that the instruments are not, in fact, in themselves intended to be in every sense an absolute conveyance out and out. It is not incidentally here and there, but in almost every passage of the instruments it is clear that the matter is treated as a purchase by Wright, and by Gossip as a sale out and out, and that Gossip (not under the deed but under the agreement) retained nothing more than a right of re-purchase; and this is so plain on the face of the instruments, that not only a professional, but a non-professional man of common sense and business could not glance his eye over them, without seeing that it was a sale and not a security. And this strikes me, every one of the five mortgage-deeds contained, as a mortgage deed would do, a covenant to pay the money, but there is none such here, and that alone, to a professional man, would mark the transaction; besides which there are indications on the face that it was intended to be a sale out and out. Indeed, the plaintiff says by his bill he knew the transaction was on the face of it to be a sale, but he was told not to mind that, that it would still be only a security. [His Honour then proceeded to consider in detail the evidence as to the intention of the parties, and concluded as follows.] Now I have gone through the evidence on the question of intention; and I have not the slightest hesitation in coming to the conclusion that the intention was, a conveyance by way of sale out and out, accompanied by a special condition or right of re-emption, provided the right was exercised within six years from the date of the transaction.

The next point I have to consider is

a question of law. It has been contended, that even if the intention was that which the defendant asserts, and which I have decided it to have been, that it is an intention contrary to the law of this Court, which this Court will not sustain, and will not allow to be carried out. A great number of cases have been cited on one side and on the other on this question. It was at first insisted to this extent, that if there be a mortgagor and mortgagee, they cannot by any subsequent transaction convert that mortgage relation into the relation of vendor and purchaser. In other words, it would come to this: that a mortgagor cannot by possibility enter into any arrangement, however fair, for the sale and conveyance of his equity of redemption to his mortgagee. That was a proposition somewhat strong, and utterly unsupported by the cases cited. Such transactions are constantly occurring and constantly upheld by the Court, and to that extent, at least, there is no foundation for that contention. But that was somewhat modified afterwards, and it was contended to this extent: that, assuming you can, as between mortgagor and mortgagee, have an absolute sale by the mortgagor to the mortgagee of the equity of redemption, that cannot be accompanied by a right of re-purchase on the part of the mortgagor, that is, the vendor; and that that is a transaction which this Court will not support. Now, I have considered the several cases which have been cited, and it appears to me that this, at all events, is clearly established, and was established at a time when there existed (what can hardly be said now, practically, to exist) a class of persons called money-scriveners, who were always dealing between borrowers and lenders in these transactions, and who were always inventing contrivances to the prejudice of the borrowers, and in favour of the lenders, for whom they were acting in the transaction; and the Court set itself against all those contrivances: (I am speaking now of a century and a half or more ago). The Court then determined this: that if the transaction between the parties, whatever be its form, whatever the language in which it is couched, or the machinery which was to carry it into effect, designed a loan of money and security for

that loan, or a debt existing and a security for that debt; if that were the design of the parties, the transaction must be redeemable like any mortgage, even although it be expressed otherwise. In other words, in that which is to be a mortgage transaction, that is, a security, the Court will not allow the right of redemption to be crippled and hampered by any arrangement between the parties at the time. That is well established as a general rule. I need not say, like any other general rule, that even that broad rule is liable to some exceptions. For example, there are one or two cases of this sort: one where the object of the transaction was not merely a loan of money, but one party meant to benefit the other. It was a sort of settlement between relations; and then the Court, although it did cripple the right of redemption, upheld the transaction. However, there is no doubt that the broad rule is this: the Court will not allow the right of redemption in any way to be hampered or crippled in that which the parties intended to be a security, either by any contemporaneous instrument with the deed in question, or by anything which this Court would regard as a simultaneous arrangement or part of the same transaction. That the Court will allow the parties by a subsequent arrangement to enter into a transaction by which the mortgagor sells or releases, or conveys or gives up (call it what you will) his equity of redemption, and makes the estate out and out the estate of the mortgagee, is clear; and the only question now remaining is this: it being clear that it may be done *simpliciter*, can it be done, coupling with it still not a right of redemption, but a right of re-emption in whatever terms and within a given fixed time? Now there is not one single case cited in which it has been decided that that cannot be done, or that there is anything illegal in it. Is there anything in the nature of the transaction which shews it cannot be done? That it is a transaction which this Court will look at with the utmost jealousy and care and scrutiny is unquestionable, but is there anything in the nature of it illegal? Are there not authorities which shew that this Court will regard it as legal; that is, if after jealous investigation and scrutiny

the Court finds the transaction was so intended, and that there is nothing whatever in the objections brought forward by the conveying party to shew that the transaction was not fair and right and reasonable, and what it ought to have been, the Court will uphold it?

Now, without going through the numerous cases, I will only refer, first, to a case in the House of Lords of *Ensworth v. Griffiths*. In Mr. Tomlin's edition, the marginal note is this: "The mortgagor of an estate releases the equity of redemption to the mortgagee" (so that here was the relation existing at the time of mortgagor and mortgagee) "for a valuable consideration, the mortgagee at the same time gives the mortgagor a note, that if he should within a year pay a certain sum" (being the original mortgage-money) "and the consideration for the release of the equity, he" (the mortgagee) "would sell and convey to him the premises." Now, here is a distinct case, precisely in point, the mortgagor and mortgagee entering into a subsequent arrangement by which the mortgagor releases his equity of redemption to the mortgagee, and the mortgagee gives, not a right of redemption but a special right of re-purchase within a given time and upon certain terms. Of course, in that case there was a great deal of argument on this subject, that it was in fact crippling the right of redemption; that it was a device to escape the old rule, and so on. But it was held "that this was an original agreement between the parties, and did not operate as a defeasance of the release, or raise any new equity to the mortgagor; and that, the money not being paid, the party was not entitled to any relief." That was upon appeal from the Court of Exchequer. Now, it has been suggested that that case was decided on other grounds. Of course, in all these cases, in *Brown's Parliamentary Cases*, we have not the opinions of the noble and learned Lords who decided the various cases, but we have the marginal notes, which, although perhaps they are not implicitly in all cases to be relied on, generally represent fairly the ground of decision, and the ground of decision is not stated to be any other than this: that it was not part of the same transaction, the mortgage, but that it was a sepa-

rate transaction and one which might be upheld. There is another case of *Sevier v. Greenway*, decided by Sir William Grant, and this is the case of a dictum, but still a dictum of Sir William Grant is that which I think any Judge would consider a very safe guide to follow. "There was a mortgage for a term of 1,000 years to secure 80*l.*, which by assignment became vested in the defendant Greenway," so that the plaintiff was the mortgagor and Greenway was the mortgagee, that is to say, whether they were original mortgagor and mortgagee is immaterial, but they stood in the relation of mortgagor and mortgagee. "A conveyance was made in November 1799, reciting the mortgage and assignment" (of the mortgage), "and that the defendant Greenway" (that is, the mortgagee) "had lent to the plaintiff then entitled to the equity of redemption the further sum of 50*l.*, and had contracted to purchase the property in mortgage at 150*l.*, out of which the defendant was to retain the 80*l.* and 50*l.*, and declaring that the plaintiff" (that is, the mortgagor) "granted and released the premises to the defendants Greenway and Marchant, their heirs and assigns, to the use of Marchant during the life of Greenway, in trust for Greenway, with remainder to Greenway and his heirs, subject to a proviso, that if the plaintiff should within two years be minded to re-purchase the premises and should pay Greenway 150*l.* with lawful interest, then the defendants should re-convey the premises." Here is a case expressly in point, a mortgagor and mortgagee, and then, by a subsequent transaction, an agreement for conveyance, they agree to convey the equity of redemption to the mortgagee, but with a condition, that within a fixed time, upon certain terms, the mortgagor should have a right of re-purchase. There were other circumstances in the case on which Sir William Grant decided that in point of fact the parties intended a mortgage, and must be treated as having meant a mortgage; but the judgment of the Master of the Rolls states it thus: "If this had rested on the conveyance of November 1799, possession being taken" (that is, of course, by the purchasers), "I do not see why it should be considered otherwise than as a sale." Then he goes on to shew that

there were circumstances by which the parties clearly afterwards treated it as a mortgage; but he says, if it stood on the transaction which took place first of all, that is, on the mortgage, and then on the conveyance of the equity of redemption with a right of re-purchase, he saw no reason why the Court should consider it otherwise than as a sale. But these cases, as well as several other cases to which I need not refer, are cited by Lord Cottenham in *Williams v. Owen*, and there the question was of this sort: there was a conveyance as upon an absolute sale, accompanied by a contemporaneous agreement for re-conveyance upon payment, on a day certain, of the purchase-money with interest and of the expenses of the conveyance which had been paid by the purchaser; and upon a bill for redemption brought after the day certain had passed, this was held to have been a sale with a proviso for re-purchase and not a mortgage. Now, that case was not a transaction between mortgagor and mortgagee, and therefore I am referring to it only for this—that Lord Cottenham, in considering the various cases of actual conveyance or the right of re-purchase as mentions, among other cases, those of *Ensforth v. Griffiths* and *Sevier v. Greenway*, and treats them both as having been decided on the footing that the transactions were transactions which the Court would uphold as being absolute conveyances, subject only to a subsequent right of re-purchase on certain terms and at a certain time. He treats them so, and cites them accordingly, and he cites various other cases.

Then, with those authorities and under those circumstances, upon what ground could I take upon myself to decide that such a transaction is impossible? This I hold, as I have said before, and I repeat it again, because it cannot be too strongly borne in mind, that if a party who has made the conveyances challenges the transaction as a sale out and out, and insists upon it that it was a mortgage transaction intended as a security; and that the form was merely a device to cover the real intention of the parties, or for the purpose of giving an advantage to the mortgagee as against the mortgagor, or getting him within his power; upon whatever grounds the party who made the conveyance may afterwards

challenge the thing, this Court will look with the utmost nicety and care and suspicion, even a jealousy, into every one of those grounds brought forward by the party who complains of the transaction, to see whether upon any one of those grounds there was anything on which the Court should say that the transaction ought not to prevail. But, if, after looking into all those grounds, the Court finds there is nothing of the kind, it will uphold the transaction, and therefore I see no more reason for setting aside this transaction and treating it as a mere mortgage than setting aside any other *bond fide* purchase.

Now, let us see what are the grounds that are brought forward. As I have said, the grounds which the plaintiff has brought forward in this bill are those which I have already dealt with in considering what was the nature of the transaction, and not as evidence to shew what the intention of the parties was. The allegation, on the part of the plaintiff, utterly unsupported, contradicted by every circumstance in the case, is, that the intention of the parties was a redeemable security within a certain time; and connected with that, as I have already said, is the question whether he had sufficient legal advice. In his original bill he said that Mr. Broomhead was the only solicitor concerned in the transaction, but when he found certain passages in the defendants' answer he corrected that by amendment, and struck out the word "only" and said that Mr. Broomhead was the solicitor mostly concerned in the transaction; in fact, tacitly admitting, that although Mr. Broomhead, as the purchaser's solicitor, prepared the conveyance, his own solicitor, Mr. Baxter, was, in fact, advising him, and that he acted under his advice.

But, besides those grounds which the plaintiff put forward in his bill at the bar, his counsel have attempted to adduce other grounds of this nature. It is contended that there are circumstances affecting the transaction, such as that it was not a fair one or such as the Court would uphold. It is said that the purchase was made at a gross undervalue, and also that advantage was taken of the plaintiff's pecuniary difficulties, that he was in such a state of embarrassment that he was not a free agent. These grounds are not put for-

ward in the bill. The only thing I can find at all approaching to anything about value is, not that the 42,000*l.* was less than the value at the time; but there is mention in the course of the bill of a valuation or survey made by Mr. Dean, a surveyor, in 1858, stating that it was a fine estate, that there were so many acres of inclosed land, so many acres warped and so many acres unwarped, and that it was capable of being warped, and that, if warped, it would be very much improved, and so on; and stating that, if all this warping were done at such a price as it was hoped it would be done for, the whole estate would be worth, after it was all warped, some 200,000*l.* That valuation or estimate is mentioned in the bill, at the same time there is no suggestion that the purchase-money was not, at the time, a fair and reasonable price to be paid for the fee-simple of the property; still less is there any allusion to the circumstance that the plaintiff was in such pecuniary embarrassment and difficulties that he was not a free agent; but it is brought forward at the bar founded upon what is attempted to be collected from the evidence. With regard to the plaintiff's embarrassed circumstances, there is no doubt about the fact, but he does not think it worth while, either by amendment or in any other way, to state: "I was in such embarrassed circumstances, so overwhelmed with debt, that I was not a free agent, my poverty was taken advantage of, and I was obliged to submit to everything that was put before me." There is nothing of the kind. The defendant, in the course of his narrative in the answer, says, "the plaintiff was overwhelmed with debt." Upon that there is no amendment, and therefore I must consider that the plaintiff has not thought it at all a ground; but his counsel, of course, very properly, leaving no stone unturned, have now suggested, without any evidence, that that is a ground to which the Court will look.

But it is contended, that where the Court sees there is a point raised by the evidence, which is not sufficiently raised by the bill, it will take one or other of two courses, either at the hearing allow the bill to be amended and the cause to come on again; and after that amendment the new issue to be gone into, and evidence to be gone into on both sides, and, in fact, the whole

question re-opened; or if the Court will not do that, it will, at all events, if it dismisses the bill as not being capable of being supported on the grounds which are adduced: if the case is capable of being supported on other grounds, it will accompany that dismissal with a declaration that it is to be a dismissal without prejudice to any other bill which the plaintiff may think fit to file upon the subject. Now that the Court has jurisdiction at the hearing to direct the cause to stand over for the purpose of amendment, and for the purpose of amendment not merely by adding parties, is a proposition which, I apprehend, I cannot hold to be otherwise than established by the cases; but even the cases which establish it shew that it is only to be used with the most sparing care, and only where there are special reasons which make it just and right it should be so dealt with. Lord Cottingham, no mean judge of cases of practice and pleading, was very averse to it. At the same time, I admit it has been done, though I confess I should be very slow to do it in any case. At the same time, I should not feel myself justified in refusing to do it, where justice could not be properly done without it; for example, there might be a question depending on the Statute of Limitations, and if you do not allow the bill to stand over, but leave the plaintiff to file a new bill, the new bill would not be within the Statute of Limitations. I mention that as a case in which justice might require, contrary to the general rule, that the Court should allow the bill to stand over, with leave to amend to raise new points. The question was raised before the Lords Justices in *Lord Darnley v. the London, Chatham and Dover Railway Company*, in which Lord Justice Turner suggested this, that no rule could be laid down; but perhaps this would be the course to take, that if the matter as to which amendment was required was raised by the bill, but not so raised as it ought to be, then the Court might allow it to be raised by amendment, if it be not so raised; or if it be not connected with an issue which is raised by the bill, then if the Court allows it at all, that is, if it sees that the evidence is so strong that the Court would consider the point thus raised by the evidence ought in some way to be allowed to be taken advantage of by

the plaintiff, then it may, in dismissing the bill, accompany its dismissal with a direction that it should be without prejudice. Of course, I need not say that if I saw reason to adopt either of these courses, I should feel myself justified in adopting that suggestion. The question then is, whether I ought now to allow, upon the evidence, an amendment, or whether I ought, in dismissing the bill, to do so without prejudice. [The Vice Chancellor then proceeded to examine at considerable length the evidence as to value, and shewed that it rested on a very slender foundation, and then continued thus] — That the bill should be dismissed I have no doubt. It is said that I ought not to allow it to be amended. It is not filed till eight years after the period to which the right of repurchase was extended by the concession and favour of Mr. Wright. The plaintiff waits for eight years, and files his bill when the principal witness, Mr. Broomhead, is dead. Shall I allow him to amend his bill by introducing an issue which he never thought of himself, but which his counsel at the bar, with great ingenuity, skill and ability have brought forward, for the purpose of allowing him to bring forward something upon the question of value or anything else, that he was a poor man, and so forth? Ought I to allow him to do so? Clearly not. If ever I do allow it, I am sure it must be in a case very different from this. Then, in dismissing the bill, ought I to do so without prejudice to the right to file another bill? If I did, it would be without prejudice to filing another bill within a very limited time; but I think I ought not to do it, and for this reason: the evidence upon which it is said I ought to do it is evidence which it appears to me, so far from being conclusive to prove the value in 1844, rests upon no solid foundation, and will not bear the test of that degree of investigation which we are able to pick up from the facts before us, the defendant not having the least notion that he should bring forward evidence of value. Under these circumstances, it appears to me that the bill must be dismissed with costs.

LOrds JUSTICES.

March 20 ;
April 17 ;
May 21, 29. } *In re POLLARD'S TRUSTS.*

Will — Construction — Devise to Trustees.

E. P., by her will, dated in 1789, devised to A. and B. and their heirs, certain real estate, to hold to them, their heirs and assigns, to the use of S. L. (her grandson) for life, with remainder to the use of A. and B. and their heirs during the life of S. L. to preserve contingent remainders, with remainder to the use of the children of S. L., but if he should die without leaving such issue to the use of C. D. L. (another grandson) for life, with remainder to the use of A. and B. and their heirs during the life of C. D. L. to preserve contingent remainders, with remainder to the use of the children of C. D. L., but if he should die without leaving such issue to the use of her granddaughters, their heirs and assigns for ever, as tenants in common and not as joint tenants. The testatrix died in 1791, leaving her two grandsons, bachelors, surviving. Subsequently they both married, and died, both leaving children:—Held, that the children of S. L. took estates for life only; that no interests were effectually given to C. D. L. or his children or to the granddaughters of the testatrix, and that, subject to the life estates to S. L. and his children, the inheritance devolved as under an intestacy to the heir-at-law of the testatrix.

The circumstance that the whole fee simple is (under a will made before 1838) devised to trustees, cannot be relied upon as a ground for enlarging a subsequent gift under the will to cestuis que trust, in a case where the will contains an ulterior though contingent gift to other cestuis que trust of the whole beneficial fee.

This was the petition of the widow and administratrix of Samuel Lewin the younger, praying for transfer to her of one-fifth of certain stock arising from the investment of monies paid into Court under the Lands Clauses Act; and the principal question upon which the right of the petitioner depended was, whether, according to the true construction of the will of Elizabeth Pollard, the children of Samuel Lewin her

4 P

grandson (named in her will) took as joint tenants in fee simple certain real estate thereby devised.

The facts out of which the petition arose were as follows.

Elizabeth Pollard, widow, by her will, dated the 16th of October 1789, made the following devises: "And as to the estates wherewith it hath pleased God to bless me, first, I give and devise unto my daughter, Mary Miller Lewin and Richard James, Esq., and their heirs, all those my manors, &c.,"—[here followed a description of various hereditaments situate in the county of Kent, of gavelkind tenure,]—"to hold the same unto the said Mary Miller Lewin and Richard James, their heirs and assigns, to the uses, &c. following, that is to say, to the use of my grandson Samuel Lewin for his life, he keeping the same in good repair, and doing or committing no manner of waste or spoil thereupon; and from and after the determination of that estate, to the use, benefit and behoof of the said Mary Miller Lewin and Richard James and their heirs for and during the natural life of the said Samuel Lewin, in trust to preserve the contingent uses and remainders thereafter limited with respect to the said hereditaments from being defeated and destroyed, and for that purpose to make entries and bring actions and do other legal acts as the case may require for the preservation thereof, nevertheless to permit and suffer the said Samuel Lewin during his natural life to receive the rents, issues and profits of all and singular the said hereditaments and premises to and for his and their own use and benefit; and from and immediately after the decease of the said Samuel Lewin to the use of all and every the child and children, if more than one, of his body lawfully begotten, or to be begotten, but if he should die without leaving such issue, then to the use and behoof of my grandson Charles Devereux Lewin for his life, he likewise keeping the said premises in good repair, and doing or committing no manner of waste or spoil thereupon; and from and after the termination of that estate, to the use of the same trustees and their heirs, during, &c., in trust to preserve the contingent uses, &c.; and from and immediately after the decease of the said Charles Devereux Lewin, to the

use of all and every the child and children (if more than one) of his body lawfully begotten, or to be begotten. But if he should die without leaving such issue, then to the use and behoof of my three granddaughters, namely, Elizabeth, Henrietta and Sophia Jane, their heirs and assigns for ever, as tenants in common and not as joint-tenants."

Then followed a devise of other gavelkind estates in the same language, except that Charles Devereux Lewin and his children were to take before Samuel Lewin and his children.

There was no residuary or other devise of real estate.

The testatrix died in the year 1791, and she left the said Mary Miller Lewin her sole heiress, and she, in the year 1798, also died intestate, leaving her two sons, viz., the said Samuel Lewin and Charles Devereux Lewin, her heirs in gavelkind, and her three daughters, Elizabeth, Henrietta and Sophia Jane, mentioned in the will, her surviving, these being her five only children.

Samuel Lewin, the grandson, was a bachelor at the death of the testatrix in 1791, but in the year 1796 he married and had issue several children, namely, Samuel Lewin the younger, who died in the year 1846, Alexander Percival Lewin and James Davies Lewin; and four daughters, namely, Elizabeth (who intermarried with Richard MacLachlan and died in 1825), Mary, the wife of Thomas Theakstone Woodhouse, a respondent together with her husband, Sophia (who intermarried with Henry Wilding, and died in 1831), and Hannah, the wife of Samuel Evans, also a respondent, together with her husband.

Samuel Lewin, the grandson of the testatrix, died in 1840, leaving his three sons surviving him, who were his heirs in gavelkind; his two daughters, Mrs. Woodhouse and Mrs. Evans, also survived him.

Charles Devereux Lewin, the other grandson of the testatrix, also married and had issue nine children, all of whom were born after the death of the testatrix; of these three were sons, namely, Charles Lewin, a respondent, Samuel Lewin, deceased, and Henry Richard Lewin, also deceased; he had also six daughters, namely, Mary, the wife of Capt. Andrew King,

Harriet Lewin, deceased, Sophia, widow of James Stuart, deceased, a respondent, and Elizabeth, the wife of George Grant, Anne Sarah, the wife of J. M. Maynard, and Lucy, the wife of D. B. Gordon Grant, who, together with their husbands, were also respondents.

Charles Devereux Lewin, died in 1837 intestate as to real estates, and left his three sons already named his heirs in gavelkind. Of these Charles Lewin was a respondent to the petition; Samuel died intestate and unmarried in 1839; and Henry Percival Lewin died in 1846, having by his will devised his real estates upon certain trusts.

The three granddaughters of the testatrix, namely, Elizabeth, Henrietta and Sophia Jane, had all married and died, leaving issue.

On the death of Samuel Lewin, the grandson, his five surviving children already named entered into possession of the estates devised to him.

In 1836 Samuel Lewin the younger and Alexander Percival Lewin executed a mortgage of their respective shares to one Zachæus Hunter, to secure 600*l.*, and it was alleged by the petition that they thereby severed their joint tenancy in the lands devised by the will. The advance was afterwards repaid, but no reconveyance was ever executed, and the legal estate was still outstanding in the heir of Zachæus Hunter.

The South-Eastern Railway Company purchased part of the land devised to Samuel Lewin the grandson and his children for the sum of 564*l.*, and paid the money into court, which was invested in the purchase of 597*l.* 10*s.* 2*d.* consols, and under an order made in 1842 by the late Vice Chancellor of England the dividends were ordered to be paid in equal fifths to the five then surviving children of Samuel Lewin the grandson during their respective lives.

Samuel Lewin the younger, the son of Samuel Lewin, the grandson of the testatrix, died as before mentioned on the 21st of June 1846 intestate, and from the time of his decease, his one fifth of dividends had been retained in Court. He left the petitioner Sarah Lewin, his widow, who took out letters of administration to his estate, and

treating her late husband and his brothers and sisters who survived Samuel Lewin the grandson as having become joint tenants in fee, and the joint tenancy as having been severed and the stock in court as being personal estate, presented her petition for the purposes aforesaid.

Mr. G. M. Giffard and Mr. Osborne Morgan supported the petition, explaining that it belonged originally to the Court of Vice Chancellor Kindersley, but that his Honour had declined to hear it on the ground that while at the bar he had been called on to advise on the will of Mrs. Pollard, and had recommended that it should be set down for hearing, with their Lordships' permission, before the Lords Justices. The learned counsel argued, first, that under the will, notwithstanding the absence of words of limitation in the gift to the children of S. Lewin the grandson, there was a disposition of the whole fee, and supported that view by citing the cases of *Robinson v. Grey* (1), *Knight v. Selby* (2) and *Challenger v. Sheppard* (3); secondly, that an intention, clearly and manifestly expressed, to give the full enjoyment of the whole property to a *cestui que trust*, coupled with the devise of the fee simple to trustees, amounted to a gift of the fee simple, as appeared from the cases of *Moore v. Cleghorn* (4) and *Hutchinson v. Stephens* (5); thirdly, that where, as here, the word "estate" was used in the devise, the Court would hold that an intention is shewn to give the fee simple, as in *Small v. Allen* (6) and *Robinson v. Grey* (7); and fourthly, that a contingent devise over, following upon an indefinite devise, operates to enlarge a devise into a gift of the fee simple, as shewn by Mr. Jarman in his work upon Wills (8), and decided in *Marshall v. Hill* (9), *Moone v. Heaseman* (10), *Pure*

(1) 9 East, 1.

(2) 3 Man. & G. 92; s. c. 10 Law J. Rep. (N.S.) C.P. 263; 8 So. N.R. 409.

(3) 8 Term Rep. 597.

(4) 10 Beav. 423; s. c. 16 Law J. Rep. (N.S.) Chanc. 469: affirmed 17 Ibid. 400.

(5) 1 Keen, 240, 659; s. c. 6 Law J. Rep. (N.S.) Chanc. 296; 2 Myl. & Cr. 452.

(6) 8 Term Rep. 147, 497.

(7) Ubi supra.

(8) 2 Jarman on Wills, 2nd edit. p. 223.

(9) 2 M. & S. 608.

(10) Willes, 142.

foy v. Rogers (11) and *Powell on Devises*, p. 399.

Mr. Wolstenholme, for the daughters of Samuel Lewin, the grandson, argued that the period at which the words "die without leaving such issue" must be ascertained must be the death of the tenant for life, and that "such issue" could, in this case, mean only "children"—*Ryan v. Cowley* (12), *Carter v. Bentall* (13), *Howard v. Howard* (14); and that there was no ground in the present case for any implication of the creation of an estate tail—*Ibbetson v. Beckwith* (15), *Tarbut v. Tarbut* (16).

Mr. Shapter and *Mr. Speed*, for Alexander Percival Lewin and James Davies Lewin, the surviving sons of Samuel Lewin, the grandson of the testatrix, and the heirs in gavelkind of that lady, contended that, subject to the life estates given by the will, there was an intestacy, and the fee simple passed to the heirs in gavelkind of Mrs. Pollard. Upon the question of enlarging an indefinite devise into a fee simple where successive estates are given, they cited *Bridger v. Ramsey* (17), *Foster v. Lord Romney* (18), *Hay v. Lord Coventry* (19), *Doe d. Briddon v. Page* (20), *Brown v. White* (21); and argued that the fee simple could not pass, as suggested by *Mr. Jarman* (22) in the cases referred to by him, citing *Andrew v. Southouse* (23), *Frogmorton v. Holyday* (24).

Upon the question of implying a fee simple from the gift of a fee simple to the trustees, they cited—

Paterson v. Mills, 14 Jur. Rep. 126;

s. c. 18 Law J. Rep. (N.S.) Chanc. 449.

They also referred to *Doe d. Comberbach v. Perryn* (25), as deciding that the words

"such issue" must be held to mean "such children."

They also referred to

Vick v. Sueter, 3 El. & B. 219; s. c. 23

Law J. Rep. (N.S.) Q.B. 212.

Bowes v. Blackett, Cowp. 235.

Mr. F. Harrison, for Charles Lewin, one of the sons of Charles Devereux Lewin, for an intestacy, cited *Rendall v. Tuchin* (26).

Mr. F. O. Haynes appeared for the sons of two of the granddaughters of the testatrix.

Mr. Osborne Morgan, in reply.

LORD JUSTICE KNIGHT BRUCE (May 29).—In dealing with the will before us under the present petition, it must be recollected that the testatrix died during the last century; that she was survived by her two grandsons, Samuel Lewin and Charles Devereux Lewin, devisees mentioned in it; that both those gentlemen are dead; that there are sons and daughters of each of them at present living, and that it is, as I understand, admitted that not any child of Samuel or of Charles Devereux Lewin was in existence when the will was made, or at the death of the testatrix. We have to construe only the first devise in the will; that comprising the manor of Hawkewell, with other manors and hereditaments, though of course we have for that purpose read and considered the whole of the instrument, including the trusts declared of the stock legacies. The first question is, whether the testatrix has used the word "child," or the word "children" as, in legal phrase, a word of purchase or a word of limitation; and I think that she has used it neither as a word of limitation, nor as meaning offspring otherwise than in the first degree merely, and I say this, though still of opinion that the case of *Lord Tyrone v. Lord Waterford* (27), decided by Lord Campbell and ourselves, was correctly decided. The will there was a very different instrument from the will here. It has, however, been contended that the present will gave to the children of the devisee Samuel Lewin an estate of inheritance by the words "to the use of all and every of

(26) 6 Taunt. 410.

(27) 1 De Gex, F. & J. 618; s. c. 29 Law J. Rep. (N.S.) Chanc. 868.

(11) 1 Saund. 388, note.

(12) Ll. & G. t. Sugd. 10.

(13) 2 Beav. 551; s. c. 9 Law J. Rep. (N.S.) Chanc. 303.

(14) 21 Beav. 550.

(15) Ca. t. Talb. 157.

(16) 4 Law J. Rep. (N.S.) Chanc. 129.

(17) 10 Hare, 320.

(18) 11 East, 594.

(19) 3 Term Rep. 83.

(20) 11 East, 603, note.

(21) 7 Ir. Exch. Rep. 473.

(22) 2 Jarman on Wills, 2nd edit. p. 223; 3rd edit. p. 251.

(23) 5 Term Rep. 292.

(24) 1 W. Black. 535.

(25) 3 Term Rep. 484.

the child and children, if more than one, of his body, lawfully begotten, or to be begotten," and for that purpose the word "estates" occurring at the outset of the instrument, and the phrase "and their heirs" occurring repeatedly, and the phrase "their heirs and assigns," where it first occurs, were particularly relied on. But it is not to be forgotten that the will has also, in the devise under consideration, the words "but if he shall die without leaving such issue" twice, and that the devise concludes thus: "to the use and behoof of my three granddaughters, namely, Elizabeth, Henrietta and Sophia Jane, their heirs and assigns for ever, as tenants in common and not as joint-tenants." Nor must we lose sight of what the testatrix, if she thought on the matter, must have deemed a possible event, namely, that her grandson Samuel Lewin, or her grandson Charles Devereux Lewin, or both of them, might die leaving grandchildren, but not leaving any son or daughter. If I had been able to discover on the face of this will an intention to give by it an estate of inheritance to either of the grandsons, or any children or child or issue of either of them in the devised manors, I should, probably, or certainly, have been for giving effect to that intention; but, whether laying or not laying stress on the phrase "contingent uses and remainders," I find myself unable to discover on the face of the instrument any such intention. Possibly, had the devise of the manors ended with the gift to the children of the grandson Samuel Lewin, I might, by reason of previous expressions, have thought the fee meant to be given to them, but the subsequent dispositions cannot be disregarded. The document is altogether one of those which can, I think, only receive a literal interpretation, there being, in my judgment, no safe guide to any other. Accordingly, I construe the word "leaving" literally, and I treat as effective the word "such" in the passage "but if he shall die without leaving *such* issue." The dispositions of the will literally construed may be, in part at least, unusual; may seem, in part at least, eccentric. Testatrixes, however, and testators, not only have a right to make such dispositions, but, as has been frequently said, have sometimes reasons, not stated, for provisions seemingly capricious and strange. The result, according to my view of the

matter, is, that in the events which have happened not any interest in the testatrix's manors has been effectually given by the will to her grandson Charles Devereux Lewin, or to his children or any of them, or to the testatrix's three granddaughters mentioned by name at the close of the devise of the manors, or to any of them; that is to say, that as to the manors, the gifts to all those persons have, by reason of children of the grandson Samuel Lewin having survived him, wholly failed. And I think that the beneficial inheritance in the manors descended from the testatrix on her daughter Mary Miller Lewin, now deceased, whom I understand to have been her sole heiress at common law and in gavelkind, but so descended, of course, subject to the life-estates in them given by the will to the testatrix's grandson Samuel Lewin, and to his children respectively, some of whom being yet alive, it will, in my opinion, be upon the decease of the survivor of them, and not sooner, that those in whom may be vested the rights of the heiress will be entitled to claim through her a beneficial interest in possession in the manors.

LORD JUSTICE TURNER. — This is a petition by the personal representative of Samuel Lewin, jun., for the payment to her of one-fifth part of a fund in court, which has arisen from monies paid in by the South-Eastern Railway Company under the provisions of their acts, as the purchase-money of some lands in Kent of gavelkind tenure, taken by them for the purposes of their railway.—[After having stated the facts, his Lordship proceeded]—No objection was taken to this petition at the bar, upon the ground that this share, if at all belonging to the estate of Samuel Lewin the younger, might belong to his real and not to his personal representative; but all parties were, as I understand, desirous of having our opinion whether Samuel Lewin the younger was absolutely entitled to this share. In order, therefore, to save the parties any further expense, I assume, for the purposes of this petition, that the share, if it belongs at all to the estate of Samuel Lewin the younger, belongs to the petitioner as his personal representative. The petitioner, in order to maintain her claim, must establish that the children of Samuel Lewin, the grandson, took estates in fee under the

limitation in their favour contained in the will. It is clear that this limitation, standing by itself, could not give estates in fee to these children, and it was not contended at the bar that it could; but it was insisted, on the part of the petitioner, that the children ought to be held to have taken in fee either by reason of the devise to the trustees and their heirs, coupled with the use of the word "estates," in the introductory part of the will, or by reason of the devise over in the event of Samuel Lewin, the grandson, leaving no "such issue"; and several cases (but more especially *Knight v. Selby* and *Moore v. Cleghorn*, as to the first point, and *Robinson v. Grey* and *Hutchinson v. Stephens* as to the second point), were relied on in support of the petitioner's contention. I am of opinion, however, that this case is not governed by the cases referred to, and that, upon the true construction of this will, the children of Samuel Lewin, the grandson, could take no more than life-estates. As to the first point, I think the case is governed by the authorities which were referred to on the part of the respondents; but, independently of those authorities, I think that the children of Samuel Lewin, the grandson, cannot in this case be held to have taken in fee by reason of the devise to the trustees and their heirs; for although, as was said in *Knight v. Selby*, such a devise to trustees may even, although the trustees take no estate under the will, indicate that it was intended to give the fee to the persons beneficially interested, the will in this case shews that the trustees, so far as they took at all, were to take for the benefit not merely of the children of Samuel Lewin, the grandson, but of the ulterior devisees also, including the granddaughters, to whom the fee is given, and the circumstance of these ulterior limitations having failed by subsequent events cannot alter the construction of the will. As to the other point relied on by the petitioner, and the authorities cited upon it, this case cannot be said to be governed by those authorities, unless they can be considered to establish that, in every case where there is a devise of land without words of limitation followed by a devise over, the first devisee takes in fee. The authorities cannot, in my opinion, be held to go, nor am I prepared to go, to that length. I think that it is a question which in each case must

depend upon the intention, to be collected from the will, whether the first devisee is so entitled or not; and I think that, in order so to entitle the first devisee, the intention ought to be clearly manifested, as he cannot be so entitled without giving to the words of the will a different effect from that which the law attributes to them. In this case I can see nothing which indicates such an intention beyond the devise over upon a contingency as part of a continued series of limitations, and I think that this is not sufficient to manifest an intention to give the fee to the children of Samuel Lewin, the grandson. In my opinion, therefore, the case of the petitioner fails upon both the points contended for. It was not contended at the bar that Samuel Lewin, the grandson, could take an estate tail under the limitations of this will, and after looking at the authorities bearing upon this point, I think the better opinion is that he could not. I agree, therefore, with my learned Brother that the proper order to be made upon this petition is to give the petitioner the arrears of income due at the death of Samuel Lewin the younger, and to direct the income from that time to be paid to the four surviving children of Samuel Lewin, the grandson, in equal shares until further order. The costs, I think, should come out of the capital.

STUART, V.C.
March 20.
LORDS JUSTICES.
May 7.

HANSLIP v. KITTON.

Practice—Production of Documents.

Where an answer had been put in by a defendant to an interrogatory as to documents, and it had not been excepted to, one of the Vice Chancellors decided that after decree the Court would not make an order for an affidavit by the defendant as to documents, unless a special case were made out; but the Lords Justices, on appeal, held that the defendant, notwithstanding he had answered and the answer had been taken as sufficient, must file the usual affidavit as to documents.

This was a motion on behalf of the plaintiff that an order made in this cause, and dated the 10th of February 1863,

might be discharged, and that the defendants Kitton and Ayliff might be ordered to file an affidavit stating whether they or either of them had or had had in their or either of their possession or power any and what documents (other than those mentioned in their respective answers filed in the cause) relating to the matters in question in such cause, and referred to in an order dated the 6th of November 1862, and particularly any diaries or memorandum-books from and inclusive of the year 1852 to the 16th of April 1859, and that they might be ordered to produce the same.

The bill was filed originally against Kitton, for establishing a partnership, and for a partnership account; and also, if the Court should think fit, for a dissolution of the partnership.

By his answer, filed on the 24th of July 1860, the defendant Kitton said that he had, in the schedule thereto, set forth all the documents in his possession relating to the matters in question in the cause. The second part of the schedule was as follows: "Diary for the year 1855, the like for the year 1856, the like for the year 1857, the like for the year 1858."

On the 2nd of November 1860 the plaintiff obtained an order to inspect the above documents and some others mentioned in the first schedule to the defendant's answer.

The bill was afterwards amended by making two other persons, Caparn and Ayliff, defendants.

The defendant Kitton in his answer to the amended bill, filed on the 13th of April 1861, said that he had in his former answer set forth the whole of the documents in his possession or power relating to the matters in question in this cause.

The defendant Ayliff in a schedule to his answer set forth two letters, both addressed to the plaintiff, and said that, save as aforesaid, he had not in his possession or power any documents relating to the matters in question in the cause.

The cause came on for hearing in May 1862, and on the 2nd of June following a decree was made, by Vice Chancellor Stuart, to the effect that the plaintiff and Kitton were entitled to share equally in all profits derived from a solicitor's business transacted by them for a certain railway company from the 3rd of July 1852 to the 2nd of

June 1862, the date of the decree, except that as to all conveyancing business transacted for the company by the plaintiff or any of the defendants since May 1857, the profits of such conveyancing business from that month were to be divided into equal third parts, of which one-third equal part was to belong to the plaintiff, another to the defendant Kitton, and the remaining one equal third part to the defendants Caparn and Ayliff.

Upon appeal the Lord Chancellor varied the decision of the Vice Chancellor by directing an account of profits from the 3rd of July 1852 down to the 16th of April 1859 only, and not subsequently.

On the 16th of February 1863 the plaintiff made an application in chambers that the defendants Kitton and Ayliff might be ordered to file the common affidavits respecting all documents in their possession relative to the matters in the suit, and particularly any diaries or memorandum-books from the beginning of 1852 to the 16th of April 1859.

That application was refused, and, in consequence of such refusal, this motion was made.

Mr. Malins and *Mr. H. F. Shebbeare*, for the plaintiff, in support of the motion.

—The decree established a partnership from the 3rd of July 1852, and it was necessary that the plaintiff should have access to all the documents relating to the partnership subsequent to that period.

[STUART, V.C.—Why did you not except to the sufficiency of the defendant's answer?]

Mr. Malins.—Exceptions were unnecessary, because the plaintiff was entitled to have in chambers the production he now sought:

Perry v. Turpin, Kay, App. xlix.

If the defendants had not in their possession the documents now asked for, they had only to make an affidavit to that effect; but if they had such documents in their possession they should produce them.

They also referred to—

Richards v. Watkins, 6 Jur. N.S. 168.

Quin v. Ratcliff, Ibid. 1327.

Manby v. Bewicke, 8 De Gex, M. & G. 470, 472; s. c. 26 Law J. Rep. (N.S.) Chanc. 20.

Rumbold v. Forteath, 3 Kay & J. 748.

By order 42. rule 4. of the Consolidated

General Orders the course of procedure as to the production of documents is the same after decree as before decree.

Mr. Bacon and *Mr. Bird*, for the defendants *Kitton* and *Ayliff*, were not called upon.

STUART, V.C. said, that what was now asked for was an order for the common affidavit relative to documents. It was contrary to the practice of the Court to grant such an order after decree, when an answer had been put in to an interrogatory as to documents, and had not been excepted to ; and he thought the practice ought not to be unsettled. It was now contended that this order was to be had as a matter of course, and that the plaintiff was not bound to make out a special case. Such an order as that now asked for had never yet been made by the Court, and he thought it ought never to be made. The application was, in his opinion, misconceived, and it must be refused, with costs.

From the above decision, and from the order of the 16th of February last, the plaintiff appealed, and the appeal was heard on the 7th of May.

Mr. Malins and *Mr. H. F. Shebeare*, in support of the appeal, referred to

M'Veagh v. Croall, ante, p. 521.

The Rochdale Canal Company v. King, 15 Beav. 11.

Mr. Bacon and *Mr. Bird*, for the defendants, opposed the motion, on the ground that the defendants had in their answers already fully set forth all documents in their possession, and could do no more. *The Rochdale Canal Company v. King* had no application, as in that case there had not been any answer at all.

Mr. Malins was heard in reply.

LORD JUSTICE KNIGHT BRUCE said, that in his opinion the defendants must make the affidavit required of them, to which, notwithstanding the fact that answers had been filed, he thought the plaintiff entitled.

LORD JUSTICE TURNER was of the same opinion. Both the orders of the Court appealed against would be discharged, and the costs of all parties should be costs in the cause.

STUART, V.C. { THE LONDON ASSURANCE v.
June 11. { THE LONDON AND WEST-
MINSTER ASSURANCE COR-
PORATION (LIMITED).

Trade-Mark—"London Assurance"—
"London and Westminster Assurance Com-
pany (Limited)."

Upon a motion for an injunction on behalf of the corporation called "The London Assurance," to restrain "The London and Westminster Assurance Corporation (Limited)" from using the latter title, the Court refused to make any order.

This was a motion on behalf of the corporation called "The London Assurance," to restrain the defendants from using the name of the London and Westminster Assurance Corporation (Limited), or any name resembling that of the plaintiffs or that by which the plaintiffs were generally known.

The plaintiffs were a corporation, established in 1720, and they alleged that from the time of their incorporation down to the present time they had used, and that they now continued to use the word "corporation" immediately after their name on all policies, bills, advertisements, letters and other documents.

The defendants were incorporated under the Companies' Act, 1862, 25 & 26 Vict. c. 89, and they were registered under the title of the London and Westminster Assurance Corporation (Limited).

Mr. Bacon and *Mr. Howard Elphinstone*, in support of the motion, argued that the name or style of the defendants so nearly resembled that of the plaintiffs that it was calculated to mislead the public, and to cause the defendants' corporation to be taken for that of the plaintiffs'.

Mr. Greene and *Mr. Surrage*, for the defendants, were not called upon by the Court.

The VICE CHANCELLOR said that he did not think the present a case for an injunction, and declined to make any order upon the motion.

STUART, V.C.

May 8.

LORDS JUSTICES.

June 3;

July 23.

O'BRIEN v. LEWIS.

Solicitor and Client—Lien of Solicitor on Costs recovered by him for Client—Capture of Client on Ca. Sa. issued on Judgment for Costs of Suit.

A solicitor does not, by taking the body of his client in execution on a judgment obtained by him at law for his costs in a suit in equity, lose his lien for such costs upon the costs of the suit ordered to be paid by the opposite party to his client.

This suit was instituted by John O'Brien against James Graham Lewis and George Coleman Hamilton Lewis, attornies and solicitors, for the purpose of obtaining the payment to the plaintiff of a sum of 300*l.* alleged to have been retained by the defendants, while they acted professionally for the plaintiff, out of monies belonging to him, and for an account. The defence was, that the sum of 300*l.* had been retained by the defendants by the plaintiff's direction, and was a present to them from him. Upon the hearing of the cause a decree was made in favour of the plaintiff, with costs, to be paid by the defendants (1). An account had been taken, and it resulted in a balance in favour of the defendants. The plaintiff's costs of the suit had been taxed at 218*l.* 3*s.* 8*d.*

Mr. Charles Lewis and his son Mr. Edward Tyrrell Lewis were the solicitors in the suit for the plaintiff John O'Brien, but they had now ceased to be his solicitors. Their costs in respect of the suit and of other matters had been certified by the Master at common law to amount to 292*l.* 18*s.* 11*d.*, for which they had obtained judgment against the plaintiff O'Brien.

On the 28th of April Messrs. C. Lewis & Son arrested the plaintiff on a *ca. sa.* issued on that judgment, and he was now in Maidstone jail.

Messrs. C. Lewis & Son now presented a petition, praying that Messrs. J. G. Lewis and G. C. H. Lewis, the defendants in the

suit, might be ordered to pay into court the sum of 218*l.* 3*s.* 8*d.*, the amount of the plaintiff's taxed costs of the suit.

The defendants had been served with notices by Messrs. Charles Lewis & Son, the former solicitors, and by Mr. Daniel Keane, the present solicitor of the plaintiff, not to pay the sum of 218*l.* 3*s.* 8*d.* to the plaintiff.

The question was, whether the petitioners had, by taking the body of their former client upon the *ca. sa.*, lost the lien for their costs in the suit of *O'Brien v. Lewis*, upon the costs which they had recovered therein for the plaintiff from the defendants.

Mr. Jessel, for the petitioners.—The costs which had been directed to be paid by the defendants had been recovered from them by the skill and diligence of the petitioners; and the petitioners were, therefore, entitled to a lien on them for their costs in the suit. Such lien was not lost by their having taken the plaintiff's body in execution—

Lloyd v. Mason, 4 Hare, 132; s. c. 14 Law J. Rep. (N.S.) Chanc. 257.

Mr. Greene and *Mr. Cates*, for the plaintiff, O'Brien, contended that a solicitor's lien for his costs only attached where there was a definite fund under the control of the Court; and that if the petitioners ever had a lien upon the costs recovered by them for the plaintiff, their having taken his body in execution was a satisfaction of their debt and extinguished their lien.

They referred to—

Morgan v. Cubitt, 3 Exch. Rep. 612; s. c. 18 Law J. Rep. (N.S.) Exch. 288.

Jauralde v. Parker, 6 Hurl. & N. 431; s. c. 30 Law J. Rep. (N.S.) Exch. 237.

Lloyd v. Mansell, 1 Bail C.C. 130; s. c. 22 Law J. Rep. (N.S.) Q.B. 110.

Barker v. St. Quintin, 12 Mea. & W. 441, 451; s. c. 1 Dowl. & L. P.C. 542; 13 Law J. Rep. (N.S.) Exch. 144.

Davies v. Bush, Younge Eq. Exch. 358; and

1 & 2 Vict. c. 110. s. 16.

Mr. Brooksbank, for the defendants, who were mere stakeholders, claimed the right of deducting their costs of this application from the sum they had to pay to the plaintiff for his costs of the suit.

STUART, V.C.—A solicitor's lien is a right which is founded upon the rules of

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(1) Vide ante, p. 569.

this Court, and is consistent with common sense. The petitioners, having by their skill and exertion obtained a decree in favour of the plaintiff, thereby acquired a lien for their costs upon whatever might be recovered from the defendants under that decree. But it has been argued for the plaintiff that the petitioners, by taking the plaintiff's body in execution for their costs of the suit, have abandoned their lien and that it is consequently extinguished. Such a doctrine, if it has ever been admitted at law, has never been held in this court. A mortgagee, for example, does not lose his security upon the land of the mortgagor by imprisoning him upon a judgment obtained for the amount of the mortgage debt. I am not aware of any decision which authorizes the position that the taking of the plaintiff's body upon the writ of *ca. sa.* has satisfied the debt due by him to his solicitors for his costs of the suit, or deprived them of their lien in the fund which their own skill and diligence have recovered. There must be an order that the defendants, after deducting 10*l.* for their costs relating to this petition, do pay the remainder of the sum of 218*l.* 3*s.* 8*d.* to the petitioners. Against the plaintiff O'Brien there will be no costs.

From this decision the plaintiff appealed, and the appeal was heard on the 3rd of June.

Mr. Greene and *Mr. Cates*, supported the appeal, contending that there was no lien on the part of Messrs. Lewis & Son at all; and, secondly, that if there were, it was satisfied and lost by the course they had chosen to adopt. They had the choice of pursuing their remedy to recover the costs in the Court where the order that the defendants should pay the costs was made, or they might go to law; they could not pursue both remedies for the same subject-matter. They had chosen a Court of law, and had taken the body of their debtor. This was an abandonment of their right to relief in equity, for the judgment at law covered this very claim. The plaintiff's conduct in endeavouring to prevent their receipt of the costs was in no respect blameable; he had at first wished that they should be paid, but his capture and imprisonment had greatly annoyed him, and now he wished them to have merely their strictest rights.

The Vice Chancellor's order was mistaken, for it assumed that a creditor could have a right against the chose in action of his debtor. The costs were payable to the plaintiff, not to the solicitors, and their right against what was a mere chose in action was lost by what had taken place. If they ever had a right at law and in equity both, they had now elected, and must abide by their election. After issuing a writ of *capias* the creditor could do nothing more at law, for it was the highest remedy, and could be succeeded by no other. On the effect at law of issuing a *capias* they referred to the following authorities:

3 *Blackstone's Commentaries*, 21st edit. p. 414.

Foster v. Jackson, Hob. 52, 59.

Burnaby's case, 1 Str. 653.

Horn v. Horn, 1 Amb. 79.

Ex parte Christie, 1 Deac. & C. 155; s. c. Mont. & B. 352; 1 Law J. Rep. (N.S.) Bankr. 103.

Taylor v. Waters, 5 M. & S. 103.

Houlditch v. Collins, 5 Beav. 497; s. c. 12 Law J. Rep. (N.S.) Chanc. 13.

Morgan v. Cubitt, 3 Exch. Rep. 612; s. c. 18 Law J. Rep. (N.S.) Exch. 288.

Beard v. M'Carthy, 9 Dowl. P.C. 136.

Chilton v. Whiffin, 3 Wils. 13.

Cowell v. Simpson, 16 Ves. 275.

Chase v. Westmore, 5 M. & S. 180, 186.

Balch v. Symes, Turn. & R. 87.

To shew that in such a case as the present the creditor was put to his election, they cited—

Barker v. Smark, 3 Beav. 64.

Roberts v. Ball, 3 Sm. & G. 168; s. c. 24 Law J. Rep. (N.S.) Chanc. 471.

As to the existence of a lien they referred to—

Cohen v. Cunningham, 8 Term Rep. 123.

Shaw v. Neale, 6 H.L. Cas. 581; s. c. 27 Law J. Rep. (N.S.) Chanc. 444.

And a lien, where it existed, might be lost by conduct, as was shewn in *Shaw v. Neale*. If a creditor takes his debtor in execution, he cannot proceed under the garnishee clauses of the Common Law Procedure Act, 1854—*Jauralde v. Parker*. The case which chiefly influenced the Vice Chancellor was *Lloyd v. Mason*, which, they contended, had no application to the case of a judgment re-

covered at law, but only to a contempt for disobedience to an order of the Court; and the respondents, when before his Honour, did no more than refer to *dicta* of Vice Chancellor Wigram, in deciding it, at page 138: "If the execution against the person of a debtor was, for all purposes, a complete satisfaction of the creditor's demand, it might be difficult to stop short of the conclusion that a mortgagor, against whose person execution had issued for the mortgage debt, might, when in prison, redeem the mortgage, although the debt was unpaid." But there was no analogy between the case of one with a pretended lien upon a mere chose in action, and that of a mortgagee who had certain express and defined remedies, all of which he might pursue simultaneously.

They also referred to—

Vigers v. Aldrich, 4 Burr. 2482.

Holcroft v. Manby, 7 Man. & G. 843; s. c. 8 Sc. N.S. 473; 2 Dowl. & L. P.C. 319; 13 Law J. Rep. (N.S.) C.P. 208.

Lloyd v. Mansell, ubi supra.

And the

Stat. 1 & 2 Vict. c. 110. s. 16.

Mr. Brooksbank, for the defendants.—

Messrs. Lewis & Son were unable to pay the costs, willing as they were to do so, from having been served with notice, by each of the claimants, not to pay the other of them.

Mr. Bacon and *Mr. Jessel*, for the respondents, Lewis & Son, argued that common law had nothing to do with the question, which was one entirely for equity. The argument of the other side amounted only to this: That after execution on a *ca. sa.* nothing more could be done at common law, for the debt was by it merged in the judgment. The act, 1 & 2 Vict. c. 110, applied only to charges created by that act, of which this was not one; and the petitioner had no single authority to shew that a person holding a lien could not make it available because he had taken his debtor's person in execution. There was no case even at common law which decided that a solicitor had no lien for his costs because he had taken his debtor's person. *Lloyd v. Mason* was conclusive; it was a direct judgment upon that point, and displaced all the petitioner's arguments upon the statute. It

upheld such a lien as the present, to which, in fact, the case of a mortgage presented for this purpose a complete analogy, and it established the doctrine, that an equitable incumbrance created by law stood on the same ground as an equitable incumbrance created by contract of the parties. The costs ordered to be paid to the plaintiff were not his property until his solicitor's bill was paid. Execution by *capias* was not payment; it was only a means of enforcing payment:

Bac. Abr. tit. 'Execution,' p. 395 letter D.

Peacock v. Jeffery, 1 Taunt. 426.

Simpson v. Hanley, 1 M. & S. 696.

Thompson v. Parish, 5 Com. B. Rep. N.S. 685; s. c. 28 Law J. Rep. (N.S.) C.P. 153.

Barker v. St. Quintin, ubi supra.

The execution could not extinguish the debt: the pledge remained, the debt remained; but the remedies at law against the debtor were gone. But whatever might be the effect of the *capias* there, the remedy in this Court against the property which was the subject of the lien would remain until that debt was actually satisfied.

They also cited

Richards v. Platel, Cr. & Ph. 79; s. c. 10 Law J. Rep. (N.S.) Chanc. 375.

Mr. Greene, in reply.—It is not contended that the debt was, in every sense, gone; but that the remedies outside that which the creditor had elected to pursue were gone.

LORD JUSTICE KNIGHT BRUCE (July 23).

—In this case a client having become indebted to his solicitor upon a bill of costs, was sued at law for the amount by the solicitor, who recovered judgment in the action, and issued execution upon the judgment, namely, a writ of *capias* against the client, who was taken under the writ accordingly. The debt remained unsatisfied, unless so far as it could be extinguished, or satisfied, by the judgment and execution. There is a fund payable under the order of the Court, but now in the hands of the defendants, on which the solicitor claims against the client a right of lien, the ordinary solicitor's lien for the amount of the bill. That right of lien the solicitor clearly has, unless he has lost it by the judgment

and execution, which the client contends that the solicitor has done. That is the question now for decision, and upon that I think the solicitor right and the client wrong. The execution was not a satisfaction of the debt, at least in any such sense. A mortgagee, we know, who is his mortgagor's creditor for the mortgage debt, may sue the mortgagor at law for it, may recover judgment in the action, and under the judgment take the mortgagor's person in execution without losing the benefit of the mortgage security; but may still enforce that security, the debt remaining unpaid. A solicitor does not, as to his lien, appear to me to stand in a worse position, and the present solicitor has a right of lien for the costs for the recovery of which the action, which ended in the execution and caption, was brought, and the lien appears to me to remain. I agree, therefore, with the Vice Chancellor who has so decided in the present instance. Perhaps it may be right to add to the order a direction for allowing against the judgment what has been or shall be obtained by means of the lien.

LORD JUSTICE TURNER.—I am of the same opinion. Two points were relied on on the part of the appellant in support of this appeal: first, that the debt due from the appellant to the respondents was merged in the judgment; and secondly, that it was satisfied by the appellant having been taken in execution under the judgment; but, assuming the debt to have been merged in the judgment, the collateral security, by virtue of the lien, would nevertheless subsist, according to the case of *Lloyd v. Mason*, and as to the debt having been satisfied by the appellant having been taken in execution, I think it clear, on the authorities, that the debtor's being taken in execution does not extinguish the debt, or operate as payment of it; and if the debt be not extinguished, and the lien subsists, the order of the Vice Chancellor complained of by this appeal cannot be otherwise than right. I had, in the course of the argument, some doubt on this part of the case, in consequence of what was said in *Beard v. McCarthy*, but this doubt has been wholly removed by the case of *Thompson v. Parish*. I think this appeal must be dismissed with costs.

After discussion as to the costs of the

appeal incurred by the defendants, it was arranged that, out of the money to be paid by them to Messrs. Lewis & Son, they should be at liberty to retain 7*l.* in respect of those costs.

KINDERSLEY, V.C. }
June 2, 3.

RANDFIELD v.
RANDFIELD.

Costs—Legatee Attesting Witness—Wills Act, s. 15.

Except in those cases where a general conversion of real and personal estate is directed so as to form a mixed fund, the whole costs of construing the will of a testator, as well in reference to the devises of real estate as to the bequests of personalty therein contained, are primarily payable out of the personal estate in exoneration of the real.

After a will had been executed and sufficiently attested by two witnesses, a devisee under the will at the request of the testator's wife, the testator intimating that it was unnecessary to do so, but not objecting otherwise, added her name as an attesting witness:—Held, that the act of attestation could not be disregarded as useless and ineffectual, and that by the express enactment of the Wills Act (section 15.) the devisee was excluded from taking any interest under the will.

This cause came on upon further consideration. The bill was filed, in October 1856, by Harriett Reeve Randfield to administer the estate of William Randfield, who, by his will, dated the 18th of October 1837, and executed the 14th of February 1844, desired all his just debts, funeral expenses and the charges of proving his will, and the taking up of his copyhold estates might be fully paid and satisfied. He devised all his freehold and copyhold estates (describing them) to his son William Cass Randfield when he had attained twenty-one, upon condition that his (the testator's) widow, Ann Randfield, should receive an annuity of 120*l.* out of his rents, so long as she remained his widow, and have a house and furniture rent-free during her life. The testator then gave to his son all his personal estate, describing it as all his stock in trade and effects of whatever description; but should the hand of death fall on his widow,

Ann Randfield, and son, William Cass Randfield, and he (the testator) having no other children, or his son any issue lawfully begotten, his will was then, that should he leave a widow, she should receive 50% annually during her widowhood out of his real estate; the residue then to be equally divided share and share alike, after paying such legacies as he might thereafter name, the division of property to be between his late brother Richard Randfield's surviving children and his sister Jessy Warner's children, his sister Rachel Squirrell's children, his niece Grace Beeston and his niece S. Stuart, they paying all his son's just debts, funeral expenses and demands, or his wife's should she be the longest liver. And the testator appointed his wife executrix, and his son William Cass Randfield and Isaac Mills executors and trustees, &c. This will was written on three sides of a sheet of paper, and was executed and attested at the foot of the third sheet thus: Witness my hand and seal, W. Randfield (l.s.)—(Witness) John S. Groom and James S. Harris. The testator was not satisfied with the form of attestation, and requested his son to add the following at the top of the fourth side, namely, "This last will and testament was signed in our presence and in the presence of each other by him." This was done, and Groom and Harris signed this new attestation clause. The testator's widow then suggested that Grace Beeston, who was present, should add her name to this memorandum, when the testator said it was quite unnecessary; but as Mrs. Randfield still urged it, Grace Beeston, to oblige her, added her name. The testator died on the 29th of February 1844; and his will was proved on the 2nd of May by his widow and his son William Cass Randfield, who attained twenty-one, and died on the 10th of September 1856 without issue, having by his will, dated the 3rd of February 1855, devised to his wife (the plaintiff) all the real and personal estate he should die possessed of, and appointed her sole executrix. The bill was filed in October 1856, against the testator's (William Randfield's) widow and the parties entitled in remainder under his will, and on the 25th of July 1857 his Honour decided that William Cass Randfield on attaining twenty-one

became absolutely entitled to the real and personal estate, subject to the annuity to the widow and her life interest; and the receiver was ordered to keep down the annuity, pay the costs of the defendants, when taxed, that he do pass his accounts, and for a sale of the real estate if the personalty should be insufficient, with liberty to apply. This decree was appealed against to Lord Cranworth, who, on the 2nd of December 1857, after reserving his judgment, decided that on the death of William Cass Randfield without issue, the gift over took effect, subject to the interests of the widow and the plaintiff under the will; and inquiries were directed as to the attestation of the will, who was the testator's heir at law, and as to the parties interested in the gift over, with the usual accounts; and an inquiry as to what parts of William Randfield's estate were received by his son. And the receiver was ordered to pass his accounts, and his Lordship declared that the costs as between solicitor and client of all parties in this cause, including the appeal, ought to be paid out of the estate of the testator William Randfield; and further consideration was adjourned to this Court. The case was then appealed to the House of Lords by the plaintiff, and their Lordships decided that as to the personal estate William Cass Randfield was absolutely entitled, but as to the real estate, subject to an executory devise over in the event of his dying without issue. The inquiries and accounts directed by Lord Cranworth were then proceeded with in his Honour's chambers, and were more than once brought before the Court on adjourned summons; and the cause now came on upon further consideration on the certificate of the Chief Clerk as above.

The principal questions argued were, first, whether the costs were to be paid wholly out of the personal estate, or to be apportioned between the real and personal estates; and secondly, whether Grace Beeston had forfeited her interest under the gift over, by adding her name as an attesting witness.

Upon the first point, the following cases were cited, viz.:

Christian v. Foster, 2 Ph. 161; s. c.

16 Law J. Rep. (N.S.) Chanc. 119.

Johnston v. Todd, 8 Beav. 489.

Pickford v. Brown, 2 Kay & J. 426;

s. c. 25 Law J. Rep. (N.S.) Chanc. 702.

Ripley v. Moysey, 1 Keen, 578.

Stringer v. Harper, 26 Beav. 585; s. c.

28 Law J. Rep. (N.S.) Chanc. 643.

Sanders v. Miller, 25 Beav. 154.

Upon the second point—

Wigan v. Rowland, 11 Hare, 157;

s. c. 23 Law J. Rep. (N.S.) Chanc. 69.

Gurney v. Gurney, 3 Drew. 208; s. c.

24 Law J. Rep. (N.S.) Chanc. 656.

Tempest v. Tempest, 2 Kay & J. 635.

Mr. Baily and *Mr. Shebbeare* appeared for the plaintiff.

Mr. Cole and *Mr. E. E. Kay*, for Ann Randfield.

Mr. Glasse and *Mr. Dickinson*, for the other defendants.

Mr. Baily was heard, in reply.

KINDERSLEY, V.C.—All this litigation has unfortunately arisen from the testator's attempt to make his own will, and a great deal of expense has been incurred from the ambiguous language used. When the case came before me, I was of opinion that William Cass Randfield was absolutely entitled to the testator's real and personal estate. Lord Cranworth, before whom the case was taken on appeal, thought that he was not absolutely entitled to either realty or personalty, but took the property subject to an executory limitation over, in the event of William Cass Randfield dying without issue. The case being further appealed to the House of Lords, their Lordships considered that as to the personal estate he was absolutely entitled, but as to the realty subject to an executory devise over, and so far confirmed Lord Cranworth's decision. William Cass Randfield died without issue, having made his will and left all his property to his widow (the plaintiff), and appointed her executrix, so that she represents every interest, except that of legal personal representative of the original testator, Ann Randfield, the widow representing that interest. There is nothing, therefore, to find fault with in the filing of this bill, which prays that the will of William Randfield may be established, and the real and personal estate administered, and the rights and interests of all parties ascertained

by the Court, and all necessary accounts taken; and that a receiver may be appointed, &c. The accounts have been taken, and the cause now comes on upon the certificate of the chief clerk. It appears to me that the decision of the House of Lords does not touch my decree, except as to the real estate, by making a contrary declaration, but leaving it otherwise as far as relates to the personal estate untouched; nor does it affect Lord Cranworth's decision, as to any other portion, except the personal estate, and assumes the propriety of all the directions which have been given, and the cause now comes on upon further consideration. Various questions, and by no means ordinary ones, arise, and the principal one is, what ought to be done as to the costs of the suit? It is a suit for the administration of real and personal estate, and for the determination of questions upon the construction of a will with respect to both. Now, one thing is obvious, that so far as it is merely an administration suit, all the expenses of that suit must come out of the personal estate up to this time, so far as relates to the administration in chambers (not as to the question of right), and *quidcunque vid*, whatever may be the right conclusion as to the apportionment of the costs, it appears to me that the costs of administration must come out of the personal estate; but the questions which arose in determining the right of the parties, unfortunately necessarily occasioned considerable expense, chiefly caused by the difference of opinion and appeals on those questions, otherwise the additional costs would have been trifling. Then comes the question, "Ought those costs, or any portion of them, to be borne by the real estate, either by way of throwing upon it any costs specially occasioned by questions relating to it, or by apportioning them according to the relative values of the real and personal estates; or ought all the costs, including the costs of the decisions of questions of right, to come out of the personal estate?" I confess if the matter were *res integra*, and in the absence of any decision, I think the tendency of my mind would be to hold that inasmuch as the real estate goes one way and the personal estate another way, so far as costs have been incurred by determining the rights with respect to the real and personal estates,

those costs (not being costs of administration) should be apportioned between the two estates. But whatever I may think *a priori*, I cannot do that, if I find that, on deliberate consideration and argument, the matter has been decided the other way by other Judges. It would not be right, nor for the interests of the suitors that there be any vacillation or difference of opinion. Where two Judges, not of the appellate Court, but of courts of co-ordinate jurisdiction, have successively concurred in thinking that such and such principle ought to govern the Courts, I ought to follow it. The first case is that of *Pickford v. Brown* (1), and the other *Stringer v. Harper* (2); in both of which Wood, V.C. and the Master of the Rolls held, that although where a testator has directed the conversion of his real and personal estates, and thrown the proceeds into a mixed fund, there should be an apportionment of the costs as between the realty and personalty, yet, where there is no such conversion and mixing of personalty and realty directed by the testator, the Court does not apportion the costs; and not only the costs of administration, but of deciding the rights of the parties, must be borne by the personal estate, in the same way as simple contract debts: the personal estate must first bear those costs, and if it is insufficient, then the real estate. Probably no clear and simple case can be found in which, there not being a mixing of the fund by conversion, the Court has determined that there should be an apportionment. The case which comes nearest to this is *Sanders v. Miller* (3), but that is not the simple case of a mixed fund being apportioned, and therefore in this state of things I am bound and must hold that the costs of the suit must come out of the personal estate, including the costs of the appeals, as being merely consequences of the litigation, and in case there is a deficiency of the personal estate, then they must come out of the real estate.

The only remaining question is with regard to Grace Beeston. The matter

stands thus: Grace Beeston, one of the parties to whom a gift over of the real estate is made in the event of William Cass Randfield dying without issue (which has happened), has, with two other persons, signed her name to a memorandum written on the paper containing the will; and it appears that, the will occupying three pages, the memorandum was on the fourth. The will concluded, "Witness my hand, William Randfield." The witnesses to the signature of the testator were two persons named Groom and Harris; and it is clear that that was a sufficient attestation, provided that it be shewn that the requisitions of the Wills Act were observed, it being unnecessary that there should be any form of attestation, though the act requires, for the validity of the will, that it should be executed in manner after mentioned, that is, signed at the foot or end by the testator (which was done here), the signature made or acknowledged in the presence of two or more witnesses, present at the same time (which I believe was the case here), and such witnesses shall attest the execution in the presence of the testator (which was the case here); and if there was nothing more, it is clear that that was a good execution and a good attestation. But it appears that the testator, when he had thus signed and had the will attested, was not satisfied with it, and desired that there should be a better attestation; and, there not being sufficient room on the third page, this additional form of attestation was placed at the top or beginning of the fourth page: "This last will and testament was signed in our presence, and in the presence of each other by him. Witnesses thereto, John Groom and James Harris." And so it stood at first; and the testator rightly considered that it was good in law, and the act was sufficient. Whether he was a lawyer or not, I do not know. Before he caused this additional clause to be written and signed by Groom and Harris, there were present not only Groom and Harris and the testator and his wife, but Grace Beeston, who was a niece of the testator. And the testator's wife was desirous that Grace Beeston should add her signature; but the testator objected, saying that it was unnecessary, not on the ground that Grace Beeston would lose what she took under the will, but that two witnesses

(1) 2 Kay & J. 426; a.c. 25 Law J. Rep. (N.S.) Chanc. 702.

(2) 26 Beav. 585; a.c. 28 Law J. Rep. (N.S.) Chanc. 643.

(3) 25 Beav. 154.

were sufficient; the widow persisting, however, Grace Beeston put her name, in order to oblige and comply with the request of the testator's wife. Then comes the question, is this, within the 15th section of the Wills Act, an attestation of the will by Grace Beeston? Now I must give to the words of this clause, or any portion of it, the ordinary acceptation, unless the context requires a different construction. "If any person shall attest the execution of any will, &c., the bequest, &c., given shall be void"; and the question is, did Grace Beeston attest the execution of this will? I apprehend clearly the meaning of the words is, signing his or her name as a witness to the execution, to the clause of attestation, by which the signature of the testator is attested; that is the plain and fair meaning. Is this, therefore, a clause of attestation to which Grace Beeston signed her name? Clearly it is, and it was intended by the testator to be so. He himself requested it to be written, and it was so written at his desire, and Groom and Harris signed it; and, clearly, they signed it as a clause of attestation; in other words, in the terms of the 15th section of the act, "to attest the execution." No doubt the signature of the testator would have been sufficiently attested, and the will would have been a valid will if the matter had been left there; but Grace Beeston having signed her name exactly in the same way as Groom and Harris, without any distinction, can I say that she has not signed a clause of attestation, and thereby attested the execution of the will? I feel regret in being obliged so to decide, and I feel the great hardship of the case; but it is absolutely necessary to adhere to the true rules of construction, and not to allow any consideration of hardship to interfere with them. I am obliged, therefore, to decide that Grace Beeston is excluded from taking any benefit under the will, and that her interest, whatever it is, goes to the testator's heir-at-law.

LORDS JUSTICES.

June 2.

} WALMESLEY v. FOXHALL.

Practice—Re-hearing.

A suit was instituted for a declaration of right as to the interests of tenants for life in the share of a deceased co-tenant for life. The decree made at the hearing after declaring the immediate rights of the tenants for life proceeded to declare that there were cross-remainders between them. The Lords Justices, although the usual time for re-hearing had elapsed, ordered a re-hearing of the case, at the instance of children of a tenant for life who had recently died, those children being prejudiced by the declaration as to cross-remainders, and the declaration being unnecessary for the determination of the question originally submitted to the Court.

This was a petition, praying that the cause of *Walmesley v. Foxhall* might be re-heard. The time of re-hearing had expired, but the grounds for the application were as follows: Edward Foxhall, the testator in the cause, died many years ago, having left the whole of the rents of his leasehold estate and the income of his other personal estate to his six children for their lives, and the object of the suit, which was instituted on the death of one of the children, Eleonora Foxhall, unmarried, and without issue, was to ascertain the rights of her surviving brothers and sisters in her share of the property. The Master of the Rolls, on the 11th of November 1854, made a decree, declaring that "according to the true construction of the will of the testator, Edward Foxhall, his surviving children were entitled to the whole of the rents of his leasehold estates and the interest and dividends of all his residuary personal estate since the death of his daughter, Eleonora Foxhall, in equal shares, for their lives, with cross-remainders between them."

A son of the testator having died in 1862, leaving children, the latter presented a petition praying that the cause might be re-heard, notwithstanding the time for re-hearing had expired.

Mr. Hobhouse and *Mr. Nalder*, in support of the petition, contended that the Master of the Rolls, in making the declara-

tion contained in the decree, that cross-remainders existed between the children of the testator had gone beyond what was the object of the suit, which only sought a declaration of the rights of the children as tenants for life, and by so doing had dealt unnecessarily with the future interests of those parties. The petitioners felt that they were damnified by that declaration; and their father, one of the tenants for life, having died so lately as at the end of 1862, they had come to the Court at the earliest possible time. The learned counsel, in conclusion, called upon the Court to grant the prayer of the petition, more particularly because at the hearing there were no parties before the Court but the tenants for life.

Mr. Baggallay, Mr. Selwyn, Mr. Rasch, Mr. W. W. Cooper and Mr. Bagshawe appeared for the respondents.

LORD JUSTICE KNIGHT BRUCE. — We think that leave ought to be given, and we accordingly give it, to present this petition; and we make an order in accordance with its prayer on the ground that his Honour the Master of the Rolls, in making his declaration as to cross-remainders, has gone further than the case before him required. The costs, both here and at the Rolls, will be dealt with when the cause shall be reheard.

LOARDS JUSTICES. } *In re IVES (a Lunatic).*
April 17.

“Stock” — “Lunacy Regulation Act, 1853,” s. 140.

The stock of a railway company, though transferable only by deed under 8 Vict. c. 16. s. 14, is included in the description of “stock” as defined by the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), and an order may therefore be made under the 140th section of the latter act for the transfer into the name of the Accountant General of stock of that description belonging to a lunatic.

In this case the Master in Lunacy, by his general report, dated the 10th of December 1862, and confirmed by fiat of the Lords Justices on the 29th of January 1863, submitted (amongst other things) that the

secretary or other proper officer for the time being of the London and North-Western Railway Company should be at liberty to transfer into the name of the Accountant General of the Court of Chancery, in trust in the lunacy, 6,187*l.* 10*s.* consolidated stock of the company, standing in the books of the company in the name of the lunatic.

In pursuance of the above report, application was made to the secretary of the London and North-Western Railway Company to make the transfer; but he declined to do so, upon the ground that the consolidated stock of the company was not transferable merely in the books of the company, but by the 8 Vict. c. 16. s. 14. required a deed for its transfer. The present petition was therefore presented by the committee, praying, amongst other things, that proper directions might be given for effecting the transfer.

The 140th section of the act, 16 & 17 Vict. c. 70, is as follows: “Where any stock is standing in the name of or is vested in a lunatic beneficially entitled thereto, or is standing in the name of or vested in a committee of the estate of a lunatic, in trust for the lunatic, or as part of his property, and the committee dies intestate, or himself becomes lunatic, or is out of the jurisdiction of, or not amenable to the process of the Court of Chancery, or it is uncertain whether the committee be living or dead, or he neglects or refuses to transfer the stock, and to receive and pay over the dividends thereof to a new committee, or as he directs, for a space of fourteen days next after a request in writing for that purpose made by a new committee, then the Lord Chancellor, intrusted as aforesaid, may order some fit person to transfer the stock to or into the name of a new committee, or into the name of the Accountant General of the Court of Chancery, or otherwise, and also to receive and pay over the dividends thereof, or such sum or sums of money, in such manner as the Lord Chancellor intrusted as aforesaid may order.” And the 142nd section enacts that, “Where an order is made under this act for the transfer of stock, the person to be named in the order for making the transfer shall be some proper officer of the company or society in whose books the

transfer is to be made." And the 2nd section (the interpretation clause) thus defines stock: "And the word 'stock' shall be construed to comprehend any fund, annuity or security, transferable in books kept by any company or society, or any money payable for the discharge or redemption thereof, or any share or interest therein.

Mr. Wickens, for the petition.

Mr. Davey, for the heir-at-law and next-of-kin.

Mr. Speed, for the company.

LORD JUSTICE KNIGHT BRUCE.—The question is one which the company might fairly raise, but in my opinion the balance of convenience appears to be in favour of the larger interpretation of the 140th section of the act. I, therefore, think that the secretary of the company should be directed to make the transfer according to our former order.

LORD JUSTICE TURNER.—I am of the same opinion.

KINDERSLEY, V.C. { THE EARL OF SHREWS-
MAY 26. BURY v. THE NORTH
STAFFORDSHIRE RAIL-
WAY COMPANY.

Demurrer to Part of the Prayer of a Bill—Supplemental Suit.

*Previously to obtaining their act the projectors of a railway agreed to pay to a landowner claiming under a settlement 20,000*l.* over and above the value of the land and the compensation to be paid for severance. The money not being paid, the landowner filed a bill for specific performance, but died pendente lite, and a person who came into possession of the estates, under a remote limitation in the settlement which the prior landowner had treated as barred, filed another bill, in substance the same as the former, and prayed that, "if necessary and proper, his suit might be taken as supplemental to the former suit." The defendants demurred for want of equity to so much of the bill as sought to make the suit supplemental. — Demurrer overruled, with costs.*

This case came on upon a demurrer for want of equity, put in to a portion only of

the prayer of the bill. The bill stated, in substance, that in the year 1845 a railway was projected, to be called "The Churnet Valley Railway," and that part of the line being intended to pass through lands which were the property of the then Earl of Shrewsbury, Mr. Sharp, on behalf of the promoters of the undertaking, entered into an agreement, dated the 25th of February 1845, and made between John Earl of Shrewsbury of the one part, and the said Mr. Sharp of the other part, and it was thereby agreed that a sum of 20,000*l.* should be paid to the said John Earl of Shrewsbury by the promoters of the railway over and above the amount of the value of the land to be taken and the sum to be paid for severance. That on the 20th of January 1848 another agreement was entered into with reference to the mode in which the 20,000*l.* was to be paid, and three acts of parliament were obtained, with which the Lands Clauses Consolidation Act was incorporated, by virtue whereof the Churnet Valley Railway Company became amalgamated with and was now represented by the defendants' company. That certain accommodation works had been executed by the said company on the lands in question, but no part of the 20,000*l.* had ever been paid under the agreements at the time of the death of John Earl of Shrewsbury, which happened some time after. The bill then stated that John Earl of Shrewsbury was succeeded by Earl Bertram Arthur, who was then an infant, and after some communications had taken place on his behalf, a bill was filed by him, by Mr. John Sadler as his next friend, for specific performance of the agreements. That the defendants appeared to and answered the bill, but before any other proceedings were taken, namely, in 1856, Earl Bertram Arthur also died, and the suit thereby became absolutely abated. The present plaintiff, Henry John Earl of Shrewsbury, after the lapse of some time and with considerable difficulty, succeeded in establishing his title to the earldom and estates, tracing his pedigree back as far as the sixteenth century, and filed this bill, which was substantially the same as the former bill filed by Earl John, and into the prayer the following passage was introduced, viz., "And if necessary or proper,

that this suit may be taken to be supplemental to, or in the nature of a suit supplemental to, the suit of Earl Bertram Arthur." The defendants put in a demurrer for want of equity to so much of the bill as sought to have the suit taken as supplemental to, or in the nature of a suit supplemental to, the suit of Earl Bertram Arthur, and to no other part of the bill.

The Solicitor General (Sir Roundell Palmer), Mr. Glasse and Mr. Bovill appeared for the defendants, in support of the demurrer, and contended that the present plaintiff not claiming under the late Earl, but in point of fact having made out his title from a long antecedent period, there could be no privity, and the present suit could not be treated as supplemental to the former one. That being so, and the claim for the 20,000*l.* being a simple contract debt only, the plaintiff's draughtsman was aware of that, and for the sole purpose of saving the Statute of Limitations from running, had introduced this passage. The whole substance of the bill shewed that it could not be supplemental, and therefore the demurrer must be allowed.

Mr. Baily and Mr. Wickens were not called upon.

KINDERSLEY, V.C.—I am of opinion that this demurrer must be overruled. I think it is an experiment of a somewhat peculiar and novel kind, but neither its peculiarity nor its novelty ought to influence the Court in either allowing or overruling the demurrer. I can hardly conceive a more inconvenient mode of raising the question, from which, it appears to me, not the least benefit can accrue to the defendants.—[His Honour referred to the statements in the bill.]—The plaintiff, upon the death of Earl Bertram Arthur, became entitled, by succession, to the honours and estates, and therefore subject to any question which might arise, under the statute of limitations, if Earl Bertram Arthur had any title to relief in the suit instituted on his behalf, the present plaintiff must be entitled to the same relief in this suit. Without intending to express any opinion upon the merits, or the claims made by this bill, it appears to me that, whether it is to be regarded as an original bill, or an original bill in the nature of a supplemental bill, if Earl Bertram

Arthur could have succeeded, so would the present plaintiff be entitled to succeed. In the prayer of this bill is the passage upon which the question mainly turns, and which is introduced by amendment (which however makes no difference), and it is now indeed a common form, although it was not the practice when I was at the bar. It is in these words: "that if necessary or proper this suit may be taken as supplemental to, or in the nature of a suit supplemental to, the suit," &c. referring to the suit of Earl Bertram Arthur. That is, that "if necessary or proper" a suit which otherwise was an original suit, might be taken as supplemental to another suit designated. I confess I have often asked myself the meaning of these words, which, I believe, in one case were actually introduced into the decree itself. It is, perhaps, difficult to say in what view this would have to be regarded, supposing the case were argued, and the Court should consider that the suit could not succeed except as a supplemental suit. But, however, without considering that question, this passage having been introduced, to this passage, and this passage only, as part of the prayer, the demurrer is put in for want of equity; and not disputing the right of the plaintiff to file such a bill as an original bill, it is contended that he has no right to do it in the shape of a supplemental bill, or a bill in the nature of a supplemental bill. It appears to me, even supposing it is necessary to raise the question how far the plaintiff has a right to treat this suit as supplemental to the suit of Earl Bertram Arthur, it is quite impossible to go into that question, without necessarily also going into that part of the relief asked which is not covered by the demurrer; and also going into the nature of the suit of Earl Bertram Arthur. It is, therefore, impossible for me to express any opinion (nor, in fact, would it be right for me to do so,) as to whether this suit should be by supplemental bill, or by supplemental bill in the nature of an original bill, or not; or, in fact, to give any opinion on any other question arising on this demurrer; or as to the prayer which it purports to cover. The demurrer assumes, and I will also assume, that the bill seeks to make the present suit supplemental to the suit of Earl Bertram Arthur; but when we come to look at it, it

does not do so, but only asks that "if necessary or proper it may be taken to be supplemental," and, therefore, on that merely technical ground (and, of course, all demurrers are merely technical), I am of opinion that it cannot be sustained. But, besides this, I think it must be overruled, simply on the ground that sufficient consideration cannot be given to the demurrer without going into those portions of the bill which it does not cover. The demurrer must be overruled, with costs, in the usual way; without prejudice, however, to any question to be raised at the hearing. The effect will be that the defendants will be precisely in the same position that they are in now.

STUART, V.C. }
 April 16, 17. }
 LORDS JUSTICES. }
 June 4. }

NOEL v. NOEL.

Practice—Production of Documents.

A defendant, in compliance with an order, made the usual affidavit as to documents. After the affidavit had been filed, he put in his answer, and the plaintiff having from the contents of the answer made out a special case as to the possession by the defendant of particular documents, the Court ordered the defendant to make a further affidavit stating whether he had those documents in his possession.

On the 15th of January 1863 an order was made in this cause for the defendant to make the usual affidavit as to documents. On the 16th of February the defendant accordingly filed an affidavit stating that he had in his possession or power the documents mentioned in the first and second parts of the schedule thereto annexed, but that he objected to produce the documents mentioned in the second part of such schedule on the ground of their being privileged communications, and he said that, save as aforesaid, he had not in his possession or power any other document relating to the matters in question in the cause.

On the 13th of March 1863 a summons on behalf of the plaintiff was taken out to consider the sufficiency of the defendant's affidavit of the 16th of February, and in

the event of the same being considered insufficient, it was asked that the defendant might be ordered to file a further more full and more sufficient affidavit, stating whether he had, or ever had had, and when last, in his possession or power, or in the possession or power of his solicitors or agents, or solicitor or agent, any and what letters, papers or writings relating to the purchase or sale of the public-house in the bill mentioned, or the negotiations and arrangements for such purchase or sale, and relating to the lease or proposed lease by the defendant to William Winson of a certain farm, also in the bill mentioned, or to the defendant's intention, wish or proposal to grant any such lease, including all letters, papers, writings and documents from Mr. Simpson in the bill mentioned, and that the defendant might be ordered to produce the same.

That summons was now adjourned into court. No letters or documents relating to the sale of the public-house or the lease of the farm were produced.

The plaintiff did not interrogate the defendant as to documents.

The answer was filed on the 23rd of February 1863, and had not been accepted to.

Mr. Bacon and Mr. G. L. Russell, for the plaintiff, in support of the summons, relied on certain statements in the answer as shewing that the defendant took a lease of a public-house and underlet it to Winson, and contended that the plaintiff was entitled to know whether there were any written documents as to that transaction.

Mr. Osborne and Mr. Leonard Field, for the defendant, submitted, that he should not be called upon to make a further affidavit. This was a vexatious proceeding.

They referred to—

The Rochdale Canal Company v. King,
 15 Beav. 11.

Manby v. Bewicke, 8 De Gex, M. & G.
 470, 472; a. c. 26 Law J. Rep. (N.S.)
 Chanc. 20.

Mertens v. Haigh, 1 Jo. & H. 231;
 a. c. 30 Law J. Rep. (N.S.) Chanc. 33.

STUART, V.C. (April 17) intimated that the former affidavit was insufficient, and said that the order must be that the defen-

dant do make a further affidavit as to documents relating to the sale of the public-house and the lease of the farm, within a fortnight from the service of the order.

Against this order the defendant appealed, and the appeal was heard before the Lords Justices on the 4th of June.

Mr. Osborne and *Mr. Leonard Field*, for the defendant, in support of his appeal, cited

The Rochdale Canal Company v. King, ubi supra.

Manby v. Bewicke, ubi supra.

Lamb v. Orton, 1 Drew. 414; a. c. 22 Law J. Rep. (N.S.) Chanc. 713.

Richards v. Watkins, 6 Jur. N.S. 168.

Walker v. Kennedy, 26 Law J. Rep. (N.S.) Chanc. 397.

Sibbald v. Lowrie, 2 Kay & J. 277, in note.

Mertens v. Haigh, ubi supra.

Statute 15 & 16 Vict. c. 86. ss. 18, 20.

Mr. Bacon and *Mr. G. L. Russell* (who appeared with *The Solicitor General*), for the plaintiffs.

Mr. Osborne was heard in reply.

LORD JUSTICE KNIGHT BRUCE (June 4) believed that his learned Brother and himself agreed in thinking that the plaintiffs ought not to be put to an amendment of their bill, when the same result might be obtained by directing a further affidavit to be made by the defendant. But they also thought that insufficiency ought not to be imputed to the affidavit which the defendant had already made, and in that respect the Vice Chancellor's order of the 17th of April ought to be varied. Their Lordships further were of one opinion that no improper question should be answered — nothing, in fact, which might go to break down that protection to which professional communications were entitled. And if it should appear necessary that such protection should be stated upon the order, their Lordships thought that it should be so stated.

LORD JUSTICE TURNER quite agreed in this view. He could find nothing in the statute which tied the Court down to a single affidavit as to documents. If there appeared to be a case of reasonable suspicion that there were additional or other

documents, there was power in the Court under the 18th section of the statute to order the party to make a further affidavit, although the earlier affidavits might have sufficiently complied with the order under which it was made. Upon the evidence now before the Court there did appear to his Lordship sufficient ground for a further inquiry as to documents in the defendant's possession, and there could be no necessity to compel the plaintiffs to amend their bill for this one object. The plaintiffs were entitled to establish their case by having a full production of documents, leaving the defendant to make out his own case by counter evidence; nor would the defendant be in any worse position than he was in before, inasmuch as the general rule gave him power to protect himself from making any improper disclosure.

WOOD, V.C.
June 20, 25.

{ PETO v. THE BRIGHTON,
UCKFIELD AND TUN-
BRIDGE WELLS RAIL-
WAY COMPANY.

Injunction—Negative Contract—Specific Performance.

G. H. B., an engineer, received a written authority from the directors of the *B. U. and T. Railway Company* on their behalf to enter into a contract for the construction, by *P. & B.* (railway contractors), of their line of railway for 215,000*l.*, 63,000*l.* to be paid in debentures and the balance in shares of the company. *G. H. B.* negotiated the contract with *P. & B.*, and on behalf of the *B. U. and T. Railway Company* signed an agreement. In the mean time the directors of the *B. U. and T. Company*, having arranged for the sale of their undertaking to the *L. B. and S. C. Railway Company*, repudiated the authority given to *G. H. B.* On a bill, filed by the contractors, praying specific performance, and that the *B. U. and T. Company* might be restrained by injunction from parting with their shares,—Held, that as the Court could not compel *P. & B.* to carry out their part of the agreement, it would not interfere to prevent the *B. U. and T. Company* from parting with their shares.

Where a contract contains an express nega-

tive covenant and complete justice can be done between the parties, the Court will grant an injunction to restrain breach of the negative covenant; but the Court rarely interferes where there is no distinct negative stipulation, but the negative obligation is inferred only from the positive contract.

This was a motion for an injunction.

Early in the month of March 1862 the Brighton, Uckfield and Tunbridge Wells Railway Company applied to George Hinton Bovill, an engineer, to make arrangements for them as to the construction of their railway, and they authorized him to enter into an agreement with Messrs. Peto & Betts to construct the line of railway and works authorized by the Brighton, Uckfield and Tunbridge Wells Railway Act, 1861, in accordance with the several plans and sections supplied by the company to Mr. Bovill.

On the 2nd of February 1863 three of the directors of the last-mentioned company signed and sent the following letter to Mr. Bovill:

"Dear Sir,—We hereby authorize you to agree with Messrs. Peto & Betts on our behalf to execute the works of our railway in accordance with the several plans and sections supplied to them by you for the sum of 215,000*l.*, payable by 63,000*l.* in debentures, bearing 5*l.* per cent. interest, and the balance in the shares of the company taken at par, the payments to be made in the usual way as the works progress."

The negotiations with Messrs. Peto & Betts were continued, and Mr. Bovill had several interviews with the directors and solicitor of the company, and on the 23rd of February 1863 Mr. Bovill, on behalf of the Uckfield Railway Company and Messrs. Peto & Betts respectively, signed an agreement as follows:

"London, 23 Feb. 1863. Agreed with Messrs. Peto & Betts that they shall make the Tunbridge Wells and Uckfield Railway works in accordance with the plans and sections supplied to them for the sum of 215,000*l.*, terms of payment and all other conditions as stipulated in the directors' letter of authority."

On the same day Mr. Bovill wrote to the directors of the company informing them of what he had done, and attended a meet-

ing of the directors, where the contract was discussed and the matter treated as settled.

On the 25th of February 1863 the following letter was sent by the secretary of the company to Mr. Bovill:

"Brighton, Uckfield & Tunbridge Wells Railway,
41, Parliament Street, S.W.
"February 25, 1863.

"Dear Sir,—I am desired to inform you that this board cannot recognize the arrangement referred to in your letter of the 23rd instant. I am further directed to express the surprise of the directors that you should have acted upon it when you were informed by the solicitor of the company (before submitting it to your principals), that it did not embrace the terms upon which an arrangement could be carried out."

To this letter Mr. Bovill sent a reply on the 26th of February, addressed to the directors of the Tunbridge Wells and Uckfield Railway Company, stating that they were his principals, that they had employed him professionally to negotiate with Messrs. Peto & Betts; and that almost day by day down to the very hour of closing the contract, the directors had been urging him to get the arrangement concluded with Messrs. Peto & Betts, that the solicitor for the company had generally been present at such interviews, and that the only definite instructions given were contained in the authority of February 2nd. The letter concluded with the following passage—

"It seems pretty clear to my mind that the real cause of your desire to repudiate the contract I have concluded on your behalf may be traced to your having sold yourselves (the company) to the Brighton Company; it would certainly have been more straightforward if you had so stated (for the facts must come out), instead of attempting to support your acts by imputing improper conduct to me. I will venture to say that neither of the gentlemen I have the honour to address would in his individual capacity have so acted. I will of course hand a copy of your secretary's letter to Messrs. Peto & Betts, and it will be for them to act in the matter as they may think proper."

The Brighton, Uckfield and Tunbridge Wells Railway Company were at this time carrying on negotiations for the sale and

transfer of their intended line of railway to the London, Brighton and South Coast Railway Company, and for absorbing the Uckfield Company in the Brighton Company.

The capital of the Uckfield Company consisted of 63,000*l.* debentures and 200,000*l.* shares. Messrs. Peto & Betts were under the terms of the contract entitled to the whole of the debentures and 152,000*l.* of the shares.

A bill was thereupon filed by Messrs. Peto & Betts, as plaintiffs, against the Brighton, Uckfield and Tunbridge Wells Railway Company: the directors of the Brighton, Uckfield and Tunbridge Wells Railway Company, and two of the directors of the London Brighton and South Coast Railway Company, setting out the facts as above, and charging that the Uckfield Company threatened and intended to deal with the whole of their debentures, and with upwards of three-fourths of their shares, and to dispose of and place the same under the control of the Brighton Company.

The bill prayed that the contract of February 23, 1863, might be declared valid, and that the Uckfield and Tunbridge Wells Company and the directors thereof might be decreed specifically to perform the same, the plaintiffs being willing to perform the same on their part. That the Uckfield and Tunbridge Wells Company and the directors thereof might be restrained by injunction from causing or permitting the Brighton Company, or any person or persons other than and except the plaintiffs, to construct the line of railway and works mentioned in the said contract, and that the Uckfield Company and also the Brighton Company might be, in like manner, restrained from disposing of or dealing with the 215,000*l.* shares and debentures agreed to be applied in payment for the construction of the said line of railway under the said contract, and from entering into any agreement or doing or causing to be done any act, deed, matter or thing whereby or by means whereof the said line of railway might be constructed otherwise than in accordance with the said contract, or whereby the plaintiffs might be prevented or hindered from performing and having the full benefit of the said contract.

Mr. Giffard and *Mr. Druce*, for the plaintiffs, submitted that this was a proper case for the interference of a Court of equity; the contract was to pay the plaintiffs in shares, not in money, and the Court had not unfrequently decreed the specific performance of contracts for the sale of shares. If the company had parted with their shares, they had done so after entering into this agreement, and with full notice of the contract. On the authority of

Lumley v. Wagner, 1 De Gex, M. & G. 604; s. c. 5 De Gex & Sm. 485; 21 Law J. Rep. (N.S.) Chanc. 898, and *De Mattos v. Gibson*, 4 De Gex & J. 276; s. c. 28 Law J. Rep. (N.S.) Chanc. 165, 498,

the plaintiffs were entitled to an injunction.

Sir H. Cairns, *Mr. Speed* and *Mr. F. Waller*, for the Brighton, Uckfield and Tunbridge Wells Company, contended that the directors had no power to enter into this contract; it was, therefore, not binding on the company—

Kirk v. the Bromley Union, 2 Ph. 640.

Jackson v. the North Wales Railway Company, 6 Rail. Cas. 112.

This was not a case in which the Court would grant an injunction, because there was no mutuality; the Court could not compel the plaintiffs to carry out their part of the agreement, and the defendants would have no remedy for their loss in consequence of the necessary depreciation in the value of the shares to be retained by them.—

The South Wales Railway Company v.

Wythes, 1 Kay & J. 186; s. c. 5 De Gex, M. & G. 880; 24 Law J. Rep. (N.S.) Chanc. 1, 87.

Johnson v. the Shrewsbury and Birmingham Railway Company, 3 De Gex, M. & G. 914; s. c. 22 Law J. Rep. (N.S.) Chanc. 291.

Heathcote v. the North Staffordshire Railway Company, 2 Mac. & G. 100; s. c. 20 Law J. Rep. (N.S.) Chanc. 82.

The terms of the contract were too uncertain to be enforced, and the plans supplied by Bovill were only such as were used for parliamentary purposes, and were not working plans. Assuming in the present case that the company were the plaintiffs, the Court

would not in that case exercise its jurisdiction.—

Ogden v. Fossick, ante, 73.

Pickering v. the Bishop of Ely, 2 You. & C. C.C. 249; s. c. 12 Law J. Rep. (N.S.) Chanc. 271.

Stocker v. Wedderburn, 3 Kay & J. 393; s. c. 26 Law J. Rep. (N.S.) Chanc. 713.

Mr. Rolt and Mr. J. H. Taylor, for the directors of the London, Brighton and South Coast Railway Company.

Mr. Giffard, in reply.

WOOD, V.C.—In this case I felt great difficulty at the first opening as to how far the Court would, under the circumstances, interfere to restrain the Uckfield Railway Company from dealing with their shares, the contract being that they engage to give those shares, through the medium of their accredited agent, to Messrs. Peto & Betts, in consideration of the performance of certain works; the engagement on the part of Messrs. Peto & Betts being, that in consideration of such transfer of shares, they would complete the works of the line in, we will assume, the ordinary manner in which such works would have to be constructed, and as if under an ordinary agreement for a contract in that express behalf. The difficulty that occurred to me was this: that if I in effect restrained the defendants from parting with these shares, I could only do so upon an engagement by the plaintiffs to perform on their part the whole of their agreement. It is a necessary ingredient in every case of this description that the plaintiff should offer to perform his contract, and that that offer should be one over which this Court could exercise due control. In the present case the Court has no means whatever of enforcing that offer; and if it has no hold on the plaintiffs by which that offer could be carried into effect, then, on the one hand, it would be restraining parties from dealing with their property, which was to be given in exchange for this work to be done by the plaintiffs; whilst, on the other hand, it would have no possible means of securing to them the benefit of the engagement which the plaintiffs were ready to enter into to complete their part of the contract. At the same time, I am bound to say, that this case struck me as so grossly

exceeding the ordinary cases of breach of faith from time to time brought before the Court, that I was very unwilling to part with it until I had given an opportunity to the defendants to offer any explanation of their very singular conduct. I think there never was anything more clearly established than that, in this case, a contract has been deliberately entered into, and as deliberately broken by the defendants, because it was found to be to their interest to do so. Mr. Bovill is furnished with an instrument signed by three directors, appointing him their agent to enter into this contract. I do not now intend to go into the question as to whether or not that was within the powers of the directors. So far as regards the *bona fides* of the transaction, he was clearly authorized by three directors, on the 2nd of February, to enter into this engagement on their behalf. The defendants now say that that authority was revoked; that Mr. Bovill was told distinctly before he had acted on the authority, namely, on the 23rd of February, that the authority was revoked; that he was told by the solicitor of the company, immediately after the authority was given, and at interviews which took place two or three days before the agreement was signed on behalf of the company, that then and in future he must not act upon the authority, and therefore that he must consider the whole matter at an end. But there is this fact, which I will only mention and not comment upon: the solicitor having made up his mind that this is an improper contract for the company to enter into, nevertheless leaves it in the hands of Mr. Bovill, and, down to the very last, has conferences with him on the subject of this very contract, knowing it to be in Bovill's hands.

Then, after various negotiations, there is the letter of the 25th of February. Anything more discreditable to the company than this letter can hardly be conceived. They had employed a man as their agent. They had left him armed with an agreement which they wished him to enter into. Up to the 23rd of February he acts upon it, and when they think something better can be got, they turn round on their agent and talk about "submitting to his principals," trying to treat Messrs. Peto & Betts as his principals. I think the best comment

on that is made by Mr. Bovill in his reply, with every word of which I agree. He says, "Your desire to repudiate the contract I have concluded on your behalf with Messrs. Peto & Betts may be traced to your having sold yourselves (the company) to the Brighton Company; it would certainly have been more straightforward if you had so stated (for the facts must come out), instead of attempting to support your acts by imputing improper conduct to me. I will venture to say that neither of the gentlemen I have the honour to address would in his individual capacity have so acted." And I quite believe him; I do not think they would. Therefore I have every possible inducement to afford the plaintiffs all the relief that can be afforded to them in accordance with the principles of this Court.

I confess notwithstanding, I feel that the difficulty is quite insuperable: perhaps there may be a slight difference in the case of a direct negative contract, because in a direct negative contract you may separate the negative part wholly from the rest, and say that part the Court will fasten upon, and that part it will effectuate, as in the case of a covenant by a tenant not to cultivate contrary to the custom of the country. The Court fixes on a particular special covenant, and it says that covenant you shall be held to. But in a case where the special contract is relied upon and the negative is inferred from the positive contract, I think the case is weaker than where there is a distinctly negative contract, standing by itself; and the cases of *De Mattos v. Gibson* and *Lumley v. Wagner* are, so far as I am aware, the only instances in which the Court has exercised such a jurisdiction. In *Lumley v. Wagner* an actor had agreed to perform at a given place. He had not agreed that he would not perform elsewhere, and I dealt with it as I best could; he agreed to perform on certain days, and I restrained him during the hours of performance from performing elsewhere on those days. In *De Mattos v. Gibson* the case perhaps went a step further. There the engagement was to carry certain coal in a ship for the plaintiff, and there the question was, whether the defendant was entitled to use that ship in a manner which absolutely precluded his fulfilling his engagement. I thought then there were

considerable difficulties in the way, considering that ultimately I should never be able to force him to perform the engagement by keeping the ship rotting in the harbour, but the Lords Justices thought that the principle of *Lumley v. Wagner* could be carried fully to that extent. In that case the lady could not be allowed to use her voice, and then it would be utterly useless to her; you could not compel her to sing. So in *De Mattos v. Gibson*, the ship would remain utterly useless to the defendant. That is the principle pressed upon me here. I am here asked to hold back these shares, because they are about to be parted with (and I think they are) entirely in defiance of the arrangement entered into with the present plaintiffs. But in all these cases the Court must do justice between the parties. I apprehend that in *De Mattos v. Gibson* it was perfectly clear that there was no difficulty in doing justice. The plaintiff had nothing to do but to pay for the coals. In *Lumley v. Wagner* there might be some difficulties to contend with, but not very grave or serious ones; it is palpable that Mr. Lumley was only too anxious for his own benefit to have the engagement performed in every part, and only too anxious for the lady to sing. In the case before me there is this to be said: if I were to attempt now to hold these directors to the contract not to part with their shares, it must be on the faith that the plaintiffs will perform their engagement, and that I can compel that performance if the plaintiffs should be minded to depart therefrom. Now, that I could enforce the performance of this agreement, even if it had been, as I will assume it to be, in the form of a written contract, is, of course, out of the question. Not only do the authorities shew that it cannot be done by the order of the Court, even in the converse case, supposing the company were now the plaintiffs, but, in point of fact, common sense shews that the thing is impossible, and that supposing Peto & Betts should fail in the performance of this contract, I could not give the defendants any adequate remedy. It has been suggested, and very justly, that these shares which I am dealing with are subject-matter of such a character that it is no consolation at all to the defendants to be told that if, after I grant the injunction, Peto & Betts should fail to fulfil their implied or positive

engagement as the case might be, then the injunction will go and the shares will be let loose. In the mean time, of course, they might be seriously depreciated in value, and the contract not being performed, it might be utterly impossible to give any remedy to the defendants. I think, on that part of the case, *Ogden v. Fossick* is a very important authority. If the plaintiffs, being, as they unquestionably would have to be, under an undertaking to the Court, either expressed or implied, to perform their agreement, should break down in the middle of it in any way whatsoever, I could not place the defendants in the condition intended by both parties to the agreement. The defendants could not get back their shares, as a matter of the same value, or anything like the same value, as at the present moment. I feel that it would be quite impossible by any arrangement I could make here between the parties so to deal with the case as to do justice to both sides; it appears to me, therefore, that this is not a case in which the Court ought to interfere, but one in which the parties must be left ultimately to their remedy at law. Under the existing circumstances of this case, which I confess surprise me not a little as regards the proceedings of the defendants, much as I regret it, I must refuse this motion without costs as to the Uckfield Company; the costs of the Brighton Company will be costs in the cause.

STUART, V.C. }
 April 16, 17. }
 LORDS JUSTICES. }
 June 10, 11. }

STERNE v. BECK.

Mortgage—Covenant for Payment of Mortgage-Money by Instalments—Breach—Proviso for immediate Payment.

Where a mortgage to secure an existing debt, payable by instalments, with interest to the times of payment, contained a proviso that, in the event of the debt not being punctually paid by instalments as specified in the deed, the full amount of the debt should immediately become payable, the Lords Justices, on appeal from one of the Vice Chancellors, held, that the proviso was not in the nature

of a penalty, and refused to grant relief to the mortgagor against it.

The bill contained allegations to the following effect :

By an award dated the 1st of January 1861 it was awarded, that there was due from the plaintiff to the defendant 1,418*l.* 12*s.* 6*d.*, which was directed to be paid in manner following; that is to say, 150*l.* on the 15th of February 1861, 150*l.* on the 15th of May 1861, and the residue by three equal instalments payable respectively at twelve months, twenty-four months and thirty months from the date of the award, with interest at 5*l.* per cent. per annum on the sum of 1,418*l.* 12*s.* 6*d.*, or on so much thereof as should remain due, such interest to be paid at the same time with the respective instalments. It was further awarded, that the plaintiff should pay to the defendant the sum of 75*l.* by way of interest on the sum of 1,418*l.* 12*s.* 6*d.*, from the date of a previous award down to the date of the then present award; and it was also awarded, that in the event of the plaintiff making default in payment of the instalments, or any of them, or of any part thereof, he should forthwith, after such default, execute a mortgage to the defendant of certain property, for securing the payment by him to the defendant of the sum of 1,418*l.* 12*s.* 6*d.* and interest, and of the sum of 75*l.*, or of so much thereof respectively as should then remain due, by equal portions, upon such of the before-mentioned days of payment as should then be to come.

The plaintiff duly paid the sum of 75*l.* and the two instalments of 150*l.* each; but he made default in payment of the first instalment of the residue, amounting to 408*l.* 5*s.* 6*d.* The defendant thereupon took out a trader-debtor summons against the plaintiff, and, after some negotiation, it was agreed that the sum of 1,154*l.* 0*s.* 6*d.*, then due by the plaintiff to the defendant, should be paid by such instalments as were specified in the after-mentioned indenture, instead of the instalments mentioned in the award. When the deed, which was prepared by the defendant's solicitors, was ready for execution the plaintiff objected to sign it in the form in which it was drawn, because the sum of 100*l.* was added to the

amount of the debt then due by him, he not owing to the defendant any such sum above the amount of the debt before mentioned, and all costs having been previously paid by him; and, further, because the deed contained a proviso that in case default should be made in payment of any one of the instalments, the whole of the monies thereby secured, and then unpaid, should immediately become payable; and also a covenant by the plaintiff in case of default, immediately on demand to pay the whole of the unpaid monies, with interest.

The defendant admitted, as it was alleged, that the proviso and covenant, and also the sum of 100*l.* had been inserted without previous arrangement, but he contended that the proviso and covenant were common forms in all similar deeds, and that he was entitled to the sum of 100*l.* by way of bonus for entering into the new arrangement. The plaintiff, however, refused to execute the deed, alleging that it would put him at the defendant's mercy.

The defendant then stated, as the plaintiff alleged, that if the plaintiff would, in order to prevent further delay, execute the deed as prepared as a security for the full sum of 1,254*l.* 0*s.* 6*d.*, and interest, the proviso and covenant objected to by the plaintiff should not be at any time enforced; and that the deed should be constructed to operate in all respects as if it did not contain any such proviso or covenant, and should stand as a security for the payment of the money thereby secured by the instalments therein mentioned, and that the defendant should not be at liberty in case default should be made in payment of any instalment to refuse payment of the whole amount due: and as a recompense for the sum of 100*l.* which had been added as before mentioned, it was agreed that the defendant would not enforce strict performance of the covenant for the payment of the instalments, but would give the plaintiff ten days' grace after each time of payment.

The plaintiff, as alleged, after some hesitation, and relying on the assurances of his solicitor that the defendant's assurance was perfectly binding, and that it would control the deed, at length executed it.

The mortgage-deed bore date the 15th of February 1862, and the sum of 1,254*l.* 0*s.* 6*d.* was thereby made payable by thirteen instalments, the last of which was to be paid on the 15th of January 1864. At the same time, with the instalments, it was provided that the plaintiff should pay interest on the above sum, or on so much thereof as should from time to time remain unpaid. The plaintiff made default in payment of the sum of 200*l.* which was to have been paid upon the execution of the deed, and the defendant thereupon brought an action against him for the whole amount thereby secured, but this action was subsequently arranged and the sum of 200*l.* paid. Default was then made by the plaintiff in payment of the fourth instalment of 50*l.*, which became due on the 15th of August 1862, and the defendant, on the 3rd of September, brought an action against the plaintiff for the whole amount then due and secured by the deed of the 15th of February 1862.

Since the commencement of the action the fifth instalment had become due, and, on the 15th of October 1862, the plaintiff's solicitor made a formal tender to the defendant of the fourth and fifth instalments and interest, but such tender was declined.

The bill prayed for a declaration that the defendant ought to make good the representations or parol agreement made or entered into by him to or with the plaintiff before the execution of the deed, that he could not enforce performance of the proviso or covenant in the above indenture on default being made in payment of any instalment at the time mentioned in the indenture, or for a declaration that the proviso and covenants were inserted by way of penalty only, and that in case the Court should declare that the defendant ought to make good such representations or parol agreement for an injunction to restrain the action or other proceedings at law, and also in case the Court should declare that the proviso and covenant were inserted by way of penalty only for a similar injunction.

The defendant admitted that the deed was prepared by his solicitor, and that it was not, prior to its execution by the plaintiff, submitted to the plaintiff's solicitor, but he said that that took place by

arrangement between himself and the plaintiff.

The defendant denied that there was any such verbal agreement as that alleged by the plaintiff with respect to the defendant not requiring payment of the full amount of the mortgage debt, in the event of default being made in payment of any instalment.

Mr. Bacon and *Mr. Langworthy*, for the plaintiff, contended that the verbal agreement not to enforce payment of the whole amount of the mortgage debt in case of default in payment of any instalment, was binding upon the defendant (1). If, however, that agreement were of no effect, the proviso and covenant were in the nature of a penalty for non-payment of money on a certain day; against which penalty this Court would relieve.

They referred to

Rose v. Rose, Amb. 331.

Bonafous v. Rybot, 3 Burr. 1370.

Holles v. Wyse, 2 Vern. 289.

Astley v. Weldon, 2 Bos. & P. 347.

Kemble v. Farrer, 6 Bing. 141; s. c. 3 Mo. & P. 425; 7 Law J. Rep. C.P. 258.

Mr. Malins and *Mr. Caldecott*, for the defendant, contended that the alleged verbal agreement was not established by the evidence, and that even if it were, it could not control the deed. The proviso and covenant were not in the nature of a penalty, but they were simply an arrangement between a creditor and his debtor, for the payment by the latter of the debt due by him. The enlarged time which the plaintiff had given to him by the deed of the 15th of February 1862, for the payment of his debt, formed a sufficient consideration for the insertion of the new provisions, making the whole immediately payable in case the instalments should not be punctually paid.

STUART, V.C.—In this case, but for the stipulation in question, which is said not to be a stipulation in the nature of a penalty, the defendant would not have a right to enforce present payment in one gross sum of the whole amount due to him from the plaintiff. The plaintiff was bound both by

the award and the contract to pay, not in one gross sum, but certain sums by instalments. By the stipulation in question,—and whether it be called a penalty or not, seems to me of little importance,—it was provided that in default of punctual payment of any one of the instalments, the defendant should have a right to immediate payment, in one gross sum, of the whole amount then due; therefore, by that stipulation, a new right—not previously existing—in the defendant, was secured to him. Reference has been made to cases where the Court has had to consider whether the stipulation is, in effect, a penalty, or whether it is to be construed as a stipulation for the payment of a gross sum by way of liquidated damages. No question of that kind occurs here. No one can say that this is a stipulation for liquidated damages; it is a stipulation for the payment of a certain sum, as to which a new right has arisen. It has been argued that the enlarged time given to the plaintiff was a sufficient consideration for the new stipulation, but it is enough to say that in cases of this kind, where a new stipulation is introduced only for the purpose of enforcing the performance of an existing agreement, the Court is not in the habit of dealing with that new stipulation in a way in which it would not deal with such stipulation if contained in the original contract. The agreement was for the payment of a sum of money under a contract, and in order to make that contract binding, there was introduced another stipulation so as to bring it under the control of this Court, which always exercises its discretionary power of moulding or dealing with stipulations of this kind to meet the justice of the case. This is a case in which, in my opinion, the plaintiff has shewn that he is entitled to have the clause in question dealt with upon the footing that it is not the substance of the agreement, but something intended to assist the defendant towards reaching the substance of the agreement. The plaintiff is entitled to a decree; but it must order him to pay by instalments upon the days intended. In case he does not do so, there will be liberty to apply; and in case of any application being necessary, the Court will give the defendant the benefit

(1) *Norton v. Wood*, 1 Russ. & M. 178.

of having the stipulation moulded in such a way as substantial justice may require. The plaintiff comes for an indulgence; he has been hardly dealt with, and although the Court will not deprive parties of the full benefit of their stipulation, yet it will not allow them to be rigidly enforced. There will be no costs on either side.

The order was, that the injunction be continued; the plaintiff to pay the instalments according to the terms of the deed; and if he should make default, the defendant to be at liberty to apply at chambers to issue execution on the judgment. No costs on either side.

From this order the defendant appealed, and the appeal was heard on the 10th and 11th of June, the same counsel appearing as in the Court below.

For the appellant (the defendant) the following case was cited—*Stanhope v. Manners* (2).

While, in support of the order, besides the authorities cited below, the following were referred to—

Davis v. Thomas, 1 Russ. & M. 506; a. c. 1 Tam. 416.

Sloman v. Walter, 1 Bro. C.C. 418.

Mr. Bacon was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—The deed, dated the 15th of February 1862, was a deed executed for valuable consideration by the defendants, and was, both at law and in equity, binding upon both parties. It has been said on the part of the plaintiff (the respondent in this Court) that there was a collateral agreement, made contemporaneously with the deed, which precluded the defendant in equity from acting upon a part of the provisions of the deed against the plaintiff. Upon that point there is a conflict of evidence, it is true, but the evidence on the part of the defendant preponderates so strongly that it is impossible for the Court to hold that the alleged oral agreement is binding. The deed dated the 15th of February 1862 shews that a stated amount of debt was then due from the plaintiff to the defendant, but that it was only payable by instalments at certain fixed times; and the deed provides that in a

certain event payment of the debt, which was then payable only at future periods, should be accelerated. It did not provide that the amount should be increased, but only that instead of being a debt payable with interest up to a longer period at that more distant day, it should be a debt payable with interest up to a shorter period at that nearer period. To such a proviso none of the principles of equitable relief against penalties are applicable, and, in my opinion, the attempt to apply that rule wholly fails upon every principle of law and of equity.

LORD JUSTICE TURNER.—Upon this appeal two points have been raised: first, as to the collateral alleged parol agreement; and secondly, whether part of the deed in question is in the nature of a penalty against which the Court will give the debtor relief? As to the alleged collateral agreement, it is impossible, on considering the evidence, to think that is satisfactorily established, and its existence is distinctly denied by the defendant. As to the second question, that of the penalty, it may well be, under some circumstances, that an agreement that a debt not presently payable should, in a certain event, be made so, might be tantamount to a penalty; but in the present case, the proviso complained of was clearly not intended to operate as a penalty, as its object was not only to secure payment, but also to secure payment in a particular manner. The recital in the deed that the plaintiff had requested the defendant to forbear further proceedings, and give him further time, "which he had agreed to do on having payment of the sum of 1,254*l.* 0*s.* 6*d.* secured to him with interest after the rate aforesaid, by the instalments and in manner hereinafter appearing," plainly shews this; and it is impossible to say that the proviso was intended otherwise than as part of the security for the debt, or that it was intended to be, or was in any way in the nature of a penalty. The bill must be dismissed, with costs, but there will, of course, be no costs of the appeal.

KINDERSLEY, V.C. } HOWARD v. CHAFFER.
 March 11; } HOWARD v. ROBINSON.
 June 22.

Trust for raising Legacies—Notice—Appropriation—Legacy Receipt.

A testator gave all his real estate to uses to secure an annuity to his wife, and subject thereto to the use of trustees, of whom his son B. was one, for 800 years, and subject thereto he gave a particular house to his son T., and devised the residue of his real estate to T. & B. as tenants in common in fee. He then declared the trusts of the term to be to secure the annuity and then by sale or mortgage to raise sufficient for the payment of so much of his debts, funeral and testamentary expenses and legacies as his personal estate not specifically bequeathed should be insufficient to pay. He also gave legacies of 1,500*l.* each to his two daughters, the legacy of the second being to the trustees of the term in trust for her and her children, and all the residue of his personal estate to his sons T. & B. as tenants in common, and appointed them his executors. By a codicil the testator, gave the legacy of 1,500*l.* of one of the daughters who had died subsequently to the date of his will, to the trustees of the term in trust for her only child. The personal estate was amply sufficient for payment of the debts, funeral and testamentary expenses and legacies, all of which were paid by T. & B., except the two legacies of 1,500*l.*, upon which they paid the duty, the word "received" being struck out of the legacy receipt in the usual way, and the words "retained in trust" left standing. The surplus of the personal estate was used by T. & B. for their own purposes, and they mortgaged the real estate to various persons for large amounts, and applied the mortgage monies in carrying on their business. The child of the deceased daughter filed a bill against T. & B., and subsequently against their assignees in bankruptcy, and the various mortgagees, claiming on his own behalf and that of his aunt and her children to have the legacies raised:—Held, that, notwithstanding the original sufficiency of the personal estate at the time of the testator's death, the real estate was well charged with the legacies of 1,500*l.*, which, as they had not in fact been paid out of the personal estate, must be raised out of the real estate.

By one of the mortgage transactions referred to, the term was treated as subsisting, and the mortgage money was paid to B, as surviving trustee of the term professedly, but the mortgagees knew that the advance was really to T. & B. for their private purposes: in the other cases, the advances were avowedly made to T. & B, and the money was paid to them, the debts and legacies being treated as satisfied, but the mortgagees made no inquiry as to this, and in some cases had constructive notice that the legacies remained unpaid:—Held, that all the mortgagees must be postponed to the legatees.

Held, also, that the payment of duty and signature of the legacy receipt was no evidence of a valid appropriation of the legacies by T. & B. as executors.

This bill was filed by John Howard, an infant, by his next friend, to establish a charge against the real estate of his grandfather, Richard Chaffer, the plaintiff being a legatee under the will.

The testator, Richard Chaffer, had three sons and two daughters: the sons were Thomas Chaffer, Benjamin Chaffer and William Chaffer; and the daughters Mrs. Howard (the mother of the plaintiff) and Mrs. Temple.

Richard Chaffer made his will, dated the 27th of March 1843, and thereby gave all his real estates to uses to secure an annuity of 150*l.* to his wife, Sarah Chaffer, and subject thereto to the use of John VEVERS and (his son) Benjamin Chaffer, their executors, administrators and assigns, for 800 years from the testator's decease, upon the trusts after declared; and, subject thereto, he gave a house and premises in his own occupation to his son Thomas Chaffer in fee, and the residue of his real estates to the use of his two sons, Thomas Chaffer and Benjamin Chaffer equally as tenants in common. The trusts of the term of 800 years were, first, to secure the annuity to the testator's wife, Sarah Chaffer, with a residence referred to, and then upon trust by sale or mortgage to levy and raise money sufficient for the payment and satisfaction of so much and such part of the testator's debts, funeral, testamentary and other expenses, and the several legacies or sums of money

by that his will or any codicil given or bequeathed as his personal estate and effects not specifically bequeathed should be insufficient to pay and satisfy, and to apply the money so raised in payment and satisfaction of such debts, funeral and testamentary expenses and legacies accordingly. And the said testator declared that the receipts of the trustees of the term of 800 years should be effectual discharges to purchasers, mortgagees and others, and that the purchasers and mortgagees were not to be bound to inquire whether the money was wanted, or to see to the application of it, or to be answerable for the misapplication. The testator then gave certain legacies, pecuniary and otherwise, upon which no question turned, and, *inter alia*, a sum of 1,500*l.* to his daughter Ann, the wife of Richard Howard; and he also gave 1,500*l.* to John Vevers and Benjamin Chaffers (the trustees of the term of 800 years) upon trust, that they should invest the said sum of 1,500*l.* and pay the interest to his daughter Margaret, the wife of Robert Temple, for her life for her separate use, without power of anticipation; and after her decease to stand possessed thereof in trust for all and every the child and children of his said daughter Margaret Temple, as therein mentioned; and in default of such children, in trust for the testator's three sons, William, Thomas and Benjamin Chaffer. And the said testator gave all the residue of his personal estate and effects to his sons Thomas Chaffer and Benjamin Chaffer equally as tenants in common, and appointed the said Thomas Chaffer and Benjamin Chaffer his executors. Subsequently to the date of the will the testator's daughter, Ann Howard, died, leaving one child, the plaintiff, surviving; and the testator, by a codicil to his will bearing date the 11th of March 1844, recited the death of his said daughter Ann Howard, and revoked the legacy given to her, and in lieu thereof gave to John Vevers and Benjamin Chaffer an equal sum of 1,500*l.*, which he directed to be raised at the end of twelve calendar months next after his decease, upon trust that they should invest the said sum of 1,500*l.*, and that it should be in trust for and be paid or transferred to John Howard (the plaintiff), the only child of his said daughter Ann Howard, his executors or

administrators, upon his attaining twenty-one years, and that the interest, dividends and annual produce thereof should during the suspense of vesting be applied to his maintenance and education; and then if the said John Howard should die before attaining twenty-one, and without leaving lawful issue, the said testator gave the legacy, or sum of 1,500*l.*, to his three sons, William, Thomas and Benjamin Chaffer.

The testator died on the 25th of March 1846, and his will and codicil were duly proved by Thomas and Benjamin Chaffer the executors. John Vevers, one of the trustees of the term of 800 years, died in the testator's lifetime, leaving Benjamin Chaffer the other trustee him surviving. The testator left considerable real estates, consisting of different portions, viz, the Town House estate, the Church Street estate at Burnley, &c., and a large personal estate amply sufficient to discharge all his debts, funeral and testamentary expenses and legacies, and the executors Thomas and Benjamin Chaffer got in such personal estate and thereout paid all the debts and legacies except the two legacies of 1,500*l.* given as above to the plaintiff and Ann Temple; and there was a very considerable surplus of the personal estate, much more than sufficient to have paid those two legacies, neither of which was ever in any manner set apart or any money appropriated in order to answer them. In 1857 a bill was filed by the plaintiff against the executors by his next friend (the suit of *Howard v. Chaffer*), the object being to compel payment of his legacy, which it sought to recover as against the executors out of the testator's personal estate, raising no question as to the real estate. On the 11th of February 1858, the common decree was made. Before any further effective proceedings were taken in that suit, Thomas and Benjamin Chaffer became bankrupt, the former in April and the latter in May 1858, and the bill in this suit (*Howard v. Robinson* (1)) was filed on the 5th of August 1858. Within a few years after the death of the testator Thomas and Benjamin Chaffer mortgaged his real estate to various persons, and this suit of *Howard v. Robinson* was instituted against them as well as

(1) 4 Drew. 522; s. c. 28 Law J. Rep. (N.S.) Chanc. 670.

against the executors the bankrupts, their assignees and the Temple family, and it appearing that Thomas and Benjamin Chaffer had spent the whole of the personal estate without appropriating these legacies, it prayed that such legacies might be declared to be a charge against the real estate, in priority to the claims of the mortgagees (defendants) to whom the various portions had been mortgaged by Thomas and Benjamin Chaffer. On the 17th of July 1860, the common supplemental decree was made, the bill of *Howard v. Robinson* being supplemental to the suit of *Howard v. Chaffer*, directing all the same accounts and inquiries against the assignees of Thomas and Benjamin Chaffer as had been directed against them by the decree of the 11th of February 1858, without prejudice to any question. On the 30th of June 1862, the chief clerk made his certificate and found in substance that the personal estate possessed by Thomas and Benjamin Chaffer as executors of Richard Chaffer, was more than sufficient by many thousand pounds to pay all the debts and legacies and funeral and testamentary expenses, and that all the said testator's debts, except two mortgages for 2,000*l.*, had been paid, and that all the legacies had been paid except the legacy of 1,500*l.* to the plaintiff and the legacy of 1,500*l.* to Ann Temple and her children. That what was due on each of those two legacies, was, as to the former, 2,117*l.* 17*s.* 2*d.* and on the latter 1,845*l.* 7*s.* The certificate then found the particulars of the various mortgages (hereinafter particularly referred to), and the cause now came on upon further consideration.

The mortgage transactions were four in number. Respecting the first, the material facts were as follows: It appeared that Thomas and Benjamin Chaffer carried on for several years an extensive business as stone-merchants, architects and builders, in partnership, under the firm of Thomas & Benjamin Chaffer, Thomas being resident at Liverpool and Benjamin at Burnley, and they kept a banking account with the Craven Bank at Burnley, in the name of the firm, and no other account, a Mr. Stansfield and a Mr. Henry Alcock being two of the partners; the latter was likewise a solicitor in partnership with a gentleman named Holmes, under the

name of Alcock & Holmes, at Burnley. Thomas and Benjamin Chaffer having considerably overdrawn their account, and Mr. Stansfield, on behalf of the bank, having pressed them to reduce the balance standing in the books of the bank against them, on the 2nd of May 1853, Benjamin Chaffer, in the name of the firm, wrote to John Robinson, the first defendant, who was manager of the Skipton branch of the Craven Bank, about eighteen miles from Burnley, and who was also a partner in the firm constituting the Craven Bank and its branches, to this effect: "Dear Sir,—Mr. Stansfield is urging me to reduce our account at the bank, which is not quite practicable at present, owing to our having lately spent considerable sums in extending and better developing our quarries, &c., though we are anxious to comply with his wishes, and the purport of this letter is to inquire if you or Messrs. Birtwhistle could advance us another 1,000*l.* on our Town House estate for two or three years, by doing which you will oblige your obedient servants, Thomas & Benjamin Chaffer." It appeared that the testator in 1840 mortgaged the Town House estate to a Miss Tennant, to secure 2,000*l.* (the mortgage still unpaid), and that mortgage had been made the subject of the marriage settlement of Mr. and Mrs. John Birtwhistle, formerly Miss Agnes Tennant, sister of the mortgagee, who had died, bequeathing that mortgage to her, Mr. Robinson and a Mr. William Birtwhistle being the trustees of that settlement. The original of the answer to the letter of the 2nd of May 1853 was not produced, but the copy was admitted, and therein Robinson inquired of the Messrs. Chaffer about the estate which was proposed to be given in mortgage. In reply to that inquiry, Thomas & Benjamin Chaffer wrote a letter in these words: "Dear Sir,—In reply to your favour of yesterday, we beg to inform you that the Town House estate is one of the best farms in the township of Marsden; the land is well managed and buildings in good repair, at a rent of 125*l.* per annum. With the improvements, &c., which have been made, the present value of the estate is 4,200*l.* There are no liabilities upon it except Messrs. Birtwhistle's for 2,000*l.*"

On the 16th of May 1853 Mr. Robinson wrote to the Messrs. Chaffer as follows:

"Dear Sirs,—We can command 1,000*l.* on the 30th of June. Mr. Robert Birtwhistle, who is a competent judge of an estate, will be with you on Thursday to talk over the matter, and shall bring with him the previous deed, which, if he is satisfied, he can leave with Mr. Holmes, solicitor, to prepare the mortgage. You must bear in mind that the interest will swallow the rents; and we hope you will not object to give a bond as a collateral security."

On the same day Mr. Robinson wrote to Mr. Holmes as follows: "Dear Sir,—I and Mr. W. Birtwhistle are trustees under the marriage settlement of Mr. and Mrs. Birtwhistle. We hold a mortgage upon the estate of Messrs. Chaffer, at Marsden, for 2,000*l.*; they have applied for another 1,000*l.* I inclose a copy of my letter sent to them this day. Mr. R. Birtwhistle will call upon you on Thursday, and hope it will be convenient for you, with Messrs. Chaffer, to see him on that day. As trustees I scarcely know whether it is prudent to lend so large a sum of money upon a rental of 125*l.*; they value the estate at 4,200*l.* Oblige me, on the receipt of this, by your opinion of the respectability and responsibility of the parties."

On the 17th of May Mr. Holmes wrote in answer: "Dear Sir,—I am in receipt of your letter of yesterday. I shall be glad to see Mr. Robert Birtwhistle on Thursday next, on which day I shall be at home. I have a copy of the mortgage-deed to Miss Tennant; but I shall want to see the marriage settlement of Mr. and Mrs. Birtwhistle, or a copy of it. On reference to the papers in connexion with the mortgage to Miss Tennant, I find the late Mr. Richard Chaffer, the father of Thomas and Benjamin Chaffer, purchased the estate you allude to for 3,600*l.* in the year 1840." The letter then went on to recommend a valuation by a person named, and stated that the Messrs. Chaffer, the present owners, were very respectable men, carrying on extensive business, and that they were also possessed of other real property. That he (Mr. Holmes) had spoken to Mr. Stansfield about their responsibility, and his opinion was, that if their affairs were wound up they would have a considerable surplus of assets. A meeting took place. Mr. Robert Birtwhistle went over to consider the sufficiency of the secu-

rity, and was satisfied with it, and the mortgage-deed was prepared.

On the 21st of June Mr. Holmes wrote to Mr. Robinson, proposing a separate memorandum of authority from Mr. and Mrs. Birtwhistle, and on the 30th of June the deed was executed by Thomas Chaffer, and on the 1st of July by Benjamin. That deed was made between Benjamin Chaffer, of the first part; Thomas and Benjamin, of the second part; and Robinson and Birtwhistle, of the third part. It recited the mortgage made by the testator for 2,000*l.* to Miss Tennant, and his will and codicil, and the death of his widow and John Vevers; that the trusts of the term of 800 years not having been fully performed, the said Thomas Chaffer and Benjamin Chaffer had applied to the said John Robinson and William Birtwhistle to advance them the sum of 1,000*l.*, which they had agreed to do upon having the repayment thereof, with interest, secured to them by the bond of the said Thomas and Benjamin Chaffer, and by a conveyance by way of mortgage of the premises thereinbefore described; such said sum of 1,000*l.* to be paid to the said Benjamin Chaffer, as surviving trustee of the same term, to be by him applied and held upon the trusts thereof, to which the said Thomas Chaffer had agreed; and the deed recited that Thomas and Benjamin Chaffer had executed the bond, and witnessed that, in consideration of 1,000*l.* paid by Robinson and Birtwhistle to Benjamin Chaffer, as the surviving trustee of the term of 800 years, by the direction of the said Thomas Chaffer, he, Benjamin Chaffer, in order that the term of 800 years might merge, so far as the same affected the present hereditaments and premises, did grant, and Thomas and Benjamin Chaffer did grant and convey the hereditaments unto and to the use of Robinson and Birtwhistle, their heirs and assigns, freed and absolutely discharged of and from all the subsisting trusts of the will of Richard Chaffer, and all charges thereby created on the hereditaments or any of them, or any part thereof; but subject to the prior mortgage, and the proviso for redemption on payment by Thomas and Benjamin Chaffer, or either of them.

The receipt for the consideration-money was by Benjamin only, by whom the money was received. An authority was sent to the

bank, authorizing them to honour the cheque of Mr. Holmes, who immediately on the execution by Benjamin got the money and handed it to Benjamin, at his (Holmes's) office, no one else being present. Out of the 1,000*l.* Benjamin paid Holmes his costs, and carried the rest to the bank and paid it in.

The bill having been amended, Messrs. Robinson and Birtwhistle put in their answer, in which was this passage: "We lent the said sum of 1,000*l.* to the said Thomas and Benjamin Chaffer, for the purpose of procuring an eligible investment of 1,000*l.* which we had in our hands as trustees. The aforesaid letter of the 2nd of May 1853 was the first step in the negotiation for the said loan, and we made the said advance not for the purpose of reducing the balance alleged to be owing from the said Thomas and Benjamin Chaffer as such partners as aforesaid to the said Craven Banking Company, or in compliance with the request contained in the said letter of the 2nd of May 1853, but because we were advised and considered that the security offered was satisfactory, we advanced the said sum of 1,000*l.* to Thomas and Benjamin Chaffer upon the security of the mortgage proposed to be given by them as aforesaid. We deny that we, or either of us, or to the best of our belief, that Messrs. Alcock & Holmes, or either of them, well or in fact knew at the time of making such advance that the same was required or would be used for the purpose. We admit that Messrs. Alcock & Holmes acted as our solicitors in the matter." Mr. Holmes made an affidavit, in which he stated that the only instructions he received as to the deed were contained in Robinson's letter, and that he had no communication with Benjamin Chaffer until the 19th of May; but it appeared in evidence that in 1851 Messrs. Alcock & Holmes had been employed with respect to some other property of the testator mortgaged to the Craven Bank, when Benjamin Chaffer wrote in answer to an inquiry they made, "My two sisters had 1,500*l.* each left to them, and I am trustee. They are to receive interest for this sum as long as they live, and at their deaths the principal to be paid to their children on the youngest attaining its majority. These are all the legacies unpaid."

The circumstances under which the second mortgage (which was dated the 7th of July 1855, and by which the Messrs. Chaffer mortgaged another portion of the testator's property to General Sir James Yorke Scarlett for 500*l.*) was made, were thus stated in Sir James Scarlett's answer: "In or very shortly before June 1855 Mr. Elijah Helme, of Burnley, my agent there, informed me that the said Benjamin Chaffer had asked him if I would lend the said Benjamin Chaffer and Thomas Chaffer 500*l.* on mortgage of some cottages and ground-rents in Church Street, Burnley; the said Benjamin Chaffer and Thomas Chaffer being well known to me, I replied to the said Mr. Helme that I would, and I authorized him, Mr. Helme, to advance them the money out of some of mine that he had in his hands. Further than the fact that I so as aforesaid authorized the money to be advanced, and that I presumed it was wanted for a proper purpose, and would be properly applied, it never occurred to me to inquire, nor did I know whether the money was to be advanced or applied either for the benefit of the said Benjamin Chaffer and Thomas Chaffer, or either of them, or for the benefit of any person or persons in particular. In truth, I never thought at all on the subject. The said Mr. Helme has now informed me, and I believe, that on receiving my aforesaid answer and authority, he saw the said Benjamin Chaffer and informed him that I would lend the money and charge 3*l.* per cent. per annum only for it, and that the said Benjamin Chaffer thereupon referred Mr. Helme to Mr. Buck as his (Benjamin Chaffer's) solicitor, and that he (Benjamin Chaffer) having received my reply requested Mr. Buck to prepare the mortgage, and Mr. Helme being informed that the deed was ready, called on Mr. Buck, who, in answer to a question by Mr. Helme whether the title was good, stated that it was, and had been accepted by the Craven Bank and other mortgagees, and that Mr. Helme then for me paid the 500*l.* to Benjamin Chaffer and received from him the mortgage-deed and other title-deeds relating to the property comprised therein; but that he (Mr. Helme) did not in any way employ Messrs. Buck & Eastwood, or either of them, as solicitors or solicitor for himself or for me in or about

the transaction." The receipt for the money was as follows: "Received by us, the within mentioned Thomas Chaffer and Benjamin Chaffer, from the within named Sir James Yorke Scarlett the sum of 500*l.* within mentioned as paid and advanced unto us upon the securities herein expressed." (Signed) "Thomas Chaffer, Benjamin Chaffer." And the answer concluded in these words: "This is all I know of or had to do with the transaction; and knowing the respectability of the said Thomas Chaffer and Benjamin Chaffer, I employed no solicitor in the matter, and I have above stated in effect the whole of the communication I had with Mr. Helme on the subject of the mortgage before it was completed and the money paid, and I had no communication with any other person on the subject before the mortgage was completed and the money paid, and except Mr. Helme no one acted as agent or otherwise in or about the transaction, and he acted only so far as is aforesaid for me or as my agent in such transaction before the said completion thereof and payment of the money."

The third mortgage transaction, which occurred in March 1856, was one of considerable complication, whereby 11,500*l.* was borrowed upon a different property of the testator's, of three persons, Messrs. Worrall, Darvell and Howard. Most of this property was subject to the trusts of the term of 800 years, but some part did not pass under the will at all, and one item was devised to Thomas Chaffer only, being six items in all, and subject to previous mortgages effected by Thomas and Benjamin Chaffer and still subsisting, namely, for 200*l.*, to Edmund Robinson, dated the 12th of November 1847; to Jane Roberts, for 1,000*l.* dated the 4th of August 1848; for 800*l.* to Messrs. Keightley & Stubbs, dated the 18th of October 1848; to a Mr. Abram, for 400*l.*, dated the 28th of December 1849; and to the Craven Bank not to exceed 10,000*l.*, dated the 1st of March 1851; and to a Mr. Job and others for 700*l.*, dated the 4th of March 1852. In March 1856 there was due on the Craven Bank mortgage 12,237*l.* 12*s.* for principal and interest, and Thomas and Benjamin Chaffer applied to Messrs. Worrall, Darvell and Howard to lend them 11,500*l.*, which they agreed to, and the following arrange-

ment was made: 4,900*l.* being the sum total of the five mortgages (not including that to the bank), they were to be paid off, and 6,000*l.* in reduction of the 12,237*l.* 12*s.*, but so far as the mortgaged premises were concerned, the Bank agreed to exonerate them from the whole 12,237*l.* 12*s.*, although 6,237*l.* 2*s.* was still owing upon it; for which they (the Bank) agreed to take a second mortgage on the same premises, and both mortgages, namely, to Messrs. Worrall, Darvell and Howard, and the second mortgage to the Bank were executed on the same day. The mortgage to Messrs. Worrall, Darvell and Howard was of twelve parts; all the other mortgagees being parties and Thomas and Benjamin Chaffer. It recited the will and codicil of Richard Chaffer and the prior mortgages, and that all the trusts of the term created by the will had been fully performed or satisfied, or become unnecessary, or incapable of taking effect, and reciting the above arrangement; it was witnessed that in consideration of 4,900*l.*, paid to the five prior mortgagees (other than the Bank) in full discharge of the premises from the former mortgages, and of the remainder of the 11,500*l.* paid to Messrs. Chaffer, in consideration of those payments, the mortgagees, by the direction of the Messrs. Chaffer, conveyed the premises comprised in their respective mortgages, and the Messrs. Chaffer, so far as related to the hereditaments comprised in the first, third, fourth, fifth and eighth schedules, and according to their interest therein, as tenants in common, co-partners or otherwise, and Thomas Chaffer, as to the premises in the second schedule, and Benjamin Chaffer, as to the sixth and seventh schedules, granted and released, &c., and to the intent that the term of 800 years (so far as the same had not been already extinguished, or had not absolutely ceased and determined might be merged and extinguished) and by the direction of himself and Thomas Chaffer, as executors of Richard Chaffer, conveyed and assured the premises to Messrs. Worrall, Darvell and Howard, by way of mortgage. The receipt for 6,000*l.* (the balance) was signed by Thomas and Benjamin Chaffer. The second mortgage to the Bank was made to the Messrs. Alcock, and was in the ordinary form.

The fourth mortgage transaction occurred

in October 1857, when another mortgage, dated the 12th of October 1857 was given by Thomas and Benjamin Chaffer to John and William Brennand, as a second mortgage on the Town House estate, to secure 2,000*l.* It appeared that John Brennand was the brother-law of Benjamin Chaffer, and that Thomas and Benjamin Chaffer were indebted to him and William Brennand, on the balance of account, in 3,389*l.* 14*s.* 6*d.*, and it was proposed, by a mortgage for 2,000*l.*, to secure part of this debt, the deed being between Thomas Chaffer of the first part, Benjamin Chaffer of the second part, and the Messrs. Brennand of the third part. This deed recited the will and codicil, the mortgage for 2,000*l.*, the mortgage to Robinson and Birtwhistle, and the sum due, &c.; and it was witnessed, that the Messrs. Chaffer thereby conveyed to the Messrs. Brennand the hereditaments comprised in the prior mortgage for 2,000*l.*, and in that to Robinson and Birtwhistle, to hold to the Messrs. Brennand freed and absolutely discharged of and from all the subsisting trusts of the said recited will of the said Richard Chaffer, and all charges thereby created on the same hereditaments or any of them, subject to prior mortgages, and subject to the proviso for redemption. With regard to this mortgage, John Brennand (William Brennand being dead) was cross-examined, and stated that he knew the legatees were minors and not competent to receive their legacies, and that they were not paid. It appeared that Messrs. Buck & Eastwood were also employed on behalf of the Messrs. Brennand in this transaction, although Mr. Brennand at first stated that he did not employ them, but afterwards admitted it on cross-examination. Under these circumstances the present suit came to a hearing on further consideration, praying as above, that the real estate of the testator, Richard Chaffer, might be charged with the two legacies of 1,500*l.* each, in priority to all the mortgages effected by Thomas and Benjamin Chaffer.

Mr. Baily and *Mr. Kay*, for the plaintiffs, argued that, in all the cases of the different mortgagees, it appeared clearly that they knew or were bound to have known that the money was lent to the Messrs. Chaffer for their own private purposes, and not for the purpose of executing

the trust. There had never been any appropriation of the legacies and the estate had never borne its burthen—

Humble v. Humble, 2 Jur. 696.

Willmott v. Jenkins, 1 Beav. 401.

Brandon v. Brandon, 7 De Gex, M. & G. 365; s. c. 25 Law J. Rep. (N.S.) Chanc. 896.

Ex parte Chadwin, 3 Swanst. 380.

Watkins v. Cheek, 2 Sim. & S. 199.

Morris v. Livie, 1 You. & C. C.C. 380; s. c. 11 Law J. Rep. (N.S.) Chanc. 172.

Mr. Little appeared for Mrs. Temple and her children, and took the same line of argument.

Mr. Anderson and *Mr. Karslake* appeared for Messrs. Robinson and Birtwhistle.

Mr. Pole appeared for General Sir James Yorke Scarlett, and cited—

Eland v. Eland, 4 Myl. & Cr. 420; s. c. 8 Law J. Rep. (N.S.) Chanc. 289.

Johnson v. Kennett, 3 Myl. & K. 624.

Storry v. Walsh, 18 Beav. 559.

Robinson v. Lowater, 17 Ibid. 592; s. c. 5 De Gex, M. & G. 272; s. c. 23 Law J. Rep. (N.S.) Chanc. 641.

Stroughill v. Anstey, 1 De Gex, M. & G. 635; s. c. 22 Law J. Rep. (N.S.) Chanc. 130.

Forbes v. Peacock, 1 Ph. 717.

Hepworth v. Hill, 30 Beav. 476; s. c. 31 Law J. Rep. (N.S.) Chanc. 569.

Sugden, V. & P., 4th edit., 662.

Anon., 1 Salk. 153.

Juxon v. Brian, Prec. in Chanc. 143, fol. edit.

Carter v. Barnadiston, 1 P. Wms. 505-18.

Hutchinson v. Lord Massacreene, 2 Ball & B. 49.

Barnett v. Sheffield, 1 De Gex, M. & G. 371; s. c. 21 Law J. Rep. (N.S.) Chanc. 692.

Sabin v. Heape, 27 Beav. 553; s. c. 29 Law J. Rep. (N.S.) Chanc. 79.

Espin v. Pemberton, 4 Drew. 333; s. c. 3 De Gex & J. 547; s. c. 28 Law J. Rep. (N.S.) Chanc. 308, 311.

Perry v. Holl, 2 De Gex, F. & J. 38.

Sugden, V. & P., 10th edit., 756.

Mr. Osborne and *Mr. Renshaw*, for Messrs. Worrall, Darvell and Howard, during the argument, produced a legacy receipt for the two legacies, of 1,500*l.* each, which they contended amounted to an appropriation of

the legacies. The reception of this was objected to, and his Honour after some argument thought it was inadmissible; but the admission of it was not ultimately opposed by the plaintiff. On the general question they cited—

Cooper v. Thornton, 3 Bro. C.C. 96, 185; s. c. 2 Co. Litt. 297, n. 14. s. 4.

Jones v. Smith, 1 Hare, 43; s. c. 11 Law J. Rep. (N.S.) Chanc. 83.

Spackman v. Timbrell, 8 Sim. 253; s. c. 6 Law J. Rep. (N.S.) Chanc. 147.

Page v. Adam, 4 Beav. 269; s. c. 10 Law J. Rep. (N.S.) Chanc. 407.

Mr. Glasse and Mr. Sidney Smith appeared for the Craven Bank.

Mr. Bazalgette, for Messrs. Brennand.

Mr. Eddis, for the assignees of Messrs. Chaffer.

Mr. Sandys, for the Messrs. Chaffer, cited—

Omerod v. Hardman, 5 Ves. 722.

Miller v. Priddon, 1 De Gex, M. & G. 335; s. c. 21 Law J. Rep. (N.S.) Chanc. 421.

Phillipo v. Munnings, 2 Myl. & Cr. 309.

Dix v. Burford, 19 Beav. 409.

It was argued for all the defendants that the estate had borne its burthen and could not bear it twice. At the death of the testator the personal estate was sufficient, and got into the hands of Benjamin Chaffer as trustee of the 800 years term, and therefore the estate could not be made liable for it a second time. In each case it was contended that the mortgagees had no notice of the intention of the Messrs. Chaffer to use the money for their own private purposes, and therefore they were exonerated and took in priority to the plaintiffs.

Mr. Baile was heard in reply.

KINDERSLEY, V.C. (June 22.)—This cause comes on for further consideration. The bill is filed by John Howard, an infant, by his next friend, to establish a charge to the amount of 1,500*l.* against certain real estate under the will and codicil of his maternal grandfather, Richard Chaffer. The testator, Richard Chaffer, had three sons and two daughters, two of the sons were Thomas and Benjamin, the third

(William) hardly appears in the course of these proceedings. (His Honour stated the facts.) Now, in considering the case, the first question that necessarily arises is this, whether, as between the plaintiff and all the mortgagees generally, the plaintiff has any charge at all on the testator's real estates; and the question which presents itself on the next division of the subject is this: if he has a charge, then as between the plaintiff and each mortgagee separately, who may have a different case from the other mortgagees, whether the plaintiff's charge is prior to the mortgages? Now, with respect to the first question, namely, whether the plaintiff is entitled to any charge at all on the real estate, it is contended that even as against the two Chaffers, supposing they had never mortgaged the estate, and had never become bankrupt and were still in possession of the real estate, the plaintiff has no charge even as against them; and on this ground, that under the will, the trustees of the term are to raise only so much of the debts and legacies as the testator's personal estate should be insufficient to pay and satisfy, and inasmuch as the personal estate at the testator's death was amply sufficient to pay the whole and leave a large surplus, therefore, even as against the Chaffers, there can be no decree making the real estate liable; in fact, that there was no trust to be satisfied; in other words, that a term never arose, or there never was a term upon which any trust was fastened, and that the only decree which could have been had against the Chaffers would have been a personal decree against them, making them personally liable, and leaving the plaintiff to pursue his remedy by execution of that decree against any real or personal estate that they might happen to be possessed of. If there were no authority on this question, I should be of opinion that this contention cannot possibly be maintained. Thomas and Benjamin Chaffer are the executors and the residuary legatees, and the devisees of the real estate, subject to the term; and it would be contrary to every notion of true construction and justice to allow them to say to the legatee, "True it is that the personal estate is now insufficient to pay your legacy, true it is that this insufficiency has arisen by our

having wasted and spent and dissipated the personal estate, and there is not a shilling of it left; but still, notwithstanding that, it was originally sufficient at the day of the death of the testator, and therefore you have no charge at all on the real estate of which we are the devisees; we hold the real estate free from all claim of the legatees." It appears to me that this is a contention which it is impossible to sustain, and it is not the true construction of the will in any Court, still less is it the view which a Court of equity would take of such a question. The question is, what was the testator's intention? Did he intend that if the personal estate was sufficient at the moment of his death, and was afterwards dissipated by his two sons and so became insufficient, his daughter Mrs. Temple and his grandson the child of his deceased daughter, should not be entitled to have their legacies raised under the trusts of the term which he created for the purpose of supplying the deficiency of the personal estate. He has nowhere said so. He does not say that the trustees of the term shall raise sufficient to pay so much of the debts and legacies as his personal estate shall at the time of his death be insufficient to pay and satisfy. He only says that they shall raise sufficient to pay so much of the debts and legacies as his personal estate shall be (not specifying any particular time) insufficient to pay and satisfy. There seems to me to be nothing either in the clause itself declaring the trusts of the term or in the context of the will to justify the narrow construction which is contended for by the defendants. It was just as much the intention of the testator that the legacies should be paid, as that the two sons should have the real and personal estate, subject to the payment of them, and with that intention he created the term as a supplement to the personal estate. I say that would be the view which I should take if there were no authority upon the subject. But what authority do we find on the subject? In the first place, no case whatever has been cited, or indeed can be cited, in support of the contention of the defendants. But, on the other hand, there is a case which appears to me directly in point, which was cited by the counsel for the plaintiff, of *Humble v. Humble*. In that case the testator devised

his real estate to trustees for a term, in trust to pay debts and legacies, if his personal estate should be deficient, and subject to the term he gave his real estate and the residue of his personalty to A. B. and C. absolutely, and named them his executors. The personalty which came to the hands of the executors was more than sufficient to pay all the debts and legacies, but was misappropriated by them. Held, that the legatees were entitled to the benefit of the term in priority to the claims of the creditors of the executor who was dead. In other words, of course, in priority to the executors themselves; that is, as against the devisees themselves and even as against their creditors. The exact language of the trust of the term in that case was, "To levy and raise a sum or sums sufficient to pay such of the testator's just debts, annuities, legacies and portions given by his will as his personal estate should fall short, or be insufficient to pay." The language of this will is, "should be insufficient to pay." I apprehend it would be impossible by any ingenuity of argument to maintain that there is any distinction between that case and the present. The language of the trust is exactly the same in substance and in meaning; in fact precisely the same, and all the circumstances are most curiously and remarkably the same as they are in this case. The trust was created to raise so much as the personal estate should fall short or be insufficient to pay the debts and legacies, and subject to the term the estate was devised to three persons who were also general residuary legatees and in precisely the same circumstances as we have here, except that instead of three persons as in that case, there are two in this, which of course will make no difference. Lord Langdale in that case decided that as against the real estate the legatees had a right (the personal estate although sufficient in the outset having been wasted by those devisees who were also executors and legatees) to come upon the real estate to have their charge raised. Now, it was suggested that that case of *Humble v. Humble* cannot be considered an authority, because it was said that it is not cited in any other case or in any text-book, and it is not in the registrar's book as is stated at the date which is assigned to it by the report in the

Jurist. But I have been furnished with an office copy of the decree in that case, shewing that there clearly was that decree, and the decree exactly agrees with the report; and it appears to me that I can no more reject the authority of that case than I can reject the authority of any other case in the books. It is a case which was deliberately argued, and argued on the very same ground (I mean on this point) on which the case has been argued on the present occasion; and after hearing the argument, Lord Langdale deliberately came to the conclusion which I have mentioned, that is to say, that at which I should have arrived, if I had not had that authority in support of my opinion. Therefore I have no hesitation in coming to the conclusion upon this first question which arises, that as against the Chaffers the plaintiff had clearly an equity to resort to the trusts of the term, the personal assets although sufficient in the outset having been wasted, that is, that the real estate in the hands of the Chaffers was liable to the charge of the plaintiff.

Now I come to the second question, which is in effect a separate question, as between the plaintiff and each mortgagee of the different portions of the estate. In fact, this cause may be said to be five causes united in one, and it may be that the plaintiff may have a right of priority over one of the mortgagees, and he may have no right of priority over others of the mortgagees of another portion of the estate. Now, before entering into the separate case of each of the mortgagees, it may be well to mention, not by way of laying down anything, but merely as an illustration, some of the principles on which this Court must act, or certain general rules about which there can be no controversy. If a person takes a conveyance either by way of absolute sale or by way of mortgage of real estate charged with the payment of legacies or of scheduled debts, he is bound to see that the money he pays is duly applied. It is not sufficient for him merely to pay it to the person who is charged with the duty of raising it and appropriating it; but even although he pays it to him, he must see it duly applied. If the charge is not of legacies only or of scheduled debts, but a charge of general debts, or of general debts and legacies, then, if he pays his money to the right

person, he is not bound to see to the application of the money; for the plain reason that it is impossible for him to know whether the debts are paid or not. No inquiry as to payment of the debts can enable him to ascertain with certainty whether the debts have all been paid. He has not the means of ascertaining what the debts are, and he may safely pay his money to the person who is charged with the duty of raising the money and paying the debts and legacies. But, although in that case, that is, where the charge is of the debts and legacies, the party may safely pay his money to the person who is charged with the duty of raising it and applying it, even in that case, if the money is, to the knowledge of the party lending, or under circumstances which give him good reason to suppose that the fact is that the money is borrowed or raised, not for the purpose of paying debts and legacies, but for the private purposes of the person borrowing or raising the money, and is intended to be so applied; then he makes himself a party to the devastavit or breach of trust, and the estate in his hands which he takes by sale or mortgage remains liable to the debts and legacies. Now I may observe that, in the present case, the debts and legacies are charged entirely on the term which was vested in Benjamin Chaffer, who had survived his co-trustee, Vevers; they were not charged on the reversion in fee which was devised to Thomas and Benjamin Chaffer. The duty of raising the money necessary for the payment of the debts and legacies, and of applying the money in payment of them, was vested in Benjamin Chaffer only, and not in Thomas and Benjamin Chaffer; and if Benjamin Chaffer, trustee of the term, applied to any person to lend him money on mortgage of the term, that person might safely lend him the money on such mortgage, provided he had no reason to suppose that Benjamin Chaffer was intending to apply it to other purposes than the payment of the debts and legacies. But if he had reason to know that the money was intended to be applied to other purposes, the term in his hands would still remain liable to the payment of the debts and legacies. On the other hand, if he lent his money to Thomas and Benjamin Chaffer, who were the devisees of the fee, for their own purposes on a mort-

gage of their interest, then, of course, he would have a good mortgage of that interest, that is, of the fee in reversion ; but it would only be a mortgage of the reversion, subject to the term and the trusts of the term for payment of the debts and legacies. And if, as I have supposed, the money was lent by him to Thomas and Benjamin Chaffers for their own purposes, the lender (the mortgagee) would not escape his liability to the claims of the creditors and legatees by going through the form of paying the money into the hands of Benjamin Chaffer alone, and taking a conveyance of the fee from Thomas and Benjamin Chaffer, and an assignment of the term from Benjamin Chaffer ; because he knew that the money was intended to be applied, not in payment of the debts and legacies, according to the trusts of the term, but for the private purposes of Thomas and Benjamin Chaffer. I have thought it convenient to make these general observations applying more or less to all mortgagees, not necessarily deciding the case as against them, but applying to all cases. I will now proceed to consider the case of each of the mortgagees separately, and I will take them in the order of date of their several mortgages, which is in fact the order in which they were argued before me.

The first is the case of Robinson and Birtwhistle, two gentlemen who lent 1,000*l.* on mortgage of a particular estate.—(His Honour stated the facts.)—Nothing could be more explicit than the letter of the 2nd of May 1853 ; it is impossible to escape from that ; there is no second construction of this letter which can be suggested ; so that it was conveyed to Robinson distinctly on the outset of the transaction (for this was the first step), that what he was asked to lend was money, which was to be applied by the firm in paying a debt of the firm. Robinson, in answer to that letter, wrote to Messrs. Chaffer inquiring about the estate which was proposed to be given in mortgage. That letter is not forthcoming, but the effect of it is admitted, and it is clearly apparent from what follows. It was, in fact, an inquiry, "What is this Town House estate which you propose to give us on mortgage to secure 1,000*l.*?" and then came the answer.—(His Honour read the letters.)—The expression "the previous deed," clearly meant the

prior deed of mortgage. The estate was mentioned in the letter as 125*l.* a year ; there was 2,000*l.* already charged upon it, and with the additional 1,000*l.* it would be 3,000*l.*, which, even at 4*l.* per cent. interest, would amount to 120*l.* a year, and, of course, there was hardly a margin with regard to the rent, and therefore he says, "You must give us your bond in addition." On that same day on which Mr. Robinson wrote that letter to Messrs. Chaffer, he addressed a letter to Mr. Holmes.—(His Honour read the correspondence and the mortgage-deed.)—The receipt for the consideration-money indorsed on the deed purports to be a receipt by Benjamin only ; it is signed by Benjamin only, and it appears by the evidence that the money was actually paid into the hands of Benjamin only. In fact, Thomas was not present, and having paid the costs to Mr. Holmes (that is, for the benefit of the firm), he carried the rest to the Craven Bank, and paid it in there according to the original intention ; it was borrowed and applied for that purpose.

Now, these facts, so far as I have stated them, are entirely undisputed, and there is no question about any of them, and upon these facts alone it appears to me quite clear that Messrs. Robinson and Birtwhistle took the Town House estate, subject to that equity in favour of the plaintiff and the other unpaid legatees, to which that estate was liable in the hands of Thomas and Benjamin Chaffer. The mortgage of the 1st of July 1853 was clearly the consequence and the direct result of the application for the loan which was made by the letter of the 2nd of May. By that letter Robinson was asked by the firm of Thomas & Benjamin Chaffer to lend that firm 1,000*l.*, expressly to enable them to discharge the debt or part of the debt due from that firm to their bankers on the banking account of the firm, that is, for the private purposes of Thomas and Benjamin Chaffer, and not for the purpose of executing any trust under the testator's will. The application so made was entertained by Robinson, and he accordingly wrote, as we have seen, to Messrs. Chaffer to inquire as to the property proposed to be given as a security. Having received their answer, and having ascertained that he (Robinson) and his co-trustee, under the settlement of Mr. and

Mrs. Birtwhistle, would have 1,000*l.* on the 30th of June, which they would be able to lend, he, on the 16th of May, wrote to Messrs. Chaffer so to inform them, and then made an appointment for Robert Birtwhistle (who was, I suppose a surveyor or a person competent to judge of the value of property) to call upon Benjamin Chaffer to talk over the matter, and saying that he (Robert Birtwhistle) should bring the prior mortgage, and if he was satisfied with its security, should leave it with Holmes to prepare the proposed mortgage; and at the same time he wrote to Holmes, as we have seen, to apprise him to the same effect. He did not send to Holmes the first letter of application that was made, that is, the letter of the 2nd of May, but he sent him a copy of the letter which he, on the 16th of May, had addressed to Messrs. Chaffer. In the letter, as we have seen, to Holmes, a doubt is expressed as to the propriety of the trustees lending on a property which only yielded 125*l.* a year rent, and he requests the opinion of Holmes as to the respectability and responsibility of Messrs. Chaffer. He receives an answer from Holmes, satisfying him in that respect. Accordingly the matter goes on, and the meeting is held on the 19th of June, which I have mentioned, at which Robert Birtwhistle satisfied himself of the sufficiency of the security, and then the money was paid in the manner I have mentioned. It is clear that all the *res gestæ* are parts of one continuous transaction, commencing with the application of the 2nd of May for the loan, and terminating in the mortgage of the 1st of July. During that period, the treaty for the loan and mortgage was never interrupted for a single day. There was no breaking off of the negotiation, and then the commencement of a new negotiation; nay, there was not even a temporary suspension of the negotiation, and then a renewal of it. The whole transaction went on uninterruptedly and continuously upon the basis of the application of the 2nd of May down to the execution of the mortgage-deed and the payment of the money. The letter of application was as much a part of the transaction of the mortgage as if the mortgage-deed had been dated and executed within two or three days after the letter was written. I should say, therefore, that it is impossible to entertain a doubt

but that at the time when Robinson and Birtwhistle advanced that money upon the mortgage they believed, or, at least, they had the best possible reason for believing, that the money was borrowed by Messrs. Chaffer for the purpose and was intended to be applied to the purpose of discharging a private debt, that is, a debt due from their firm to their bankers. But I must advert to a passage in the answer of Messrs. Robinson and Birtwhistle; they say, "We lent the said sum of 1,000*l.* to the said Thomas and Benjamin Chaffer for the purpose of procuring an eligible investment of a sum of 1,000*l.* which we had in our hands as trustees," (that is true enough). "The aforesaid letter of the 2nd of May 1853 was the first step in the negotiation for the said loan, and we made the said advance not for the purpose of reducing the balance alleged to be owing from the said Thomas and Benjamin Chaffer, as such partners as aforesaid, to the said Craven Banking Company, or in compliance with the request contained in the said letter of the 2nd of May 1853, but because we were advised and considered that the security offered was satisfactory, we advanced the sum of 1,000*l.* to the said Thomas and Benjamin Chaffer upon the security of the mortgage proposed to be given by them as aforesaid. We deny that we, or either of us, or to the best of our belief that Messrs. Alcock & Holmes, or either of them, well or in fact knew at the time of making such advance (that is, the advance of 1,000*l.*) that the same was required or would be used for the purpose. We admit that Messrs. Alcock & Holmes acted as our solicitors in the matter." I confess that I was a little surprised when I came to that passage. It is true in one sense of the verb "to know," that is to say, inasmuch as the communication of the purpose for which the money was wanted, namely, to pay the debt to the Bank, was made by the letter of the 2nd of May, and the mortgage was not executed and the money paid until the 1st of July, of course there was a physical possibility that the intention of the parties had undergone a change, and in that sense, no doubt, of the verb "to know," the parties have not untruly sworn that when they advanced their money neither they nor either of them, nor Alcock & Holmes, nor either of them, knew

that the money was to be so applied. They did not *know* it, it was not a mathematical demonstration; but in no other sense can that be true; I must assume it in that sense in which it is true. But what does that amount to? "We did not, at the moment we advanced our money, know with mathematical certainty that the money was to be so applied." But there is a total silence upon this—Did you not, when you received that letter of the 2nd of May, know that then it was the intention to apply the money so? Of course you did; you were told so by the parties asking you to lend to them; they told you that was the purpose with which it was borrowed. Was there ever any change in the negotiation, any communication to you, any hint to you to lead you to suppose that Messrs. Chaffer had changed their intention? Not the slightest. Therefore, assuming it to be true in that critical sense of the verb "to know," that they did not know it at the moment they advanced the money, it remains clear beyond all doubt that they had the best possible reason for knowing it, or, at least, for firmly and unhesitatingly believing it. They had the best reason to suppose that the money was intended to be applied in payment of the debt of the bank, and that is sufficient. Then, of course, considerable stress is laid by the counsel for Robinson and Birtwhistle upon the fact that the deed provides that the money should be paid to Benjamin Chaffer as the surviving trustee of the term, to be by him applied and held upon the trusts thereof, and it was accordingly paid into his hands alone, and he alone signed the receipt for the money; and therefore they contend that they were absolved from all obligation to see to the application of it, and were not answerable for its misapplication. Now, it is quite obvious why that passage was introduced into the deed by Mr. Holmes, and why he took care that the receipt for the consideration money should be signed by Benjamin only, and that the money should be paid into the hands of Benjamin alone. He did not introduce that passage in consequence of any instructions which were given to him either by Robinson or Birtwhistle, or by Messrs. Chaffer, or by any one. In fact, he never received any instructions or information to that effect from any person whatever. He tells us himself, in one

of his affidavits, made in support of the defendant's case, that the only instructions he received on the subject of the mortgage were those contained in Robinson's letter to him of the 16th of May. That letter, so far from intimating that the 1,000*l.* was to be advanced to Benjamin Chaffer as trustee of the term, conveys a totally different impression. I do not mean to say that it shews in express terms, like the letter of the 2nd of May, what the particular purpose was, but there is not even a hint of any intention of applying it in satisfaction of any trust, nor any allusion to any trust. And in the same affidavit he says that he never had any communication with Benjamin Chaffer on the subject of the mortgage until the meeting of the 19th, and at that meeting nothing whatever was said shewing for what purpose that 1,000*l.* was to be advanced. As to Thomas Chaffer, he lived at Liverpool, and there was no personal communication or written communication between Mr. Holmes and Thomas Chaffer at all. Why then did Mr. Holmes introduce this of his own authority into the deed, and why did he take care to have it done in this way? It was entirely his own spontaneous act; when he came to prepare the mortgage he had before him of course the testator's will and codicil, and he saw there the term created and the trusts of the term. As a lawyer, he knew that unless the legacies as well as debts had been all paid and satisfied, the security of the mortgagees would be subject to a claim of the legatees if the money was paid to Thomas and Benjamin Chaffer, for Thomas was not a trustee of the term. He knew also the general rule, that as the trusts of the term were to pay debts as well as legacies, the person advancing money to the trustee of the term was not answerable for the application of it. And besides that, he saw that the testator's will contained an express clause to the same effect, and therefore he considered that if he only took care to make it appear on the face of the deed that the money was paid to Benjamin Chaffer, the trustee of the term, and took care to pay it to him accordingly, the mortgagees would be safe, forgetting that, notwithstanding the general rule, and notwithstanding the special clause in the will, the mortgagees would not be safe if they had reason to believe when they advanced the money that

the intention of the borrower was to apply it to a different purpose. The passage inserted in the deed by Mr. Holmes expressed no real intention either of the lender or the borrower. It was only a suggestion of Mr. Holmes's own mind as an experienced lawyer, not even communicated to any one of the parties. Both the Chaffers swear they were not aware there was any such passage in the deed. Mr. Holmes says that he does not recollect that he ever mentioned it to them, and he does not say a word as to his having ever mentioned it to Robinson and Birtwhistle or either of them. It was in truth merely a conveyancing device (not using the word in a bad sense) to give to the transaction an appearance of propriety in case any claim should be raised by a legatee, by making it appear that the money was not borrowed by or lent to Thomas and Benjamin Chaffer, but to Benjamin alone as the trustee of the term and expressly on the trusts of the term. In fact, if we look at the deed itself, it shews, notwithstanding the careful machinery of that passage, that the money was lent to Thomas and Benjamin Chaffer and not to Benjamin Chaffer as the trustee of the term, and that it was lent on the security not of the term but of the fee. Besides the usual agreement to lend and borrow the money, instead of the term being made the security it is the fee that is made the security, and nothing but the fee, with the term merged in it. It is the fee of the devisee and not the trusts of the term that is made the subject of the security. If indeed Robinson and Birtwhistle had been applied to to lend 1,000*l.* to enable Benjamin Chaffer as trustee of the term to execute the trusts of the term, and they had agreed to do so provided Thomas and Benjamin would convey to them their reversionary fee by way of additional security and give their bond as still further security, the transaction would have been unobjectionable, assuming always that Robinson and Birtwhistle had no reason to suppose that it was intended to apply the money to other purposes. But so far from this being the nature of the transaction, the deed on the face of it shews not only that the money was lent to Thomas and Benjamin Chaffer, but that there was no intention that Robinson and Birtwhistle should have the security of the term at all, for the term is

expressly merged, it is put out of existence, and the only security taken is the security of the fee simple in possession, with the addition of the bond of Thomas and Benjamin Chaffer.

But here the question arises, how came Mr. Holmes to recite in the mortgage deed that the trusts of the term had not been fully performed? That recital is unquestionably in accordance with the facts, for the two legacies of 1,500*l.* each, now in question, still remained unpaid at that time. But how did Mr. Holmes know it? Did he, when he was preparing the mortgage deed, make inquiry of the Chaffers or any other person and so acquire the information? If he did make the inquiry at that time, what was the information given to him? Did he learn, in answer to such inquiries, that the two legacies of 1,500*l.* or either of them remained unpaid? or what were the trusts of the term which he ascertained to be still unperformed? One may ask those questions. But there was no such thing; he made no inquiry. I am not saying now that it was his duty to make inquiry, but all I say is that he made no inquiry: how then did he know the fact that the trusts of the term had not been satisfied, which fact he recites and truly recites in the deed? Why, he knew it thus: It appears in evidence that about two years before, in 1851, he and his partner Mr. Alcock (as the firm) were employed as solicitors in a transaction respecting another portion of the testator's property, not now in question, which was mortgaged to the Craven bankers, who were the clients of Alcock & Holmes; and Alcock & Holmes, in the course of that transaction, found it expedient to ascertain whether at that time any of the legacies remained unpaid, and they wrote to Benjamin Chaffer making inquiry, and in answer to that inquiry Benjamin Chaffer wrote them a letter. [His Honour read the letter.] He omits to advert to the fact that one of the sisters had died and that a codicil had substituted the 1,500*l.* legacy to the present plaintiff; but that does not affect this question. He says, "My two sisters had 1,500*l.* each left to them and I am trustee." (That is true.) "They are to receive interest for their sums as long as they live, and at their deaths the principal is to be paid to their children on the

youngest attaining its majority. These are all the legacies unpaid." So that by that letter, Messrs. Alcock & Holmes became aware, at that time at least, that these two trust legacies were not paid. It is true that that information was acquired by Holmes two years before the mortgage of 1853, which is now under consideration, that is, the transaction with Robinson and Birtwhistle, and it was acquired in relation to a different transaction. But Mr. Holmes does not attempt to say that that information was not present to his mind when he was preparing the mortgage to Robinson and Birtwhistle in 1853. And it is clear that it was on the strength of that information acquired in 1851 that he recited in the mortgage-deed that the trusts of the term were not fully performed. This brings me to observe on a part of the mortgage-deed which is very peculiar, I mean that the term of 800 years, instead of being assigned to the mortgagees or to a trustee for them, and so kept on foot, is expressly merged. The act of merging the term could, of course, only proceed upon the assumption that having, according to Mr. Holmes's views, the view which he wishes to set up, raised the 1,000*l.* on the trusts of the term, that 1,000*l.* was all that was necessary for the satisfaction of all the trusts of the term remaining unsatisfied, and that, therefore, the term was no longer needed. Now, upon what ground did Mr. Holmes make this assumption? Having been informed by Benjamin Chaffer's letter in 1851 that the two legacies of 1,500*l.* each, making together 3,000*l.*, remained unpaid, and that they were the only legacies then remaining unpaid, what led him to assume, in 1853, that no more than 1,000*l.* was wanting to satisfy them in full? Mr. Holmes's affidavit is totally silent on this point. The truth is obvious, that Mr. Holmes did not assume either one way or the other as to how much was required for the satisfaction or payment of the legacies. He never proceeded upon any such ground. It was all artificial, all that matter of reference to the trusts of the term in the deed. The money was in fact borrowed by and lent to Thomas and Benjamin Chaffer, on the security of the fee simple of the Town House estate; and in carrying out that object Mr. Holmes endeavoured so to frame and shape his machinery as to

give to the transaction the appearance of a loan to the trustee to enable him to execute his trust, hoping by those means (very naturally) to make his clients, the mortgagees, safe, in case any claim should afterwards be raised by the legatees. The attempt seems to me entirely to have failed. You cannot get rid of the fact, which is conclusive on the subject, that Robinson and Birtwhistle themselves, independent of anything which their solicitors knew (that is, one of them, and that is sufficient), Robinson knew when he received the letter of the 2nd of May, applying for the loan, that the purpose was a private purpose of Thomas and Benjamin Chaffer, and that he was affected with knowledge that at the time the money was advanced and the deed executed on the 1st of July. I am of opinion, therefore, that the Town House estate in the hands of Messrs. Robinson and Birtwhistle is liable to the same equity in favour of the plaintiff, to which it was liable in the hands of Thomas and Benjamin Chaffer, and that the plaintiff's charge has priority over the mortgage of the 1st of July 1853.

I now come to the second case, which is that of General Sir James Yorke Scarlett. He claims to be mortgagee of a different estate, which, for convenience, I shall call the Church Street estate, for 500*l.* His mortgage is dated the 2nd of July 1855. The circumstances attending the loan are stated by him in the most straightforward way—[His Honour stated the facts]—and I have no doubt that it represents the exact truth. Putting aside any question with respect to Messrs. Buck & Eastwood, whether they are to be considered as acting as solicitors for Sir James Yorke Scarlett in relation to this mortgage; they were solicitors for the Chaffers; but I put that question aside, and doing so, what is the simple fact? I must assume that General Scarlett is affected by knowledge of the testator's will and codicil, and, in fact, they are recited in the deed, therefore he must be considered to have been aware of the creation of the term and the trusts of it; and what he does is, he lends the money to the two Chaffers, the devisees of the fee. There is not here, as in the case of Robinson and Birtwhistle, any insertion of any suggestion in the deed, or otherwise any suggestion of the money being wanted for this purpose or

for another purpose ; it is simply a lending to the remaindermen so much money on the security of their fee, and taking (as we shall see) a merger of the term. Now, the deed is a deed which so far differs from that of Robinson and Birtwhistle, and says nothing about the money being paid to Benjamin Chaffer, the trustee of the term—[His Honour referred to the deed].—It is simply a loan to the remaindermen on their assurance that the trusts of the term had been satisfied. But, further, Sir James Yorke Scarlett is informed that all the debts had been paid, and that was the exact fact ; he was also further informed that all the pecuniary legacies, as they are called, that is, clearly meaning the legacies not to be held in trust for anybody, but to be paid to the legatees direct, had been paid, and that was the fact. He was informed by these same mortgagors, who wanted him to lend them the money, that the trust legacies, although not actually paid, were “duly raised or provided for.” It is an indefinite term, but that is no matter. Being so informed, he has notice of one thing, which is the truth, and at his peril he takes the information as to the other. It was unfortunate for him, I will not say that he employed Buck & Eastwood, for I am not assuming that they were solicitors for the Chaffers, but that he did not employ a solicitor. I think it very possible if he had, that the matter would have been more carefully looked at. He says, I did not employ a solicitor, I did not employ Buck & Eastwood. Therefore it comes to this : that here is a party having knowledge that the debts were paid, what was the effect of that ? That question was raised in *Johnson v. Kennett*, which came before the Vice Chancellor of England, and afterwards, on appeal, before Lord Lyndhurst. The case was simply this : A testator, by his will, gave certain pecuniary legacies, and subject thereto and to the payment of his debts, he gave all his real and personal estate to his son, and appointed him his executor. So far it is clear that in that state of things a purchaser or mortgagee of the real estate would be perfectly safe in paying his money to the son, on whom the duty of paying the debts and legacies was cast, assuming he had no knowledge of any misapplication. The son paid all the debts out of the personal estate, and he afterwards sold the real estate

without having paid the legacies ; the debts were all paid, the legatees filed a bill to have their legacies charged on the real estate, and the Vice Chancellor of England held that the purchaser was liable, on the ground that as all the debts had been paid, the matter stood in the same position as if there had never been any charge of debts at all, but only a charge of legacies, in which case a purchaser is bound to see to the application of his money. That was the view taken by the Vice Chancellor of England. On appeal, Lord Lyndhurst reversed the decision, on the ground that there was nothing to shew that the fact of the debts having been paid was known to the purchaser, and that decision of Lord Lyndhurst's was approved of by Lord Cottenham in *Eland v. Eland*. I consider those cases have established this rule of the Court on the subject, that where an estate is charged with debts and legacies a purchaser or mortgagee is safe, notwithstanding that all the debts have been paid, provided that fact was unknown to him ; but if that fact of the payment of the debts was known to him, then indeed he is bound to see to the application of his money, just as he would have been if the estate had been only charged by the will with the legacies. Now, applying that principle to the present case, as Sir James Scarlett knew when he advanced his money that the debts were all paid, he was bound to see to the application of his money ; true it is that the deed represented that the trust legacies, although not actually paid, had been raised or otherwise provided for ; the only way in which the trust legacies could have been raised and properly provided for was, that they should have been placed in the hands of the trustee, who was to hold them in trust in his character of trustee. If he had wasted them afterwards then there would have been no liability except in himself. But this was never done. Unfortunately, Sir James Scarlett was content with the vague statement in his mortgage-deed that the trust legacies had been raised or otherwise provided for, and then advanced his money on the peril of the truth of that representation. If, indeed, Sir James Scarlett had lent his money to the trustee of the term whose duty it was to hold the legacies in

trust, and having no reason to suppose that it was intended to be used for other purposes, he would have been safe, because although he knew that the debts were paid, still by the terms of the will, if he paid his money to the trustee he was exonerated from all liability, assuming he did not know of any intended misapplication. But he did not do so; he lent and advanced his money to Thomas and Benjamin Chaffer for their own purposes; the whole transaction proceeded on the footing that the money was lent to them as the devisees of the fee, not to Benjamin Chaffer, as the trustee of the term; and although Benjamin Chaffer, the trustee, was one of the two persons to whom the money was advanced, it was not advanced to him as trustee, but to him and his brother as owners of the fee. It is, perhaps, hardly necessary to enter into the question with regard to Messrs. Buck & Eastwood, but it appears to me to be clear that, if it were necessary, Messrs. Buck & Eastwood must be considered as having acted as solicitors both for the mortgagors and for Sir James Yorke Scarlett as mortgagee. I think the proposition is stated somewhat strongly in one case; but I am by no means disposed to hold that in every possible case, if a mortgagee, for example, does not employ any solicitor, it must be considered that the solicitor of the mortgagor was his solicitor in the transaction, because a mortgagee may be himself a retired solicitor, or a barrister, or a person acquainted with the law and capable of managing his own affairs, and therefore I do not hold that in every case that is so. But here we have the fact that when Mr. Helme referred Mr. Benjamin Chaffer to Mr. Buck of the firm of Buck & Eastwood, as the person who was to prepare the mortgage-deed, it is clear that Sir James Scarlett never performed any of the functions which must be performed by somebody on behalf of the mortgagee. Some one must look at the title, some one must look at the draft of the deed to see that it is right, some one must see that it is duly engrossed. Sir James Scarlett says, I never troubled my head about it; I was to lend 500*l.* on mortgage to the two Chaffers and I told Mr. Helme I would lend it them and to let me have a mortgage. Mr. Helme

never intervenes, Mr. Helme does not investigate the matter. It is not suggested by Sir James Scarlett that Mr. Helme was anything more than his agent in lending the money, and all that Mr. Helme did was, that when the mortgage-deed was ready and about to be executed, he said to Messrs. Buck & Eastwood, who were the mortgagors' solicitors, "Is there a good title?" They said, "Oh, yes; there is an excellent title, it is accepted by the bank and other parties, and therefore you are quite safe." I should hold, if it were necessary to resort to that view, that Messrs. Buck & Eastwood were acting as solicitors to Sir James Scarlett in the transaction.

I now come to the third case, which is that of Messrs. Worrall, Darvell and Howard, three gentlemen who lent upon the security of a still different property which was derived from the testator, a sum of 11,500*l.*, upon a mortgage dated the 20th of March 1856.—[His Honour stated the facts.]—It is apparent that the 11,500*l.* was lent and advanced by the Messrs. Worrall, not to Benjamin Chaffer as trustee of the term or for enabling him to execute the trusts thereof, but to Thomas and Benjamin Chaffer for their own purposes. But a contention has been raised which applies to all the mortgages, or at least to several of them, and is well deserving of consideration. It is contended that although the money was lent to Thomas and Benjamin Chaffer and not to Benjamin as the trustee of the term, yet inasmuch as Benjamin Chaffer was the trustee of the term, whose duty it was to raise the legacies and to hold the legacies of 1,500*l.* each for the benefit of the legatees, his joining in the mortgage and representing that all the trusts of the term had been fully performed, or satisfied, or become unnecessary, or incapable of taking effect, and merging the term, was sufficient to free the mortgagees from all liability; and in support of that argument the case of *Storry v. Walsh* (1) was cited. In that case the testatrix by her will, dated in 1830, gave a legacy of 2,000*l.* to her trustees, of whom Mr. Rigby was one, in trust for a lad, ythen Jean Dixon, afterwards Mrs. Severne, for her life, with remainder to her children, and she gave the

(1) 18 Beav. 559.

residue of her real and personal estate, subject to the payment of her debts and legacies, to Richard S. Dixon absolutely, and appointed him and Rigby her executors. Richard S. Dixon, the legatee of the residue, died in or soon after 1841, having by his will appointed certain persons as trustees and executors of his estates. Thus Rigby became the sole executor of the testatrix. In December 1845—and as the date of the testatrix's death is not given, I am not able to say how long this was after her death, but I should suppose it must have been ten or twelve years after her death, or at least a good many years—in 1845 Rigby the sole surviving executor, executed a deed by which, after reciting that all the debts, contracts and obligations of the testatrix, and all her funeral and testamentary expenses, and all legacies by her bequeathed had been fully paid and discharged or satisfied, he conveyed the residuary estate of the testatrix to the trustees and executors of the will of Richard S. Dixon; he conveyed it to those who were entitled to it on that assumption; not the purchasers, but the persons who were entitled to the estate subject to the payment. The executor says, everything has been satisfied, years have elapsed, I am quite content to have the estate handed over to the residuary legatee or devisee, or rather to those who stood in his shoes, his trustees and executors. In 1846, the following year, the plaintiff purchased from the trustees under Dixon's will part of the real estate derived from the testatrix. Afterwards, in 1852, six years after that, he (the plaintiff) sold that portion of the estate which he had himself purchased to the defendant in the special case. I should think that must have been the best part of twenty years after the death of the testatrix, but I am not able to say exactly. The question arose between the plaintiff and the defendant with regard to the liability of the purchaser to pay interest upon his purchase-money, and it was agreed to leave the question to the Master of the Rolls upon a special case confined to that question. And the question depended upon this: there had been notice given by the purchaser that he had got his money ready and that he should not pay interest. The question was, whether the vendor could at that time shew a good title, and that

depended upon this, whether the circumstances I have mentioned gave the plaintiff a good title. The Master of the Rolls held, that upon the facts which I have thus stated, the plaintiff had shewn a good title. Now, it is quite obvious what a wide distinction there is between that case and the present. Rigby, the executor, whose duty it was to see that the debts and legacies were paid or satisfied, and in whom was vested the personal estate, and (although there was no term,) the right over the real estate for the purpose of the payment of them,—Rigby, the executor, was not one of the executors of the devisee of the real estate; he had no interest in the real estate whatever or in any estate; he had nothing but a duty and no personal interest, and never had. At all events, as far as the real estate was concerned, he was not one of the devisees of it. He had no object in raising money upon the security of that real estate, he merely did this when he found after the lapse of years that everything was satisfied in the shape of debt or legacy; then, not by way of conveyance to the purchaser, but simply by way of putting the estate free from all question into the hands of the devisees under the will, that is, those who represented them, he executed that conveyance, and then seven years afterwards this purchase was made on which the question arose that the Master of the Rolls had to determine as to the right of the vendor to interest on the purchase-money. I say there is a wide difference between that case and the present. Here we have Benjamin Chaffer the trustee of the term, the person whose duty it was to see that these debts and legacies were paid, on whom the duty was cast of paying and raising money to pay them. He is one of the two persons who are the devisees of the fee as well as the residuary legatees. It is his object and his interest to raise money; he has no difficulty with his brother the co-devisee; they want money to pay their bankers; they have largely overdrawn their account at their bankers'; they have spent all the personal estate of the testator; it is all gone, and although they have a good business and a good capital in that business perhaps, they have not money to go on without borrowing, and then it is that Benjamin Chaffer and Thomas Chaffer

represent, or (if you please, for it makes no difference) Benjamin Chaffer, one of the two, represents that all the debts and legacies have been paid. Surely the difference is obvious. In the one case the purchaser was perfectly well justified in trusting to the act that had been done, not mere representation, but the act that had been done by the executor in freeing the estate from all the debts and legacies, which never would have been done if it ought not to have been so freed; and in this case, the interested party trusted to the representation of the party whose interest it was to raise money. It appears to me that the principle established in that case is utterly inapplicable to the case now before me. I am of opinion, therefore, that as to Messrs. Worrall as well as the others whose cases I have hitherto disposed of, the plaintiff is entitled to priority; but, of course, only so far as relates to those portions of the estate in that mortgage which were derived under the testator's will.

The next is the case of the bankers, and I have already anticipated most of what I have to say, in stating the facts with regard to Messrs. Worrall's mortgage. This is the mortgage made under the arrangement by which Messrs. Worrall's mortgage was agreed to be made and was made prior to the mortgage to the bankers, (that is, Messrs. Alcock, who were partners in the Craven Bank); and it was for the remainder of the 12,000*l.*, the balance of the banking account of Thomas and Benjamin as customers with them, that this mortgage of the 20th of March 1856 was given. It appears to me that all the observations I have made with regard to Messrs. Worrall's mortgage really apply to this. But there is an additional observation which applies to this which does not appear to me to apply to Messrs. Worrall's, and it is this—Alcock & Holmes were the solicitors of the bank, there is no question about it, habitually and in this special transaction. Messrs. Chaffer did not employ any other solicitors than Alcock & Holmes. It is said by Alcock & Holmes that Benjamin Chaffer and Thomas Chaffer did not employ them as solicitors in the transaction; but for the same reasons under which I have been obliged to hold, if it were necessary to apply to that argument in Sir James Scarlett's case, that the solicitors who were employed must be con-

sidered as acting as his solicitors, I should say that here Alcock & Holmes must be considered as having acted in this transaction as the solicitors of Messrs. Chaffer. But besides that, and putting that aside, here we have the case of Alcock & Holmes, who received, in the year 1851, information that the two trust legacies were not paid, and who knew from the will that one of them was given to an infant, and the other given to a tenant for life, with remainder to her children, and Mr. Holmes not venturing to state that all that knowledge was not present to his mind when this transaction of security to the bank was made, it appears to me I must consider there was knowledge; that is, constructive notice to the bankers of the fact that the legacies were not paid. In that respect only does the question with regard to the bankers' mortgage differ from that of Messrs. Worrall.

There remains only one other case, and that is the case of the Brennanda. One is dead, and John Brennan is the survivor; he claims as second mortgagee of the Town House estate, which is the subject of the mortgage to Robinson and Birtwhistle which I first considered, and he claims under a mortgage to him and William Brennan, now deceased, dated the 12th of October 1857.—[His Honour stated the facts.]—The expression in this deed "freed from the subsisting trusts" is a very singular one; I should think it must be a slip, and I do not think I ought to affect the mortgagees by the insertion of that term, which, if it was meant to be there, represented in effect that the trusts were still subsisting, notwithstanding that the whole of the deed proceeds on the footing that they are not subsisting, I think it must be considered as a slip in framing the deed. Mr. Brennan in his cross-examination says he knew the legatees were minors and not competent to receive their legacies, and that they were not paid. Then we have here this simple case of a party who says this, and he, finding that by the prior mortgage to Robinson and Birtwhistle, 1,000*l.* had been raised and the trusts merged, he acted on the faith of that and lent his money to the two Chaffers as owners of the fee simple of the estate, and chose to take it for granted on that representation that all the trusts of the term had been satisfied; indeed, it was not necessary

to look at the term at all, or to think of the trusts, although one of the two parties (Mr. John Brennand, the present defendant) perfectly well knew that the trust legacies were not paid. There is another circumstance with regard to this mortgage, that Buck & Eastwood, who were the regular solicitors of the Chaffers, were also in this transaction the solicitors of the Brennands. Mr. Brennand, indeed, either in his affidavit or answer, says he did not employ them as solicitors, but, in his cross-examination, cannot dispute that they acted as solicitors for the Brennands as well as for the plaintiff. Under these circumstances, it appears to me that the Brennands also took their mortgage subject to the prior charge in favour of the plaintiff.

I ought before I leave the case to observe upon an argument raised by the several defendants, or some of them, that the estate has borne its burden and must not bear it twice. I confess I am not quite clear in what sense that is intended to be said. If it means that the two sums of 1,500*l.*, or either of them, has been raised, or that one farthing of them has ever been raised, out of the estates which are now the subject of these mortgages, it is clear that the estate has never borne its burden. I suppose that what is meant is, that there was personal estate, and that personal estate, being sufficient, must be considered as having borne its burden. Otherwise, I confess I really do not know in what sense it is meant to be contended. What is meant by an estate bearing its burden? If a man is the owner of an estate which is liable to pay a legacy or a sum of money to a trustee in trust for a family, if the money has been paid into the hands of that trustee without any knowledge that the trustee had any intention of misapplying it, and the trustee afterwards wastes that property, then, indeed, the estate has borne its burden, and is not to bear it over again; but that is the only sense in which, as I understand it, an estate can bear its burden. In this case, therefore, the estate has never borne its burden, and therefore it appears to me that that argument is not tenable. Another argument, which is also applicable to all the mortgagees, was this: two legacy receipts were produced, which I think were discovered or thought of while the case was in

argument—at all events, after it had been set down—they were not in evidence in the cause, nor thought of at all, or put in evidence, but they were agreed to be admitted. It was said that these legacy receipts amount to an appropriation of the two sums. Of course if they do, there is an end of the whole case against the plaintiff, and also with respect to the mortgagees. All the mortgagees are entitled to the benefit of this argument if it prevails. It is said those legacy receipts shew that there was due appropriation and setting apart of the two sums of 1,500*l.* each for the satisfaction of these two legacies. Now let us see what they are. The testator died on the 25th of March 1846. When the two Chaffers, who were the executors as well as the residuary legatees, came to pass the residuary account at the stamp-office, of course it was necessary that they should pay, not only the duty payable on the residue, but it was necessary to pay, or shew that they had paid, the duty on all the legacies which were given. We know that the officers at the stamp-office will not pass a residuary account until that is done, and therefore the common printed form of a legacy receipt issued by the stamp-office is, "Received," and then words that you may substitute thus, "or retained in trust for" such and such a legacy. If the legatee has the money paid to him, he signs the receipt as having received so much. If the money is not paid to the legatee, the executor signs the receipt as having been retained on trust; that is, the executors say they have got the money to pay it with, and they pay the duty upon the legacy to the government. The testator died on the 25th of March 1846. This legacy receipt, which is in the common printed form, is filled up thus; the legatee is stated to be "John Howard," and that the bequest is a legacy or sum to be invested on real or government security for the use of the legatee until he attains twenty-one, within twelve months after the deceased's death, as per codicil; and if the legatee should die under twenty-one, then over to the sons of the testator; that is the description, and the duty is 15*l.* The receipt of the legacy is ("received," of course, being struck out), "Retained in trust, the 25th of March 1847," (therefore, exactly the day twelve months after the death of the testator, and for an obvious reason,) "the sum

of 1,500*l.*, being the legacy or trust sum above mentioned": that is signed by Thomas Chaffer and Benjamin Chaffer, and the same exactly for the other legacy in favour of the Temples. It was argued that upon the inspection of these documents it would appear that they were signed only by the party executing them, by Benjamin Chaffer, and that Thomas Chaffer merely put his name as a witness of the execution by Benjamin Chaffer. Now, in the first place it would be extremely absurd to have a witness of that; it does not require a witness; if ever a name is put as a witness, it is altogether a work of supererogation, but upon the inspection of it, it is clearly to be signed by Thomas and by Benjamin as being the executors of the testator, and they both sign it. I do not see the slightest indication of Thomas having put his name merely as a witness to the execution by Benjamin. Then what is the state of the case? Is this a case in which there has been a setting apart and placing in the hands of Benjamin in his character of trustee of the term these two sums of money? Not the slightest. It was merely this, that in order to pass the residuary account which required the payment of the legacy duty, as well as all the others, it was merely for that purpose that there was this every-day form which is done nineteen times out of twenty by executors when they have not actually paid the legacies but want to pay the duty upon them, they say, "retained in trust." It appears to me that is no appropriation whatever. In fact, there is no suggestion founded upon any act done that there has been an appropriation. In the chief clerk's certificate he finds that these legacies are unpaid, and there is nothing said about their having been appropriated, although he does not find that they were unappropriated; the question was not referred to him, and he was only to ascertain what legacies there were unpaid. It appears to me, under these circumstances, that these legacy receipts operate nothing as an appropriation. I am of opinion that the plaintiff and the other legatees, Mrs. Temple and the parties entitled to that legacy, are entitled to priority over each of the mortgagees. There must be a declaration to that effect; there must be an ascertainment of the relative values of the properties mort-

gaged, and the principal, interest and costs of these legatees must be provided for by a first charge to the extent of the term of 800 years, must be provided for by mortgage or sale of that term, in order to raise the amount, throwing the same *pro rata* on the different properties mortgaged, which is justice and equity between the mortgagees *inter se*. I suppose (I cannot do it except by arrangement) that it might be better for the mortgagees themselves, instead of selling or mortgaging the term to sell or mortgage the fee. All that I do with respect to the costs is this, that the costs of the plaintiff and the costs of Mrs. Temple and the parties representing that legacy, the costs of this suit and any other costs as incumbrancers will be added to the principal and interest due to them respectively, and will have to be raised, that is, two sets of costs to the legatees, not deciding any question as between the mortgagees. Whatever personal estate remains in specie must first be applied and sold. The executors will have their costs as part of the costs of the suit.

KINDERSLEY, V.C. } THE ATTORNEY GEN-
July 16. } ERAL v. ETHERIDGE

Orders of the 6th of March 1860—Fee for revising Print of Answer—Sums received by Solicitor for Copies of Answers.

*The fee of 2*d.* per folio for revising the print of a defendant's answer can be allowed only in those cases where the defendant swears to and files a printed answer.*

*The sums paid for office copies of answers at 4*d.* per folio, and for ordinary printed copies at ½*d.* per folio, are payable to the defendant, and when received by his solicitor must be applied in reduction of the cost of printing the answer.*

This was a motion to vary the Taxing Master's certificate. The suit was by information and bill, and at the hearing it was dismissed with costs as against all the defendants. The costs were taxed in the usual way, and the Taxing Master had refused to allow the following classes of items, which formed the subject of the second and third of certain objections taken

by the defendants to the Taxing Master's certificate :

	£.	s.	d.
Revising print of the answer of the defendant Benjamin Copeland Etheridge, at 2 <i>d.</i> per folio before filing ...	4	12	6
Revising print of the answer of the other defendants, at 2 <i>d.</i> per folio before filing	1	8	2
Printer's charges for printing the answer of the defendant Benjamin Copeland Etheridge	26	18	10
Disallowed	9	5	0
Printer's charges for printing the answer of the other defendants	11	1	0
Disallowed	2	16	4

As to the first class of items, which were the subject of the second objection, the question was, whether, the plaintiff having sworn and filed a *written* answer, the fee for revising the print ought to be allowed.

As to the second class of items which were the subject of the third objection, the amounts disallowed were in respect of the sums paid by the plaintiff to the defendant's solicitors for certified copies of the answers, at 4*d.* per folio, which sums the Taxing Master held must be treated as having been received in reduction of the cost of printing the answers; and, consequently, the full charges for printing be disallowed to that extent.

There had been a difference of opinion among the Taxing Masters in reference to the first question, and the practice had varied in the different offices; but after consideration on the present occasion, they had come to the conclusion that the fee for revising ought to be allowed only where a printed answer was filed.

The Taxing Master (Mr. Wainewright) had given written reasons for his decision, which were as follows: The Taxing Masters are of opinion that the true construction of the order of the 6th of March 1860 is, that the fee of 2*d.* per folio to revise, in addition to 2*d.* per folio for examining and correcting the proof, applies to cases in which the print of the answer is sworn to and filed. The fee is given "for revising the print before swearing or filing." Now, having reference to the directions of the 2nd and 3rd sections, it appears that the defendant is to swear to and file his written answer; after that he is to get it printed from a certified copy, and within

four days thereof to leave a print with the Clerk of Records. It is not possible, therefore, for him in such case to revise the print before swearing, and the print in such case is never filed; it is the written answer which is filed. But when the defendant swears to and files a printed answer, then this fee is given for the double revision of the print before the defendant is required to swear to it. The strict verbal construction of the Order seems to render it impossible to say that the second revision is to apply to a case where a written answer is filed. The 5th section says, "Notwithstanding the preceding orders, a defendant is to be at liberty to swear to and file a printed answer:" and the fee given "for revising the print before swearing or filing" is considered to apply only to the cases in which a printed answer is sworn to and filed, or filed without oath or signature. In addition to the verbal construction of the above Order, there seems to be some points for consideration. Where a written answer is filed, and the printed answer is to be made from a certified copy which cannot be altered, is more than 2*d.* per folio for examining and correcting the proof necessary, it being borne in mind that only 2*d.* per folio is allowed in the case of printed bills for correcting proofs, and no fee for revising? If a printed answer be sworn and filed, it must have been examined and corrected; but though quite correct as a print, the defendant before swearing it may wish an alteration made, and this renders a revise necessary. This requires a larger fee than when a written answer is filed; also, if the schedule of fees to this Order is of a compensatory character, it must be considered that in the case of a written answer being filed, there is the profit on the written copy for filing, which does not take place when a printed answer is filed.—On the third objection the question is whether the money paid by the plaintiffs for the certified copy of the answer at 4*d.* per folio, and also for the copies at $\frac{1}{2}$ *d.* a folio (for all are in the same position), should be retained by the defendants' solicitors for their own use, or be credited by them to their clients, the defendants, in diminution of the expense of printing the answer. In the General Orders of the 6th of March

1860 there is no intimation given that the defendant's solicitor is to keep those monies for his own use; on the contrary, the payments are to be made, not to the defendant's solicitor, but to the defendant—see section 7. of the Orders; and the 14th section of the Orders refers to a schedule of fees to be taken by solicitors; but the payment for these copies is not in that schedule. In the case of printed bills, since their origin in 1852 to the present time, the plaintiff's solicitor has invariably given credit for sums received from the defendant for printed copies of the bill (at $\frac{1}{2}d.$ per folio) to his client, the plaintiff, in ease of the expense of printing the bill. In the Orders of the 7th of August 1852, as to printed bills, the Schedule A. contained this clause: "For printer's bill (as paid), deducting any copies paid for by the defendant." The solicitor's fees in this Schedule A. have been incorporated with other fees to solicitors in the Consolidated Orders, which came into operation on the 14th of February 1860; but the said clause in Schedule A. not containing a fee to solicitors, has not found a place in the Consolidated Orders. In the case of printed answers, under the Orders of the 6th of March 1860, the same practice has been carried out by the Taxing Masters to this time, that is to say, they have held that the money paid for copies of the answer (whether at $4d.$ per folio or $\frac{1}{2}d.$ per folio) belongs to the defendant, and not to the defendant's solicitor, and therefore that the defendant's solicitor must give credit for the same (when received) to his client, the defendant, who pays for the printing and should be entitled to the benefit of the sale of copies.

Mr. Marten, in support of the motion, as to the first class of items, for all the defendants, except William Bonfield.—Under the Orders of the 6th of March 1860, it was at the option of the party to have his answer either written or printed; if the former, before the printed copy could be lodged at the office, it must be carefully gone through, therefore a charge for revising was allowed. The reason why the charge for revising was inserted was, that up to the last moment before filing a defendant might wish to make some alteration, perhaps a most material one, and therefore there must be a revise before a certificate

could be made—*Morgan's Chancery Orders*, 3rd edit. pp. 679, 682; *Orders of the 6th of March 1860*, rules 2, 3, and 5.

Mr. Hardy opposed the motion.—One copy, whether printed or written, was to be filed; if written, the print was not filed, but simply left at the office. A printed answer might be filed, though neither sworn nor signed; and in a case in which Lord Combermere was defendant there were interrogatories to the amended bill, the object being to get discovery, and the answer of great importance, and yet the putting in the answer on the honour of a peer (which was in the place of swearing) was dispensed with, and it was filed only. There could be no separate charge for revising.

Mr. Marten was heard in reply.

KINDERSLEY, V.C.—Finding that the Taxing Masters have arrived at a particular conclusion, I should hesitate very much in expressing a different opinion, more particularly as previously their opinions had not been uniform; it is, nevertheless, my duty to consider upon the Orders, whether that conclusion is a correct one; not whether it is reasonable that certain allowances should be made, but whether, under the Orders, a certain amount of a particular item should be charged, and beyond that the Taxing Master cannot allow a farthing. It appears to be optional with the defendant to swear to and file a written or a printed answer; and if he swears to and files a written answer, there must be, at the same time, left a fair written copy, and the Clerk of Records and Writs must examine it with the printed one, and certify that it is correct, and from that, when certified, the defendant causes a print to be made, but as printers' mistakes must be guarded against, the table of fees includes one for attendance with the written and printed copy and the certificate, in addition to examining and correcting the proof, $2d.$ per folio, and also another fee of $6s. 8d.$ to the solicitor for attending the printer. Then comes the item in question, "for revising the print before swearing or filing it, $2d.$ per folio." It is clear that a portion of this item at least, "for revising print before swearing," refers to the swearing a printed and not a written answer, there being no print in the case of filing a written answer until after it has been sworn and filed,

certificate made, &c. But the words are not only "for revising the print before swearing," but before "filing." It has been contended that these words refer to the case of a defendant who swears to a written answer and leaves a printed copy; but that is not the natural construction of the words; they refer to the case of a defendant filing the print which it is not required that he should swear to, and there may be cases, no doubt, (as Mr. Hardy has stated there have been,) where the plaintiff dispensed with the oath and signature, though they must be peculiar and rare. If the Taxing Masters had not come to the conclusion they have, it is the conclusion I should have arrived at, and therefore the objection cannot be supported.

Mr. Marten then moved as to the second class of items.

KINDERSLEY, V.C.—I have no doubt on this question. When these Orders were under consideration, on the question of the propriety of printing answers, the idea was to compensate the defendant, in the case where a very few copies were required, for it required a certain number to be taken to be remunerative. The plaintiff might require, as of right, ten copies and as many more as he chose to pay for; and he must also pay for the stamp and 4*d.* per folio, but in that case the defendant was not to charge the printer's bill and retain the compensation; the motion therefore on both points must be refused with costs.

WOOD, V.C. } MOLESWORTH v. SNEAD.
July 20. }

Practice—Short Cause—Notice.

A plaintiff setting down his cause as short, without the consent of the defendant, is bound to give notice to the defendant that he has done so; and in the absence of proof of such notice a decree cannot be made in a short cause against a defendant who does not appear.

The plaintiff in this case gave to the defendant the usual notice of a motion for a decree. The plaintiff, afterwards, without the consent of the defendant, set the cause

down as short, and did not give any notice to the defendant that he had done so. The cause came on to be heard, the defendant did not appear at the hearing, and a decree was made.

In drawing up the decree, the Registrar took the objection that there was no evidence that the plaintiff had given notice to the defendant that he had set the cause down as short, and desired that the matter might be mentioned to the Court.

Mr. B. L. Chapman, for the plaintiff.—The 33rd of the Consolidated Orders requires that notice of a motion for a decree should be given. This has been done, and nothing more is required. The rule 10. of the Regulations of March 15, 1860, states that "causes may be marked short without the consent of the solicitors for any of the defendants." There is, however, no direction as to any notice to be given to the defendant.

WOOD, V.C. said, that he had no doubt on the point, and that the plaintiff ought to have given notice to the defendant. The best way to remove the defect would be that the plaintiff should set the cause down on the next day for hearing short causes, and give notice to that effect to the defendant.

KINDERSLEY, V.C. } Re BARBER'S WILL.
July 30. }

Trustee Relief Act—Jurisdiction—Retention of Part of the Fund for Costs.

The jurisdiction of the Court of Chancery under the Trustee Relief Act does not extend beyond the fund actually paid into Court; and the Court cannot, upon petition under that act, order a trustee to refund monies retained by him for costs.

This petition was presented by George Alderson Emmerson and Maria his wife, and Agnes Clementina Barber, and it prayed that the costs of the petitioners, preparatory to and of and incidental to this application might be taxed as between solicitor and client, and out of 41*l.* 13*s.* 10*d.* (the fund in Court) and any cash uninvested the costs might be paid to the petitioners' solicitors, and one-half of the residue paid to the peti-

tioner George Alderson Emmerson in right of his wife, and the other half to Agnes Clementina Barber, and that the trustees might be ordered to pay to the petitioners in equal moieties a sum of 16*l*. This sum of 16*l*. was the amount retained by the executors of the will of Thomas Barber, in respect of costs of paying the fund in question into Court. The title of the petitioners was established, and the only question was as to the jurisdiction of the Court to order the executors to refund this amount.

Mr. W. Pearson appeared for the petitioners, and contended that the trustees were not justified in retaining the costs of the payment into Court, but that such sum ought to have been paid out of the testator's residuary estate. The cases were conflicting, but on the whole it was now established that, when part of a fund was paid into Court under the Trustee Relief Act, the Court had jurisdiction over the whole, a general jurisdiction over the trust—

Woodburn's Will, 1 De Gex & J. 333; s. c. 26 Law J. Rep. (N.S.) Chanc. 522.

The petitioners were therefore entitled to the 16*l*.

Mr. Millar appeared for the trustees. —This was not the case of a legacy paid in, but of a sum the title to which was uncertain, and the cases were directly in point, shewing not only that the trustees had a right to sever the costs and retain a sum to answer them, but that the Court had no jurisdiction over anything but the fund paid into Court.

Mr. W. Pearson was heard in reply.

Cases cited:

Re Jones, 3 Drew. 679.

Re Cawthorne, 12 Beav. 56; s. c. 18 Law J. Rep. (N.S.) Chanc. 116.

Re Cater, 25 Beav. 361–6.

Re Knight's Trust, 27 Beav. 45; s. c. 28 Law J. Rep. (N.S.) Chanc. 625.

Re Hue's Trust, 27 Beav. 337; s. c. 28 Law J. Rep. (N.S.) Chanc. 893.

Re Bartholomew's Will, 16 Sim. 585; s. c. on appeal, 19 Law J. Rep. (N.S.) Chanc. 237.

Re Hodgson, 18 Jur. 786.

Lewin on Trusts, edit. 1861, p. 265.

Goode v. West, 9 Hare, 378; s. c. 21 Law J. Rep. (N.S.) Chanc. 127.

Re Bloye's Trust, 1 Mac. & G. 488; s. c. 19 Law J. Rep. (N.S.) Chanc. 89.

The Attorney General v. Alford, 4 De Gex, M. & G. 843.

Thorp v. Thorp, 1 Kay & J. 438.

Re Lazarus, 3 Ibid. 555.

Re Heming's Trust, 3 Ibid. 40; s. c. 26 Law J. Rep. (N.S.) Chanc. 106.

KINDERSLEY, V.C.—The simplest ground of decision would be, if some distinct authority could be found upon the subject. Looking at the words of the act itself, it would be a great stretch to say that it was meant by the legislature to give jurisdiction to deal with any portion of the trust fund other than that actually paid into Court. Questions relating to the costs I consider to be clearly within the jurisdiction, because they are connected with the question of jurisdiction as to how the money paid in is to be disposed of. The 1st section gives an absolute discharge to the trustees to the extent of the money paid in, and no further; and the trustee may, either from timidity or indifference, when he ought to regard the trust fund as a sum of, say 10,000*l*., only admit 5,000*l*., not dealing at all with the other 5,000*l*., but only with that which is paid in; the general jurisdiction of the Court being applicable to the rest. There can be, however, no doubt that, looking only at the language of the 2nd section, the signification is very extensive, sufficient to embrace the whole trust fund; but if such a meaning were given to the words, so that they would have a meaning extending to the administration of the trust fund beyond the amount paid in, where is it to stop? If the matter were *res integra*, my own opinion would be, and I think I have so decided on a former occasion, that the Court has no jurisdiction over any portion except that which is actually brought into Court. The principle as enunciated by the Courts seems to lie between the cases of *Bloye's Trust* and *Woodburn's Trust*. In the first of these cases, the very question arose, a trustee having paid in the whole fund, except 89*l*., which he retained to answer the costs of paying the fund in; and the question was whether the Court had any jurisdiction over that part of the fund not paid in, that is, the 89*l*. so retained? and the Lord Chancellor having the matter brought to his attention, was of opinion that there

was no jurisdiction over the 89*l*. Then, as to the second case, of *Woodburn's Trust*, it must be admitted that it is a higher authority than the other, being the decision of the full appellate Court; but on looking at the arguments in that case, it is evident to me that this question was never raised before their Lordships, and that they never meant to decide it. The point raised there was, whether, upon the fund being divided, the Court had jurisdiction to order the trustee to pay costs: which was a new point at that time. But the question here is, whether the Court has jurisdiction over money not brought in. So, what we have is this, the Lord Chancellor deliberately deciding one way, and the full Court not having the question raised at all before them. Under these circumstances, of course, I must abide by the decision of the Lord Chancellor, and the trustees will have their costs of this application out of the fund, and the rest of the petition will be as prayed.

KINDERSLEY, V.C. }
July 28, 30. } MOSS v. SYERS (1).

Joint-Stock Company (Limited)—Power to issue Preference Shares.

Under the articles of association of a joint-stock company, the company was empowered at a special meeting to increase the capital of the company by the issue of new shares, to be of such nominal value and subject to such conditions as to payment of calls or proportion of profits, as might be determined:—Held, that this did not authorize the issue of preference shares.

This case (in which an interim order had been made on the 21st of July) now came on upon a motion for an injunction to restrain the directors of the Strand Music Hall Company (Limited) from issuing preference shares.

The company was incorporated on the 4th of July 1862, with a nominal capital of 25,000*l*., in 2,500 shares of 10*l*. each.

The company was projected by Robert Syers, and consisted of himself, the Honourable F. H. Fitzhardinge Berkeley, Messrs.

Stevens, Magnus, Britten, Lawrance and another, who took one share each, for which they subscribed the articles of association.

The company was registered, a prospectus was issued, and the plaintiff applied for and was allotted fifty shares.

The company had offices at 345, Strand; and negotiations and an agreement having been entered into with respect to obtaining a lease from the Marquis of Exeter, a special report was issued in a printed form in October 1862 referring to that matter, and also to the plans as to building, &c.

On the 16th of May 1863 a circular notice was issued that a general meeting was fixed to take place on the 28th, with a special meeting immediately afterwards to issue preference shares to the amount of 25,000*l*. At that meeting accounts and a balance-sheet were produced, and resolutions were passed respecting them, and also that preference shares should be issued.

The bill alleged that these resolutions were not in fact passed, although the chairman declared them to be so, but that in fact the shew of hands was against them; in consequence of which proceedings of the chairman, the plaintiff and other shareholders present drew up a written protest on the spot, and handed it in.

On the 29th of June a special meeting was held for the purpose of confirming what had been done at the previous meeting of the 28th of May.

The bill then stated, in substance, that at this special meeting on the 29th of June the chairman, the moment the clock struck one, put the various resolutions and declared them carried, in the absence of the mass of the shareholders: in consequence of which the plaintiff and other shareholders present held a meeting themselves, at which they passed various counter-resolutions, particularly that the former proceedings were invalid, and that preference shares ought not to be issued.

It appeared that, under the agreement with respect to the lease of the company's premises, Robert Syers had taken a transfer of certain shares, and that these same shares were now held by some of the directors.

The two clauses on which the questions turned were the 35th and 55th, which were as follows:

(1) See the next case.

The 35th. "The company, in special meeting, may authorize the borrowing of such sum or sums of money, and on such terms and conditions as they may think fit; and may also, by the resolution of a special meeting, to be convened by not less than fourteen days' notice to be sent by the General Post to every shareholder stating the object for which such meeting is to be held, increase the capital of the company by the issue of new shares, which shares shall be of such nominal value, and subject to such conditions as to the payment of calls or proportion of profits, as may be determined on by the resolutions creating the same."

The 55th. "The company may from time to time, by resolution passed by at least three-fourths of the votes of the shareholders present personally at an extraordinary meeting, alter or make new provisions in lieu of or in addition to any regulations of the company, whether contained in these articles or not."

Mr. Glasse and *Mr. C. Locock Webb*, on behalf of the plaintiff, having stated these facts,

Mr. Roxburgh and *Mr. Fry*, for Robert Syers, submitted, by way of preliminary objection, that the frame of the suit was defective.

KINDERSLEY, V.C.—I cannot decide this without hearing the case; but I may suggest whether the case cannot be argued on the point, whether there is a right to issue preference shares under the provisions of the articles of association.

Mr. Swinburne appeared for the Hon. F. H. Fitzhardinge Berkeley.

Mr. Osborne and *Mr. Street*, for Mr. Stevens.

Mr. Baily and *Mr. George Murray*, for Mr. Magnus.

Mr. Speed, for Mr. Britten.

Mr. Sleigh (of the common law bar), for Mr. Lawrance, the secretary.

Authorities referred to :

Edwards v. the Shrewsbury and Birmingham Railway Company, 2 De Gex & Sm. 537.

York and North Midland Railway Company v. Hudson, 16 Beav. 485; s. c. 22 Law J. Rep. (N.S.) Chanc. 529.

Beck v. Kantorowicz, 3 Kay & J. 230.
New Brunswick, &c. Company v. Mugeridge, 4 Drew. 686.

KINDERSLEY, V.C. — Although various questions may arise at the hearing of this cause, I shall, at present, confine myself to the question whether the directors of this company have power to do what they are proceeding to do; that is, issue preference shares. It appears to me that, under the articles of association, there is not power in the directors or the company to create or issue shares of a preferential nature, entitling the holder to the receipt of dividends in priority to the other shareholders. The language of the only section (the 35th) which bears upon this question is, that the directors may increase the capital by issuing new shares, which shall be of such nominal value as may be determined on. That is the only clause which authorizes that being done; but it does not authorize the issuing of preferential shares. It has been said that, under the 55th clause, the directors of the company have power to alter any of the regulations, which, if so altered as to give the power, then it might be done; and it was also said, that it had been done by the resolution which did authorize the issuing of the preference shares. That is not so. If this was a meeting held for the purpose of altering the regulations, and giving power to the directors or body at large which did not necessarily previously exist, there must have been due notice of what was intended to be done to make that binding, and that was not given. All the proceedings at the meeting may have been perfectly regular, and I do not, by any means, intend to restrain the directors or the company from proceeding to hold any meeting or meetings they may think fit to call, or, in fact, to do what they please; nor do I mean to express any opinion as to what may be done with respect to any other form of issuing shares; but I will grant an injunction to restrain, till the hearing or further order, the directors from creating or issuing any share or shares entitling the holders or holder thereof to the payment of dividends in priority to any other shareholders.

The remainder of the case then stood over until Michaelmas Term.

KINDERSLEY, V.C. }
 July 30; } MOSS v. SYERS (2).
 Aug. 1. }

Practice—Omission to file Printed Bill within the Fourteen Days.

A written bill being filed on the usual undertaking to file a printed bill, the fourteen days prescribed by the 4th rule of the 9th Consolidated Order elapsed without a printed bill being filed, the clerk, whose business it was to do so, being called into the country on business of his employer, and not informing him of his omission; and the written bill was taken off the file. Subsequently an injunction was moved for and obtained. Upon proceeding to file interrogatories the omission was discovered, and a motion made for leave to file a printed bill notwithstanding that the fourteen days had elapsed:—Held, on the authority of the case of Ferrand v. the Corporation of Bradford, that the omission must be regarded as a venial slip, and that the written bill should be restored to the file, and a printed bill received; the plaintiff paying the costs of the application.

Where a plaintiff omits to file a printed bill within the fourteen days, the application to the Court for leave to rectify the omission should not be made ex parte, but upon notice, and, as a rule, the defendants are entitled to appear upon the application, and the plaintiff must pay their costs.

This was a motion for leave to file a printed bill, notwithstanding that the written bill had been taken off the file, in consequence of the expiration of the fourteen days, under the 4th rule of the 9th Consolidated Order. The bill was for an injunction to restrain the issuing of preference shares by the defendants, as directors of the Strand Music Hall Company (Limited) (2), and the usual undertaking was given to file a printed copy within the fourteen days, which expired on the 29th of July. Copies of the bill were printed and furnished to the defendants' solicitors; but the clerk of the plaintiff's solicitor, whose duty it was to file the printed bill, omitted to do so; and the clerk of records

and writs, in compliance with the 4th rule of the 9th Order, took the written bill off the file on the expiration of the fourteen days.

A motion for an injunction had been moved for *ex parte*, and an *interim* order made. On the 28th of July the motion was renewed on notice, and argued; and on the 30th of July, the omission to file the printed bill not being known, an order for an injunction was made.

On the 30th of July, after the making of the order on the motion for the injunction, the plaintiff's solicitor attended at the office to file interrogatories, but was then, for the first time, told of the fact that the written bill had been taken off the file, the printed bill not having been filed. A motion was then made on the same day, on behalf of the plaintiff, *ex parte*, for leave to file a printed bill as on the 29th of July, and his Honour made the order. Under this order a printed bill was filed on the 30th of July; but on the 31st his Honour said that he had received a communication from Mr. Murray, the clerk of records and writs (who attended in Court), and he (the Vice Chancellor) was of opinion that the order ought not to have been made *ex parte*, but that notice should have been given to the defendants.

At a subsequent period of the same day counsel for the plaintiff mentioned the matter, and referred to the cases of—

Mold v. Wheatcroft, M.R. Nov. 5, 1859, Registrar's-book, M. 144;

Lyon v. Phillips, V.C. S. 1859, L. 139; and

Warren v. Furnival, V.C. S. June 13 1862 (not reported),—

as authorities that such orders had been made upon *ex parte* applications.

His Honour then thought that the matter had better be mentioned to the Lord Chancellor.

This was accordingly done, and his Lordship considered that it was a case in which notice should be given, and gave leave to serve notice of motion for the same day, before this Court, provided his Honour's consent could be obtained; and he, on application made to him, gave leave to serve notice of motion for the following day.

Notice was given in pursuance of this leave, accompanied by a letter, in which the

(2) See last preceding case.

plaintiff offered to pay the defendants such costs as had been incurred on the motion ; but added, that if the defendants appeared they would do so at their own risk, as otherwise the plaintiff objected to their having the costs of their appearance.

The present motion was then made for leave to file a printed bill, notwithstanding that the fourteen days had elapsed as above.

An affidavit was made by the clerk of the plaintiff's solicitor, whose duty it was to have filed the printed bill, wherein he stated that he had received instructions in the course of business to file the printed bill, and had made an entry in the diary which he kept that he was to do so on the 29th ; but on that day he was suddenly and unexpectedly called away into the country upon business of his employer, and omitted either to file the printed copy, or to tell his employer previously to his departure that he had not done so.

Mr. Glasse and *Mr. Charles Locock Webb*, in support of the motion, argued that this was a mere slip, and within the jurisdiction of the Court's discretionary power to relieve against. In the case of *Ferrand v. the Corporation of Bradford* (1) the Master of the Rolls relieved against a mere omission to file the printed bill which took place under pressure of circumstances, similar to those occurring in this case here, and his decision was affirmed on appeal to the Lords Justices. If the Court had the power, the question of costs must be dealt with on the same footing, and the matter must be treated as if the omission had not taken place ; the defendants, therefore, would not be entitled to their costs.

Mr. Roxburgh and *Mr. Fry* appeared for *Mr. Syers*, and contended that, inasmuch as there was no bill on the file and no suit at the time the motion was argued and the order made, this case did not come within the authority of the case of *Ferrand v. the Corporation of Bradford*, and the defendants must have all the costs of suit, and the motion must be refused, with costs.

Mr. Baily and *Mr. George Murray* appeared for *Mr. Magnua*.

Mr. Osborne and *Mr. Street*, for *Mr. Stevens*.

Mr. Swinburne, for the Hon. F. H. Fitzhardinge Berkeley.

Mr. Speed, for *Mr. Britten* ; and

Mr. Sleigh, of the common law bar, for *Mr. Lawrance*, the secretary, took the same line of argument.

Mr. Glasse was heard in reply.

KINDERSLEY, V.C. (after stating the facts).

—Subsequently to making the order on the *ex parte* application, *Mr. Murray*, the Clerk of Records and Writs, had an interview with me, and in consequence of that, upon consideration, I was of opinion that the *ex parte* application ought not to have been granted, or rather that it was not a case for an *ex parte* application, but that notice should have been given to the other side, and I accordingly considered that an application should be made to the Lord Chancellor, and on that being done, his Lordship was of the same opinion. Meantime, I thought that matters should be kept *in statu quo*. With respect to the question now before me, the matter stands thus : the 6th section of the Chancery Improvement Act, 15 & 16 Vict. c. 86, which introduced the practice of printed bills, referring to cases in which there might be pressure, such as applications for writs of *ne exeat regno*, injunction bills and cases in which infants were concerned, and considering that great injustice might be done if the matter were to be delayed until a bill could be printed, and unless a written bill were allowed to be filed at once, enacted that a written bill might be filed, provided that, within fourteen days from such time, a printed copy was filed ; and to carry out that enactment, the Order on the subject of the 7th of August 1852, was made, which has now become the 4th rule of the 9th of the Consolidated Orders ; and it is the duty of the officer, without waiting for the application of any one, to take the written bill off the file on the expiration of the fourteen days ; and on that being done, the defendants are entitled to be paid all the costs of the suit. Now, that is a very stringent order, and shews how strongly the Lord Chancellor, who signed and assisted in framing those Orders, felt the necessity of enforcing the undertaking of filing the printed bill within the fourteen days, by the severe penalty attached to its non-

(1) 21 Beav. 422 ; s.c. 8 De Gex, M. & G. 93 ; 25 Law J. Rep. (N.S.) Chanc. 389.

performance, which, remarkably enough, is for the benefit of the defendants, who do not appear to have suffered by the omission; but there is the express direction; so that the moment the written copy is taken off the file, the defendants acquire a right to have the costs of the suit paid to them. If the matter were *res integra*, I should hesitate a great deal before I should decide that this Court could deprive the defendants of that right; but, on the other hand, no doubt, it has jurisdiction to dispense with the exigency of the severity of the General Orders in special cases. I am, however, relieved from the decision of the question by the opinion of the Master of the Rolls and the Lords Justices in the case of *Ferrand v. the Corporation of Bradford*. I have been furnished with a copy of the order in that case as drawn up, and it appears that in that case, the fourteen days having expired, the exigency of the order was dispensed with, and the order made in that case was affirmed.—[His Honour referred to the facts in that case.]—The question, therefore, now is, whether there has been a slip here, as in that case, or whether the circumstances of the present case justify the Court in saying that, notwithstanding that decision, the authority of that case does not apply? There the omission was caused by the illness of a senior clerk, which thus created a pressure on the rest of the office, so that one of the junior clerks, whose duty it was to have filed the printed bill, forgot to do it; and the Court considered that to be such a slip as a Court of equity would relieve against. In the present case, the clerk whose duty it was to have filed the printed bill, states in his affidavit that he was obliged to leave London on the very day on which it should have been done on business of his employer, and forgot to intimate to him, previously to his departure, that it had not been done, and, in fact, did not tell him of the omission until after the expiration of the fourteen days, and until after the motion for the injunction had been made and the injunction granted. It really appears to me that that is just the same kind of slip as occurred in the case cited: a certain kind of pressure occurred, in the one case extra work to do, in the other case leaving London on business of his employer, the

result being that it was forgotten. In one sense, no doubt, the omission was culpable, being a forgetfulness; but in another sense it was venial, inasmuch as it took place under the pressure of circumstances, and therefore I think I must come to the same conclusion in this case as the Master of the Rolls and the Lords Justices arrived at in the case of *Ferrand v. the Corporation of Bradford*. The only difference in this case is, that in the meantime, after the expiration of the fourteen days, the order for the injunction was made, when, in fact, there was no bill upon the file, and in that sense no suit, and therefore it is said that order is a nullity. However that may be, the Court will leave to the defendants the responsibility of acting upon it if they think fit. But the question now is, whether the Court is to order a printed bill to be filed *nunc pro tunc*, as it appears to me to be unnecessary to determine what was the effect of the omission, whether the order for the injunction is a nullity or not, that being no reason why a printed bill should not be filed. Whichever way it is to be regarded, the present order must be the same as that made in the case referred to of *Ferrand v. the Corporation of Bradford*, that is, that notwithstanding the expiration of the fourteen days, the written bill, which has been taken off the file, may be restored to the file, and a printed copy received and filed to be dated on the 28th of July, the day on which it ought to have been filed. With respect to the costs, this is not a motion of course, but it comes on upon the merits, and the Court must be satisfied on the question before it can deprive the defendants of their right to the costs which they have under the order. The defendants clearly have not only a right to be served, but also a right to appear and to be heard, and the Court would be actually taking from them their right to costs, if it did not give them, as, moreover, they can know nothing of the merits of the case, unless or until they appear. I am of opinion, therefore, that the plaintiff must pay the costs of this application.

ROMILLY, M.R. }
Feb. 11, 12. } **BROMLEY v. WILLIAMS.**

Ship Insurance—Mutual Association—
35 Geo. 3. c. 63. s. 11.—*Parties.*

A club or association of shipowners was formed for the mutual assurance of ships belonging to the members, and the regulations by which the association was governed provided for the management of affairs by a finance committee, consisting of treasurer, secretary, &c., for the creation of a general fund or stock, by payment of premiums, &c.; and if the funds were at any time found insufficient the treasurer was to collect from each member such a per-centage as might be deemed necessary. No provision was made for granting policies, and the regulations were apparently framed on the assumption that policies would not be needed:—Held, notwithstanding the enactment of the 35 Geo. 3. c. 63. s. 11, that the association was not illegal.—Whether, in order to found a valid claim for a loss, in any particular case, a policy must have been granted, quære.

Upon a bill filed by a member of the above-described association, to recover the amount of a loss incurred by him, alleging that no finance committee had been appointed, —Held, that seven of the members were properly made defendants as representing the whole body, and that the treasurer and secretary (though not alleged to be members) were properly made defendants as being the active managers of the concern, and having the control of the funds.

Where a probable, though not a perfectly clear, equity was alleged by the bill, the Court overruled a demurrer and allowed the plaintiff to go to the hearing, reserving the points raised.

This was a hearing of three demurrers put in to the bill.

The bill was filed, by John Marshall Bromley, against Vivian Stevens Williams, the treasurer, William Tonkin, the secretary, and seven members of the Saint Ives Shipping Insurance Club, and prayed that the plaintiff, as creditors' assignee of John Dale, a member of the club, might be declared entitled to payment of 250*l.* and interest after deducting the amount of premium properly payable in respect of a ship called

the *Betsy* at the time of her loss, out of the monies and property of the club, or by the rateable contributions of the persons who were members at the time of her loss; and that the amount might be paid out of the funds of the club, or that it might be raised and paid by the persons who were members of the club at the time of the loss of the ship, or such of them as might be liable to contribute thereto, according to the rules of the club and the customary mode of payment and satisfaction of claims in use in the club; and for effectuating the purposes it asked for all necessary accounts and inquiries.

The bill contained statements to the following effect:

The club was formed in July 1858, and the members consisted of a large number of shipowners, who mutually insured the ships of each other against loss, and agreed to contribute to such loss in rateable proportions to the extent of the amount insured by them respectively; the club had been continued from year to year, down to the year 1860, and carried on business under rules and regulations, which, in 1860, contained the following:

"1. The members of this club shall be owners, part-owners or ship's husbands of vessels belonging to any port in the United Kingdom. Its affairs shall be managed by the members generally, assisted by a treasurer and secretary.

"2. Annual meetings shall be held on the first Wednesday in January and March pursuant to three days' notice to each member stating when and where such meeting will be held; in January to audit the accounts and to elect a treasurer, secretary, auditors, finance committee and surveyors; in March to value all vessels in the club, and alter the rules if necessary; and at either of these meetings any other business may be transacted.

"3. The treasurer shall keep the accounts of the club, collect all premiums, calls, fines and other items of income, and dispose of the same in accordance with the orders of the annual or other meetings, but he shall not disburse any of the funds unless by order of such meetings respectively signed by the chairman, secretary, and at least four other members.

"4. The secretary shall attend all meet-

ings, and enter in a book the resolutions which from time to time may be adopted. He shall keep a record of all other proceedings, issue the notices necessary for convening meetings, preserve all letters, notices and papers received by him, and keep a copy of all correspondence carried on in behalf of the club.

"5. The finance committee shall consist of three members, who shall examine the treasurer's accounts monthly, sign all cheques and see that the funds are duly appropriated.

"6. Provided that five surveyors should be appointed out of the members who had been two years in the club.

"7. The finance committee, surveyors and auditors shall form a committee for the transaction of urgent business in case of the stranding or loss of any vessel.

"8. All questions discussed at any meeting shall be determined by a majority either by open vote or ballot as at the time may be deemed most expedient, and in case of equality of votes the chairman shall have the casting vote.

"13. Vessels entering shall pay as follows :—One-third part of the per-centage of the amount of the stock in hand when entered, one-third at the end of two months, and the remainder at the end of four months from the date of entry; but should losses or other circumstances require an earlier payment of the second and third instalments it shall be made accordingly on the secretary giving notice thereof.

"14. When the stock of the club is reduced below 5*l*. per cent., there shall be a payment of 10*s*. per cent. per quarter on the amount insured on each vessel, and if the funds are at any time found insufficient to meet the claims, the treasurer shall be ordered to collect from each member such a per-centage as shall be deemed necessary.

"15. All vessels at sea in any or either of the months of October, November, December, January, February and March shall, for every month or part of a month so at sea, pay a premium of 7*s*. per cent. on the amount insured.

"16. Any member neglecting to pay any premium, call, or fine for the space of one calendar month after it becomes due and notice thereof given by the secretary, shall

pay a fine of 10*l*. per cent. per month on the amount, and at the end of two calendar months from the date of the notice shall be deprived of all benefit of insurance until such arrears are paid.

"26. In case of the loss of any vessel notice thereof in writing must be sent by the owner or master to the secretary without delay, and the amount insured shall be paid to the owner, or to his order, three months after such loss shall be proved to the satisfaction of the club."

In the month of July 1858, John Dale, of Penzance, was admitted a member of the club in respect of his vessel the *Betsy*, and he insured her in the club against loss in the sum of 250*l*., which was far below her value; and such insurance was duly entered in the books of the club by the secretary thereof.

From that time to October 1860, John Dale paid to the secretary all premiums, calls and fines due from him in respect of the insurance of the said vessel, and otherwise as a member of the club, according to the rules and regulations; but through some mistake he omitted to pay the premiums which became due in October 1860, and on the 18th day of that month the defendant William Tonkin, the secretary, sent him a notice that unless the premiums then due from him in respect of the said vessel, and which amounted to the sum of 3*l*. 15*s*., were paid on or before the 13th day of November then next, the claim of the said John Dale upon the said club would be forfeited.

On the 23rd of October 1860 the *Betsy* was totally lost at sea.

On the 25th of October 1860, John Dale sent to the secretary notice of the total loss of the said vessel, and on the following 26th of October he remitted the sum of 3*l*. 15*s*. to the secretary through the Penzance Bank, but he refused to receive it; he then, before the 13th of November 1860, tendered the 3*l*. 15*s*. to the treasurer in cash, but he, on the part of the club, refused to receive the same, and such premium was never paid.

John Dale, on the 11th of January 1862, was duly adjudged a bankrupt by the Registrar of the County Court of Bodmin, and, on the 11th of March 1862, the plaintiff was appointed the creditors' assignee of his estate and effects,

The plaintiff, as such assignee, applied to the secretary and treasurer of the said club, and required payment from the members of the said club of the sum of 250*l.*, the insurance on the ship, and requested them to raise the amount out of the funds of the said club, or by contribution from the members thereof liable thereto, the plaintiff having offered to allow the amount of the unpaid premium to be deducted therefrom, but the defendants refused to pay the same.

The bill then alleged that the seven other defendants were members of the club when the vessel was lost, that they still continued members but denied the liability of themselves and the other members of the club to pay the sum of 250*l.*, and that there was no finance or any other committee in 1860 for the management of the affairs of the club; that the other members of the club were numerous, and could not conveniently be made parties to the bill, and that to do so would prevent the prosecution of the suit with effect.

The bill then charged that the seven defendants, parties to the suit, sufficiently represented the members of the club liable to pay or contribute towards the payment of the 250*l.*

The defendants put in three several demurrers to the bill for want of equity: the one by the secretary, another by the treasurer, and the third by the seven defendants who were members of the club.

Mr. Speed, in support of the third demurrer on behalf of the members of the club.—It is not alleged that the liability to the plaintiff's demand rests with these defendants; they had no power to raise money from the members. The demand, if any existed, was several and not joint; the finance committee was the only body liable for any claim; it was through them alone that the funds of the society could be reached. The club, however, had no legal right to grant insurances; there were no policies granted, and it was not alleged that any policy existed; but even assuming that the association was legal, the allegation that the premium was not paid or tendered before the ship was lost, shewed that the contract was determined; this was fatal to the plaintiff's claim; no equity for the relief asked was made out, and it would

not be given upon a forfeiture for the non-payment of premiums.—

Strong v. Harvey, 3 Bing. 304.

35 Geo. 3. c. 63. s. 11.

Mr. Southgate and *Mr. Bevir*, for the plaintiff.—The object of the suit was to obtain a contribution from the members of the club, which had omitted to appoint a finance committee; the bill was therefore properly filed against individual members. The 35 Geo. 3. c. 63. was passed to prevent unstamped policies from being underwritten, but here mutual assurance was alone contemplated and no policy was required; the contract between the parties was legal, but assuming a policy to be necessary the want of an allegation that it was duly made would not be fatal to the bill. The 16th rule of the club allowed premiums to be paid within a month after they were due, and it did not deprive the insured of the advantage secured to him for two months after default. Here the premiums were tendered within a month, nothing further was required, and the notice by the secretary was a waiver of all penalty.

Taylor v. Dean, 22 Beav. 429.

Hutchinson v. Wright, 25 Ibid. 444;

a. c. 27 Law J. Rep. (N. S.) Chanc. 834.

Sarazin v. Hamel, ante, 378.

Pattison v. Mills, 1 Dow & Cl. 342.

Mr. Speed, in reply.

The demurrers on behalf of the treasurer and secretary were then opened.

Mr. Speed, in support of the demurrers.—These defendants ought not to have been made parties to the suit. In suits against corporations the secretary was made a party, it being the only means of obtaining discovery, as a corporation could only answer under its common seal; but that had no reference to private partnerships, unless for some specific reason alleged it was shewn to be material that the servants of the company should be made parties to the suit. In this case the bill contained no such allegation, neither was it alleged that either the treasurer or secretary was a member of the club.—

How v. Best, 5 Madd. 19.

Story on Equity Pleading, pl. 166, ss. 2. 325.

Fenton v. Hughes, 7 Ves. 287.

Miford on Pleading, 188, 320, 152, 4th edit.

Mr. Southgate and Mr. Bevir.—By the rules of the society the secretary and treasurer have ministerial and directing powers; in the absence of any committee or other managing body, it was necessary to make them parties. In bills against companies the directors were constantly made parties.

The Great Western Railway Company v. Ruskout, 5 De Gex & Sm. 290.

Simpson v. Denison, 7 Rail. Cas. 403.

Munt v. the Shrewsbury Railway Company, 20 Law J. Rep. (N.S.) Chanc. 169.

Beman v. Rufford, 1 Sim. N.S. 550; s. c. 20 Law J. Rep. (N.S.) Chanc. 537.

Sturge v. the Eastern Union Railway Company, 7 De Gex, M. & G. 158.

Mr. Speed, in reply.

THE MASTER OF THE ROLLS.—There are four objections taken to this bill, considering all the demurrers together; three are technical, they may be important; the fourth is upon the merits. The first objection is that the association is an illegal one; the second, that the defendants are not personally liable to be sued; the third, that at all events the treasurer and the secretary cannot be sued; and the fourth is, that, upon the facts stated, the plaintiff has no equity.

The company was a set of persons joined together who put into a common fund sums of money proportioned to the amounts which they required to be paid to them in case of the loss of the vessels to which they were entitled. It may be called an insurance; and it was, in fact, an insurance. They were in the nature of a joint-stock company, or partners in particular adventures. Each person had a ship, and each person valued it at so much as was the proper sum to be paid in case the ship should be lost, and each paid a certain proportion into a bank or common fund for that purpose. It is suggested that this must be an illegal association; that the statute 35 Geo. 3. c. 6. makes it illegal. Upon looking at that statute, I am of opinion that is not so. The statute was really intended to prevent gaming among underwriters: it related to the underwriting of policies, and this is not at all affected by the act, nor does it make it illegal for per-

sons who are owners of ships to join together and make a common fund by which they severally contribute among themselves in case of the loss of a ship. The cases cited shew that. Whether it is necessary to have a policy appears extremely doubtful. I should be inclined to think that it is not, but that will be open to the defendants at the hearing of the cause; at present it is not necessary to go beyond what the rules state.

The second objection is, that the defendants, other than the treasurer and secretary, are not the persons to be sued. It is true they are members of the association, and contribute to the common fund; they are persons holding ships, and they have agreed to contribute among themselves to the losses. But it is said that, by the rules, the company is to be governed by the finance committee, and that this committee shall carry on the whole business of the concern; but that in fact no finance committee has ever been appointed, and that consequently there is no body of management, and that being so, it is impossible you can do anything against the association except by suing the individual members. The first question is, can you sue all the individual members? Supposing all the members are made parties, what objection could there be? It is to be observed that, unless I hold that the plaintiff can sue all the members, and that this association is not an illegal association, the only consequence would be that the treasurer and secretary, if they have a material control over the funds, have nothing to do but to put the amount which is in their custody into their pockets, and tell the rest of the shareholders, "We have nothing to do with you; you cannot come against us." Mr. Dale was a shareholder, and the same objection would apply to any one of the other defendants if they lost a vessel and came to have the insurance paid. The rest of the members might say, "You have nothing to do with us." And if the matter is managed by the treasurer and secretary, who have the control of the fund, and who may have received so much, they might take the money simply themselves and say, "You have nothing to do with us; you were foolish enough to pay your money, but having done so, you have no claim against us, and we

will act and deal with it as we think fit." The objection is made because they think that the plaintiff has no merits, and they want by this side-wind to avoid contesting the question of merits. But the necessary conclusion would be, if I so held, that it would depend upon the honour of the treasurer, whether he would put the money in his pocket or not. The other members could object, and say that he is bound to account; that this was an association in which they were entitled to have the fund set apart and duly administered, according to the terms upon which they had contributed it. If that is so with respect to all the members of the association, then, this rule is well established, that if they are so numerous that they cannot be made parties to a cause with any chance of bringing it to a hearing, that abatements and the like would make it impossible to bring it to a hearing, then you may make two or three of a class defendants to represent the interest of that class. Formerly that was not the practice of this Court, but that has been modified and altered to suit the exigencies of modern practice. It has been held that you may make three or four members defendants, provided the interest of all those persons whom you make defendants is the same as the interest of all those whom you do not make defendants. If there are three or four classes of contributors to a concern, or in a joint-stock company, who have separate and conflicting interests, then you may select two or three from each class to represent that interest, in the same way as if the whole class had really been brought before the Court. It is obvious that this is not a case in which the plaintiff could have sued on behalf of himself and all other members of the concern, because he is actually suing the concern, and his interest is in conflict with them all. It sometimes happens that there is a class of members of a company which have a conflicting interest with the others; and then the plaintiffs, if they are very numerous, put two or three on behalf of themselves and all the others, describing the particular interest, against all other persons who are members and who are defendants, according to the view of the parties. This case comes within that rule. A few persons may be selected here and made defen-

dants to represent the rest of the body, who are not members before the Court. Consequently, in that respect, I think the bill is correct.

The next question was, whether the treasurer and secretary can be sued, and certainly that was a question of more nicety and difficulty, as it does not appear by any allegation in the bill that they are members of the concern. But it is clear they are part of the governing body, the affairs are to be managed by the members generally, assisted by the treasurer and secretary. Then it appears that the treasurer has got the fund. It is the right of every member of the company to ascertain how the treasurer administers the funds of the company, and in what manner he employs them, and he is bound to account for the mode in which he has administered them. Here, it appears, he has acted in this matter upon his own authority, or upon the authority of some other member of the company, refusing to receive certain monies, and refusing to pay certain other monies: this is entitled to consideration. Here they make a claim to the funds, and to an account of how the funds are administered. It appears from the statements here, that the treasurer and secretary are the only two persons who manage the concern and have the control of the funds, and they are properly made parties therefore to a bill for this purpose. That is distinct from the ordinary case of a corporation, where the clerk of a corporation is made a party merely for the purpose of giving evidence on oath, which a corporation cannot do.

These three grounds, although very important to be fully considered at the hearing of this cause, are matters which are, in their nature, technical; and they are only expedients whereby the defendants say, "We won't go into the question of merits." But, in my opinion, their case in this respect fails.

I have now to consider whether, upon the question of merits, the case also fails. The case is this upon the merits: Mr. Dale had a ship called the *Betsy*; he assessed the value of the ship at 250*l*. The premium to be paid was, 3*l*. 15*s*. in respect of this sum. The premium was duly paid up to the month of October 1860, but after the month of October 1860 he did not

pay one; and the secretary wrote to him on the 18th of October to inform him that he had not paid it, and that he must pay up his subscription. In the mean time, on the 23rd of October the vessel was lost. Upon the 25th, the owner of the *Betsy* sent to the association asking for the amount of the loss, upon which the secretary says, "You have not paid the amount of what was due last October;" upon which, two days after, he sends the amount, tenders it, and thereupon the secretary refuses it. He tenders it several times, and upon all occasions the secretary refuses it. Will that entitle a person to the same benefit as if he had paid it before he knew of the loss? It is a question of some nicety. The 16th rule induces me to overrule the demurrer. There is some ambiguity as to its effect and meaning; but it is sufficiently in favour of the plaintiff to say that he is entitled to have this cause heard. The amount of the premium was alone tendered; there does not appear to have been any tender of the fine of 10l. per cent. per month upon the amount, and it is now contended that it would not be due unless the premium had been neglected to be paid for one calendar month after it became due; and that was not so in the present case, upon the facts alleged in the bill.

Upon that part of the case, leaving untouched the question whether the knowledge of the loss would make any difference with respect to that clause, the question must be reserved to the hearing, when the matter may be determined. The demurrers cannot be sustained.

WOOD, V.C. { THE LEATHER CLOTH COMPANY (LIMITED) v. THE AMERICAN LEATHER CLOTH COMPANY (LIMITED).
July 7, 8.

Trade-Mark—Injunction.

In 1855 J. R. and C. P. Crockett, in partnership with other persons, carried on business as manufacturers of leather cloth, both at Newark, in the United States, and at West Ham, in England, under the style of the Crockett International Leather Cloth Company. In 1857 the C. I. L. C. Company sold to a newly-formed English company, "The Leather Cloth Company (Limited)," their business in England, together with their

right to use, in Great Britain, the trade-marks up to that time used by them. The L. C. Co. thereupon commenced business at West Ham, using the trade-mark previously used by the C. I. L. C. Company, which contained the words "J. R. & C. P. Crockett, Manufacturers," and also the words "Crockett International Leather Cloth Company, Newark, N.J. U.S.A., and West Ham, Essex, England." On bill filed by the L. C. Company (Limited) to restrain a colourable imitation of this trade-mark by a rival company in England:—Held, that although the goods sold by the plaintiffs were not, in fact, manufactured by J. R. & C. P. Crockett, and although the plaintiffs had no manufactory at Newark, U.S.A., they were entitled to be protected in the use of the trade-mark.

The L. C. Co. had a patent for "tanned leather cloth," and were in the habit of stamping "Tanned Leather Cloth, Patented" on all their goods, whether tanned or not:—Held, that as any person could see whether the cloth was tanned or not, this was not such a misrepresentation as to preclude them from relief in a Court of equity.

Hall v. Barrows observed upon.

This was a suit instituted by the Leather Cloth Company (Limited) to prevent the use of a particular trade-mark by the American Leather Cloth Company (Limited).

Messrs. John R. Crockett and Caleb Pearson Crockett carried on business together at Newark, in the State of New Jersey, as manufacturers of a fabric which obtained considerable celebrity, and was generally known as Crockett's Leather Cloth.

In 1852 this manufacture was first introduced into England by Messrs. Crockett through the agency of a certain firm of Dodge & Brewster.

In 1854 this firm, which consisted of two partners, namely, N. S. Dodge and H. P. Brewster, was dissolved, and a fresh partnership created between N. S. Dodge, L. S. Bacon and R. L. Giandonati, under the style of Dodge, Bacon & Co.

In 1854 L. S. Bacon and R. L. Giandonati became partners in the American firm of "Crocketts," and the style of the last-mentioned firm was thereupon changed to "Crocketts & Co."

In October 1855 the members of the firm of Crocketts & Co. dissolved partnership, and, together with certain other persons, established in America a joint-stock company, which was duly incorporated, under the style of the Crockett International Leather Cloth Company; the chief objects of the company being the manufacture of leather cloth in America and in the kingdoms of Great Britain, France and Germany.

Previous to the formation of this International Company certain improvements in the manufacture and in the machinery used had been invented by C. P. Crockett; and upon the establishment of the International Company, the firm of Dodge & Co., as agents for and on behalf of the International Company, took out patents for these inventions both in England and France. Those taken out in England were the following :

On the 20th of October 1855 for improvements in machinery or apparatus for spreading or distributing waterproofing or similar composition over webs or sheets; and on the 14th of January 1856 for improvements in the preparation or manufacture of tanned leather cloth.

Upon the establishment of the International Company the firm of Dodge & Co., as agents for the International Company, procured a lease of a certain factory at West Ham, in Essex; and, on behalf of the International Company, commenced and carried on the manufacture of the fabric known as Crockett's leather cloth.

In 1857 the International Company determined to dispose of its lease and business at West Ham and of the benefit of the patents in England and France, and appointed C. P. Crockett its attorney to effect such sale.

In the same year negotiations were commenced by the firm of Dodge, Bacon & Co. and Jean Baptiste Athanase Lorsont for the formation in this country of a company, with limited liability, having for its object the purchase of the factory and business at West Ham, and the carrying on the manufacture of leather cloth. These negotiations resulted, in 1857, in the formation of the Leather Cloth Company, Limited (the plaintiffs in this suit), which was duly incorporated. As a preliminary to the formation of the plaintiffs' company an agreement, dated May 21, 1857, was entered into between

L. S. Bacon, N. S. Dodge, R. L. Giandonati and J. B. A. Lorsont, for themselves jointly and severally, and C. P. Crockett, as the attorney of the International Company of the one part, and John Murray as agent for the then intended Leather Cloth Company, Limited, of the other part, whereby it was, amongst other things, agreed, that the said parties thereto of the first part, or any of them, would not directly or indirectly carry on, nor would they, to the best of their power, allow to be carried on by others in any part of Europe, any company or manufactory having for its object the manufacture or sale of productions which were the subject of the above-mentioned letters patent, and manufactured in the business or manufactory at West Ham, as above mentioned, and would not communicate to any person or persons the means or processes of such manufacture so as in any way to interfere with the exclusive enjoyment by the said intended company of the benefits thereby agreed to be purchased.

The benefit of the above-mentioned patents, and the lease and factory at West Ham, were eventually purchased by the plaintiffs for 20,000*l.*, and assignments of the benefit of the several patents and of the lease of the premises at West Ham were made to the plaintiffs by two several indentures, each dated the 8th of July 1857. By one of such indentures, made between N. S. Dodge of the first part, the International Company by C. P. Crockett (therein described as the true and lawful attorney of the last-named company) of the second part, and the plaintiffs of the third part, the above-mentioned letters patent, the machinery, tools and fixtures at West Ham, and the goodwill of and in the business carried on by the International Company at West Ham, were assigned to the plaintiffs; together with full power and authority for the plaintiffs to use all and singular the trade-marks theretofore used by the International Company in the course of their business at West Ham.

Upon the establishment of the plaintiffs' company, they immediately commenced, and have ever since continued the manufacture of leather cloth according to the processes of manufacture before used by the International Company.

From the date of their incorporation down to the month of July 1859, the plaintiffs employed, as their sole agents for the sale of their manufactures, N. S. Dodge & R. L. Giandonati, who were carrying on business in partnership, L. S. Bacon having retired from the firm.

At the date of the above-mentioned purchase the International Company were using as their trade-mark,

An American Eagle, above which was printed "Excelsior," and below were the words following :

"Crocketts & Co.
Tanned Leather Cloth,
Patented Jan. 24th, '56.
J. R. & C. P. Crockett,
Manufacturers.
12 yds."

the whole being surrounded by the following words in a circular form :

"Crockett International Leather Cloth Company, Newark, N.J., U.S.A. West Ham, Essex, England."

The plaintiffs, upon completing the aforesaid purchase, immediately adopted the above-mentioned trade-mark, and used it for stamping their goods of the first quality.

In August 1861, the American Leather Cloth Company, Limited (the defendants in the present suit), were incorporated for the purpose of carrying on the manufacture and sale of leather cloth.

The defendants' manufactory was situate in the Old Kent Road, on the premises formerly used by Messrs. Dodge & Giandonati. The general manager of the defendants' company, Mr. Thomas, and the secretary, Mr. Stonard, were both previously in the employ of Messrs. Dodge & Giandonati, as clerks, and the defendants' manager at the works in the Old Kent Road, Mr. Wegelin, had been previously in the employ of the plaintiffs' company, first at West Ham and afterwards at Rouen.

The defendants adopted as their trade-mark for goods of the first quality the following : above the symbol of an eagle the word "Superior," the following words being printed beneath :

"Leather Cloth,
Manufactured by their Manager,
Late with
J. R. & C. P. Crockett & Co.,
12 yds.
Old Kent Road, London,"

the words "American Leather Cloth Company, Limited" being printed in a semicircle over all.

On the 27th of September 1861 the plaintiffs filed a bill praying that the defendants might be restrained from selling any goods marked with the above-mentioned trade-mark, or any other stamp or trade-mark so contrived or expressed as by colourable imitation or otherwise to represent the fabric or article manufactured or sold by the defendants as being the same fabric or article as that manufactured or sold by the plaintiffs, or as being the fabric or article known as Crockett's leather cloth.

It appeared from the evidence that the defendants' manager at the works in the Old Kent Road, W. Wegelin, never had been employed by J. R. & C. P. Crockett & Co., but that Thomas, the general manager, had been employed by Messrs. Dodge & Co. at the time they were acting for the Crocketts. Thomas admitted that he had always been paid by Dodge.

The case set up by the defendants was that there was nothing distinctive in the plaintiffs' trade-mark—that other persons used a similar trade-mark, and in particular that Messrs. J. R. & C. P. Crockett continued to use a trade-mark identically the same as that used by the plaintiffs, except that the words "West Ham, Essex, England," were omitted, and that the use of such trade-mark by Messrs. Crockett had never been interfered with by the plaintiffs. That Giandonati, as a partner with Crockett & Co. in America, was entitled to use this trade-mark, and that he had never parted with his right. And further, that the plaintiffs were not entitled to relief because they were in the habit of affixing their above-mentioned trade-mark to all their first-class leather cloth, whether tanned or untanned, whereby the public were deceived ; and the defendants further contended that the patent was of no real value, the tanning being absolutely injurious to the cloth ; and that the patent had been obtained solely to enable the plaintiffs to introduce the word "patent" in their trade-mark.

Evidence was, however, produced shewing that Messrs. Crockett's business was confined to the United States, and that if they had exported any goods to this country for sale, they had never had any depôt here.

The plaintiffs also produced evidence that although most customers shewed no preference for "tanned" leather cloth, yet that the London, Brighton and South-Coast Railway Company would use no other. It was also proved that the leather cloth manufactured by Messrs. Crockett had obtained considerable celebrity in the trade under the designation of "Crockett's leather cloth," and that the defendants when asked for "Crockett's leather cloth" supplied leather cloth manufactured by themselves and stamped with their above-mentioned trade-mark.

Sir H. Cairns and Mr. Dickinson, for the plaintiffs, cited the following cases :

Croft v. Day, 7 Beav. 84.

Edelsten v. Vick, 11 Hare, 78.

The Collins Co. v. Brown, 3 Kay & J. 423.

Webster v. Webster, 3 Swanst. 490.

Churton v. Douglas, Johns. 174; s. c. 28

Law J. Rep. (N.S.) Chanc. 841.

Batty v. Hill, 1 Hem. & Mil. 264.

Dent v. Turpin, *Tucker v. Turpin*, 2 Jo. & H. 139; s. c. 30 *Law J. Rep. (N.S.)* Chanc. 495.

Mr. Rolt and Mr. T. H. Fischer, for the defendants, cited the following cases :

Perry v. Truefitt, 6 Beav. 66, 418.

Hall v. Barrows (before M.R.), ante, 548.

Motley v. Downman, 3 Myl. & Cr. 1; s. c. 6 *Law J. Rep. (N.S.)* Chanc. 308.

Flavel v. Harrison, 10 Hare, 467; s. c. 22 *Law J. Rep. (N.S.)* Chanc. 866.

Blanchard v. Hill, 2 Atk. 484.

Bury v. Bedford, 1 New Rep. 5.

WOOD, V.C. (after stating the circumstances).—The questions I have to consider are, first, what was the trade-mark alleged to have been improperly taken; secondly, how far, regard being had to the late case before the Master of the Rolls, there could be any parting with the right; then how far, if parted with, others were left in possession of it, so that it could not be regarded as denoting the peculiar business carried on by the plaintiffs; and lastly, there is a difficult question as to the circumstance of certain *indicia* in that trade-mark which speak of letters patent having been obtained, having been put upon a class of goods, as to which the patent had not been obtained.

As regards the trade-mark, there is no dis-

pute as to the fact of the firm having been constituted and the manufacture having been carried on by successive firms both in America and here. Messrs. J. R. & C. P. Crockett being the original inventors, they afterwards take into partnership the West Ham firm, and then merge themselves in the International Company. The plaintiffs' mark shews it was a mark used from the time of that merger, and the mark is this—in a circle, the words "Crockett's International Leather Cloth Company, Newark, N. J., U.S.A. West Ham, Essex, England." All that part was perfectly true at the time of the invention of this mark. Then there is put the American eagle and "Excelsior" over it, "Crockett & Co." underneath; then there is "J. R. & C. P. Crockett, manufacturers, 12 yards," underneath that. Then there is in the intermediate space "Crockett & Co., Tanned Leather Cloth, Patented Jan. 24th, 1856." That is a mistake; it should be the 14th, but nothing turns on that. I will read it as if it was the 14th of January 1856. All this is anterior to the assignment, and according to the evidence the whole of this mark, including this objectionable part, was in use before the assignment, and was a thing not assigned, because I observe the draftsman has done it in a very correct form, taking my view of what the trade-mark is, he has assigned the goodwill of the business, but he has only given full power and liberty to use the trade-mark, which is the right form of disposing of an interest of this description.

The first objection raised to the plaintiffs' case, irrespective of the merits or demerits of the defendants' case, is this: It is said that the parties could not part with the use of the trade-mark in the manner in which they proposed to part with it by the deed of 1857, because the trade-mark represents on the face of it that the goods are manufactured by J. R. & C. P. Crockett; it represents also Crockett's international manufacture; it represents that their manufacture is in the United States—at Newark, as well as at West Ham, Essex; and that from the time the assignment was executed the parties who were to carry on the manufacture in England would no longer carry it on in New Jersey by J. R. & C. P. Crockett, and that it was, in fact, an entirely new company, and that upon the principles upon which this Court

has acted with reference to trade-marks, according to which it will not allow the public to be deceived, these various misrepresentations, wholly irrespective of the question about the patent, were such as to render it impossible for the Court to assist the plaintiff. Now, the question as to what is or is not the possession of the trade-mark, I think, has been so clearly laid down by Lord Langdale in *Perry v. Truefitt*, that I would rather use his words than my own. He says, "I think that the principle on which both the Courts of law and equity proceed in granting relief and protection in cases of this sort is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end; he cannot, therefore, be allowed to use names, marks, letters or other *indicia* by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or has not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception and in order to attract to himself that trade or custom which without that improper act would have flowed to the person who first used or was alone in the habit of using the particular name or mark." The same case indicates also one of those instances in which fraudulent misrepresentation on the part of the plaintiff will render it impossible for this Court to assist him.

I should observe, both in that case and in the case of *Pidding v. How* (1), the Court did not refuse to give any assistance, but said it would not assist the plaintiff till he had established the right at law; and I have done the same thing myself; I have retained the suit, with liberty to bring an action. This question never rests upon property at all, but it is simply a question whether or not the act of the defendant is such an act as to hold out,

on the part of the defendant, that his goods are the manufacture of another person, which manufacture has become known by certain names, or whatever the *indicia* may be which distinguish goods of his manufacture from those of the manufacture of any other person. The Master of the Rolls, in *Hall v. Barrows*, observed that the doctrine did not wholly rest on fraud, although in law it is necessary the *scienter* should be alleged before the plaintiff can recover. This Court has held, that it is not necessary to prove the *scienter*, but the Court will grant an injunction to prevent that which will deceive the public, although it may be proved that the defendant had no fraudulent intent at the time he made the representation. I think the difference between the Courts of law and equity in that respect is, that the Courts of law do not think that the defendant has made himself liable to an action where the *malus animus* does not exist; while this Court does think if he continues that representation after he has been told what the nature of the plaintiff's right is, he will be committing a fraud, and the case may be put in substance as being founded on the jurisdiction of this Court to prevent fraud by one person on the right of another.

With regard to the right to property, the Master of the Rolls also made some observations upon a particular class of cases in which the right ought to be proved to be almost a right to property; but even then I doubt whether it would amount to what this Court would think property: for instance, in the case where the manufacture has derived its merit from the locality, as in the case of vineyards that have acquired a reputation for a particular quality of wine: if there is a vineyard of a particular character, and the initials of the vineyard are marked upon the wine-vessels to indicate the growth of that particular locality, a sale of that vineyard might include the use of the mark that denoted the growth of that particular property, so that the Court would prevent any other person from indicating his wine to be the growth of that particular land, which it was not.

I should not have commented so much upon this if it had not been for the judgment of the Master of the Rolls, which makes it seem to me to be proper to express

(1) 8 Sim. 477; s. c. 6 Law J. Rep. (N.S.) Chanc. 345.

my views on the principles of law which are to govern me in granting or not granting the injunction in the present case.

Then it is said, How can you part with this right? If it had been a sale of land—take the case of a vineyard, which I have mentioned—you would not allow a man to buy that land and then to sell his own inferior productions from some other part of the kingdom stamped with that mark. But here the question is a very different one—a trade-mark has been used for a number of years by an established manufacturer of the name of Crockett, who has manufactured his goods of a quality that induces persons to purchase them—the question is, whether that mark may be used after he has ceased to make the article. Now I have had occasion to consider that certainly two or three times over—it did not come upon me by surprise; I have frequently had occasion to reflect upon the subject, and it does appear to me that if I were to hold that it is not competent for a person who has once acquired a reputation in his trade, on parting with his trade, to continue his name in the business, I should be striking at an enormous number of cases as being fraudulent. The business of this country has been conducted on a perfectly analogous principle for centuries, that is to say, manufacturers put the same mark on the goods, they being manufactured at the same place with the same machinery. A man has purchased the whole of the trade and the secret of the trade (because that is the case here, the method is not to be divulged); if such a man is not to be allowed to call his manufacture what it was when he took to it, then Messrs. Child are wrong in calling their bank Childs' Bank. Instances might be found throughout every class of trade in this metropolis; I believe a very large portion of them indeed are carried on by persons under a particular name when there is not one single person of that name in the firm. If it is said confidence is given to the name, take the case of solicitors' firms, where the confidence is still greater than in ordinary businesses; I should be much surprised if a firm of solicitors who were to continue the name of the old firm, were to be told they could not recover their costs because there was a fraud in holding out the name of a person

no longer existing. I should certainly hold a person may write the same name over a shop-door that has acquired a celebrity by that particular name. The shop is known; the kind of goods supplied there is known; and to suppose the public rely upon a particular individual is absurd; it may be brought to this, that they rest on the civility of a particular partner, and when that partner retires it ought to be notified. I apprehend I should be carrying the case a great deal too far if I were to lay down any such doctrine as that. The case before the Master of the Rolls does not go nearly to that length, there is nothing of the kind decided there; but, inasmuch as there was one partner who had a right to the trade-mark, the Court could not dispose of it against that partner.

Mr. Roll.—With regard to that point about solicitors, there is a provision in the Solicitors' Act, 6 & 7 Vict. c. 73. ss. 26, 32, that if a solicitor carries on his business in the name of another, he shall not recover his costs.

The VICE CHANCELLOR.—That is quite a different case. I am talking of a deceased person. That provision in the Solicitors' Act strikes at this: that a solicitor shall not carry on business for a person who is not on the Attorneys' Roll. I am speaking of the case of a deceased partner who never could be again a solicitor. I happen to know several firms who have the names of deceased partners in the firm, and I should be exceedingly surprised if their costs were called in question because the names of the deceased partners still remained in the firm. That act was passed *diverso intuitu*, not to prevent a fraud on the public in that sense, but to prevent a person not qualified from interfering in the carrying on of the business. I hold, therefore, that the plaintiffs were perfectly entitled, having made this purchase, to use that trade-mark which had been used at the time by those who parted with the business to them. Upon the face of it, in truth, the plaintiffs' trade-mark tells three stories to anybody who looks at it: there is the "Crockett's International," the "Crockett & Co.," and then "J. R. & C. P. Crockett, manufacturers": the transfer of the trade is marked upon the face of it for some purpose or other. Take the case of Morison's Pills: I apprehend

Morison's Pills would be protected now, as they have been before in two or three cases, though nobody of the name of Morison is now entitled to manufacture them; and the single circumstance of continuing the name in the trade-mark is not one that will prevent the plaintiff from obtaining relief in this Court. Then it is argued that, at all events, no one can come into the Court and say, "I am entitled to this trade-mark," when somebody else is entitled to use it just as much as himself, and that not even against a wrong-doer: in that case, could the Court interfere? That is the question I had to consider in the case of *Tucker v. Turpin*, *Dent v. Turpin*. I think that case presented more difficulties arising from its circumstances. No doubt every case must be decided on its own circumstances. The whole jurisdiction of the Court rests upon this, that B. is not fraudulently to palm off his goods as the manufacture of A. If a man says his goods are known by a certain mark, which does not denote his goods more than it denotes the goods of thirty or forty other persons—and that is the case I had to consider as to the prize medal in *Batty v. Hill*—the Court would find it excessively difficult in such a case as that to interfere; at the same time, where as in *Dent's case* two sons of a testator or two partners separated, each of them manufacturing goods under a name which had acquired celebrity, and which each was entitled to use, I have a strong opinion that, as against a wrong-doer, either of them might bring an action; and, in that case, the two combined might say, "You have no right to represent these goods as ours. We are the successors of Dent; this name is a valuable property to us; and it is not because there happens to be two of us, instead of one, that this Court will allow a wrong-doer to carry on that manufacture." I have not nearly so strong a case here; because nobody except the plaintiffs has used "Crockett & Co." from the date of the assignment in 1857. Nobody has done anything of the kind in England. Mr. Giandonati says he was a partner with Crockett & Co. (I think, on the evidence, it was in America), and that he has a right to use the name of Crockett. If Mr. Giandonati had been manufacturing by that name, the defendants would answer, "How do

you know they are your goods, if Mr. Giandonati has a right to the manufacture as well as you? It might be a difficulty. I dealt with it in *Dent's case*, though I have not to deal with it in this. Nobody has ever used this mark except the gentlemen in America; and if for four years Mr. Giandonati has allowed this trade-mark to go out as the only trade-mark in England, all I can say is, nobody would think they were Giandonati's goods when the goods were sold. But Mr. Giandonati has never done anything of the kind: if it had been "West Ham" and all the rest upon the goods, it would only be designating the goods of the plaintiffs.

Before I go into the question about the patent, I will consider how far the defendants' trade-mark is an interference with the plaintiffs. I prefer taking that point first. The covenant and agreement was probably much too large to be enforced in a court of law, and very probably the plaintiffs would not have succeeded in an attempt to enforce a covenant of that description, not to manufacture in Europe; but as a fact they have not used this trade-mark so parted with. They have in America gone on manufacturing certain goods upon which appears the name of Crockett & Co. No doubt Crockett & Co. is a very valuable part of the trade-mark for reasons I shall state presently; but what appears about the use of it is this, that another firm having the right to use it in America, and never having manufactured a single article here with that name, do export to those who choose to buy their goods; they sell in America to those who choose to buy them here; they have no depôt here in the sense of its being the depôt of Crockett & Co. Then it comes to this: the question is, whether I am to refuse to interfere against a wrong-doer as to a mark used wholly and solely upon goods manufactured by one particular firm, so that any person asking for that manufacture would at once be furnished with the plaintiffs' goods, and none other; because a person in America has reserved to himself the right of using that name and sending the goods to England, the manufacture not having taken place in England? It appears to me, that again is a case very much stronger in favour of the plaintiffs than the

case of the Dents. It turns out there are only two firms in the world using the name of Crockett & Co.—one in America, and one in England having a different class of trade, and who are well known by the wholesale dealers to sell an improved article. I do not think that circumstance has really any bearing on the case; what we have as the defendants' case is this: the defendants find themselves in a position (and I do not dispute their right) to use a name similar to the plaintiffs' name; it is difficult to invent any other, it must always be a leather cloth company. Then they use (which is not necessary) an eagle, which is the device in the trade-mark of the plaintiffs, but spread out in a different form from the plaintiffs' eagle; and then they have over the eagle the word "Superior" written exactly where the plaintiffs write the word "Excelsior," so that the two things correspond. Why they should have so near a resemblance I do not know, but probably that would not be sufficient ground for the Court to interfere by way of injunction; still the observation arises that those who do go so near the mark should take care not to add anything unnecessarily which shall approach to that which is the most valuable part of the mark. Unquestionably the name of Crockett & Co. is the most valuable part in the plaintiffs' mark. All those other things might have been of very little consequence to the plaintiffs, but then the defendants consider how is the name "Crockett" to be brought in? The defendants have brought it in thus: "leather cloth manufactured by their manager, late with J. R. & C. P. Crockett," and it is so put that it comes just in the corresponding portion of the mark, and in the same style of letter.

Now, that being so, let us first see what is the value of this mark. It appears from the defendants' evidence manifestly that this name of "Crockett's" leather cloth is of great importance. I find the plaintiffs the sole successors to the Crocketts' business. What do we find in the defendants' mark? They say, "manufactured by their manager, late with J. R. & C. P. Crockett & Co." No doubt, if their manager was really late with J. R. & C. P. Crockett & Co., they would have a right, in some way or other, to intimate that fact to the cus-

tomers; but they have clearly not a right to indicate it by putting J. R. & C. P. Crockett exactly in the same place as the plaintiffs, the same size, and coupled with all the other *indicia*, though not thoroughly corresponding, because it is a half-circle instead of a complete circle; but putting it in the same type and in the same place. I say, supposing them to have a clear right to use this name, and they are doing it *bona fide*, they would not have a right to do it in that mode and in that place; and, moreover, I do not think this is done *bona fide*.

What has happened is this: Here is a business established in the Kent Road in 1858; it was a business of three years' standing; it had been unfortunate, the partners became bankrupt, and they had to start again; and they get into their service Mr. Thomas and Mr. Wegelin, who had been employed at West Ham. Wegelin was never employed by J. R. & C. P. Crockett. Mr. Wegelin seems to have come into their service after the Crockett International Company was formed. If it means him, therefore, it is not the truth at all. Then Mr. Thomas says, "I am the person"; but he is so in a very shadowy sense. He was employed at West Ham at a time when Mr. Bacon, on behalf of the firm, went to America, and in America formed a partnership with the American firm, on behalf of the West Ham firm. Mr. Thomas never was there while the Crocketts had anything to do with it; he was never paid a farthing by the Crocketts, but always by Mr. Dodge; and the most that can be said is, by a stretch of names he was at one time engaged in that firm, and it might be called an employment by Crockett & Co. When we find this method resorted to, and when we find in the cross-examination of Thomas there is a little hitch as to whether it is Thomas or Wegelin that is intended, one cannot help seeing plainly that nobody would have cared about Thomas or Wegelin having been in that firm if it had not been for the "J. R. & C. P. Crockett" in the trade-mark. It does appear to me that by adding that very important designation to all the rest of it, the defendants have entitled the plaintiffs to the assistance of the Court, because they have plainly interfered with their right.

Now comes the last point, which is one

that has given me great anxiety, especially upon the evidence; although I contemplated the possibility of such a case as now seems to be stated. No one can feel more strongly than I have done the necessity of keeping plaintiffs, who come into court to be relieved against a fraud, to acts of good faith on their part; and I believe the case of *Flavel v. Harrison* was the first in which it happened that, on the facts, the Court refused an injunction, because the person had marked his goods patent, and they were not patent; and I shall do the same on any future occasion. In the case of *Edelsten v. Vick* a person originally had a patent, when he stamped the word "patent" on his articles, giving no date to his patent, and he continued that long after the patent had expired, it appeared to me that was not a case in which I could say the plaintiff had acted fraudulently to the public; the goods bore a *bona fide* trade-mark. It was a patented article; he obtained that *bona fide*, and having done so, he continues his original trade-mark without alteration, because it is well known any alteration in a trade-mark is a serious matter to a man who has once established a mark in the trade, and the persons who deal with him must be supposed to know that patents have a termination like everything else.

In the case before me, what is done is this: The plaintiffs have a patent for tanned leather cloth; that patent is dated the 14th of January 1856—it is by mistake written the 24th. They state in the specification that the tanned leather cloth is either to be dyed or tanned—it is part of what they call tanning that it is dyed like tan. That is alone the patent. It may be either dyed on one side or the other. Then, those who sold to the plaintiffs, the Crockett International Company, who were the persons who had these trade-marks, added to their trade-mark "tanned leather cloth, patented 24th of January 1856." I think in strictness it would have been much better if this mark had only been put on the patented articles; but they stamp it indiscriminately on all their cloth. It seems to me that everybody who takes up an article of this kind knows whether it is tanned or not; therefore, when he sees "tanned leather cloth patented," it cannot be meant to represent that it is tanned. Not one of the

witnesses speaks to being deceived by the word "patented"—not one speaks of its being supposed to be tanned. It has been suggested that they might think it tanned behind. I look upon it in this way: it is only *idem per idem*; but perhaps, is a stronger illustration. Suppose the plaintiffs put "gilt leather cloth patent," nobody could say, taking up this cloth, that it was gilt; there is no semblance of gilding at all, and a purchaser would be induced to ask, when he saw "patent gilt leather cloth," What do you mean by calling this gilt? The manufacturer might say, "My patent is for the gilt leather cloth; but I put this stamp upon the whole of them." It is not the leather cloth that is patented; it is tanned leather cloth patented with a date. So far, the case is better than that case of *Edelsten v. Vick*, where there was no date: here there is a date, which will enable any person to go and refer to the specification although a wrong date; the plaintiffs say, "We give you the date; we tell you it is for tanned leather cloth." There is an article which any one can see is not tanned at all; and when they can see it is an article with which the patent has nothing to do, it seems to me this mark is not a misrepresentation.

I ought not to omit noticing another point, which if it had been established I should have had no hesitation in deciding against the plaintiffs. Thomas swears that this patent was taken out for the purpose of getting the word "patent" on the article, that it was a mere sham as to the patent, that there was nothing in it; but I do not admit Mr. Thomas's view at all. He goes on to say the tanning proved to be a complete failure, as the process of tanning rotted or caused the cloth to decay, and a very small quantity of tanned leather was ever sold in the market. What are the facts? So far from its being a failure, though it is quite true the bulk of the article is not made under the patent, nevertheless the manufacture does go on, and so far from rotting the leather and being found to be unfavourable to the cloth, the London and Brighton Railway Company to this day prefer it, and continue to buy it. When you find a company preferring this article, the other part of the public perhaps not liking it because of the price, with this evidence of the *bona fides* of the patent, that they sell the article

which they have patented for a higher price, and they do find customers for that dearer article, and a customer such as the London and Brighton Railway Company, on that account I cannot doubt it is a useful patent and thought to be so by the customers. I am not at all surprised to find that the bulk of mankind like something a little cheaper, and do not think it worth while to pay for the patent process. That is all that the evidence comes to. I find the patent was obtained *bonâ fide*. I find it is not described as leather cloth patented which is sold—what is put in the mark is “tanned leather cloth patented”—and if it had been “gilt leather cloth patented,” I do not think a doubt could have existed on the subject. No doubt it is true that the public will give a larger price for a patented article, but at the same time the public must exercise common and ordinary discretion. If they are told it is tanned leather cloth which is patented, and they are buying some other cloth marked “tanned leather cloth patented,” they are not necessarily led into a deception that that which they are purchasing is the patented article. If there had been no other leather cloth in the market, some argument might be raised upon it; it might be said, this is done to represent all to be patented, but there were several qualities of this untanned description in the market, therefore those who are buying in the market find the article leather cloth abundant, but they do not find tanned leather cloth abundant, because nobody can use it without infringing the plaintiffs’ patent. It appears to me it would have been far better never to have marked “tanned leather cloth” on that which was not tanned, yet as I cannot hold “tanned” leather cloth to be any more a deception than “gilt” leather cloth would have been, and as there is no evidence that any one has been deceived, I do take it as a description of that which was tanned, and not of that which was not tanned, and not sold as a patented article.

There is one remaining point as to the defendants’ infringement. It is said there is no evidence that anybody has ever been deceived by the defendants’ mark. I do not admit that; there is evidence that a man goes into a shop and asks for Crockett’s leather cloth, and they hand out to him the

defendants’ leather cloth. Crockett’s leather cloth is a thing which the plaintiffs are known to manufacture—which the Crocketts were known to manufacture before, and the plaintiffs now in their stead; if a person goes in and asks for Crockett’s leather cloth, and without more ado this article, manufactured by the defendants, is presented to him, I do not think the defendants can deny that they represented it as Crockett’s leather cloth, more especially when you find, as I do here (though the Court is not very precise about minute evidence as to the deception), that which is the important ingredient of the trade-mark is put exactly in the place where the plaintiffs’ trade-mark appears, and with the same *indicia*, without any reason except for the purpose of making people suppose it is the plaintiffs’. Under all these circumstances, although the case has unquestionably not been without difficulty on that point about the tanned leather cloth patented, I think the plaintiffs are entitled to a decree, and being entitled to it, he is entitled to it with costs. The decree will be in the terms of the first paragraph of the prayer, that the defendants, their agents, servants and workmen, be restrained from selling or exposing for sale, or procuring to be sold any leather cloth or any fabric, or article similar thereto, having affixed thereon such stamps or trade-marks with the name of J. R. and C. P. Crockett or the name of Crockett & Co. introduced thereon in such manner as by colourable imitation or otherwise to represent the fabric or article manufactured or sold by the defendants as being the same fabric or article as that manufactured and sold by the plaintiffs, or as being the fabric or article known as Crockett’s leather cloth. I think that will meet the justice of the case. There should be a perpetual injunction to that effect, with costs.

As regards an inquiry as to damages, it is a very doubtful matter in this case; although it is hardly the plaintiffs’ fault, there has been considerable delay. I do not say I am not to do justice because the case is difficult, but I think I shall do justice in this case if I confine the relief to the injunction.

WOOD, V.C. }
 July 1, 3. }

PRYOR v. PRYOR.

Power of Appointment, Undue Exercise of—Re-settlement by Appointee.

If a power of appointment is exercised in favour of an object of the power, upon the understanding that deeds shall be executed by the appointee, settling the property on persons not objects of the power, in furtherance of the desire of the donee of the power to appoint to those persons, the appointment, although made without any corrupt motive, is void in equity as a fraud upon the power.

Secus—where a bona fide appointment is made to an object of the power, with a view to an immediate settlement of the appointed property with the approbation of the appointee; as in the instance of an appointment by a parent to a child in contemplation of a settlement on the marriage of the latter, in which case the parental influence of the donee of the power may be legitimately exerted in procuring a proper settlement.

Previous to the marriage of Vickris Pryor and Jane Ann Peacock real estate was vested in trustees and their heirs upon trusts to be declared by certain indentures, dated the 10th of September 1808; and by one of such indentures it was declared that the trustees should stand possessed of the trust property after the death of J. A. Peacock, and in the event of her dying in the lifetime of her husband, subject to a life interest given to him, to the use of all and every the children of the body of the said J. A. Peacock by the said V. Pryor, her intended husband, to be begotten, in case there should be more than one child, or of such one or more of them exclusive of the other or any other or others of them in such parts, shares or proportions, for such estates and interests to take effect in possession at such ages or times, charged and chargeable with such sum or sums of money, either annual or in gross, and also such powers, provisos, remainders and limitations over, being for the benefit of the same children, or some or one of them, and in such manner in all respects, or to the use of an only child of the said marriage; and if there should be but one such child for such estate and interest to take effect

in possession or profit at such age or time and in such manner in all respects as J. A. Peacock and V. Pryor should at any time or times, or from time to time during their joint lives jointly direct, limit or appoint; and in default of such joint limitation and appointment to the use of all and every the children of the body of the said J. A. Peacock by the said V. Pryor, &c., for such estate and interest, to take effect in possession at such age or time, and in such manner as the survivor of them, the said J. A. Peacock and V. Pryor should at any time direct, limit or appoint; and in default of such appointment to the use of all the children equally as tenants in common, with limitations over.

The marriage was solemnized, and there was issue of the marriage five sons and four daughters.

One of the sons died an infant; and one of the daughters died in 1838, leaving her husband and one child surviving.

In 1846 Mr. and Mrs. Pryor desired jointly to exercise their power of appointment under the settlement, and their solicitor Mr. Veasey received instructions in the handwriting of Arthur Pryor, one of the sons, for the settlement of the property on the four sons, on condition that they paid their three sisters and the husband of the deceased sister 50*l.* per annum each during their respective lives, the income over and above the sum mentioned to be equally divided amongst the four sons and their issue; and on the death of one son without issue his share to be equally divided amongst the three surviving sons and their issue, and so on, the last survivor to have power to will.

Mr. Veasey laid his instructions before counsel and obtained an opinion; he then received general instructions from Mr. and Mrs. Pryor to act according to the opinion. The following instructions were then laid before counsel: "You will be so good as to draw an appointment to the sons of Mr. and Mrs. V. Pryor in fee as suggested by your opinion, subject, of course, to the life estates limited to the parents by the settlement, and will also draw such a deed of settlement of the reversion as will carry out the intention of the parties, which by the annexed paper originally submitted to you appears to be for the four sons as tenants in

common for their respective lives, remainder among their respective children, or issue of children, or to an only child of each such son as he may appoint, and in default of appointment, equally amongst the children and the issue of any deceased child *per stirpes*, or to an only child of each such son, with cross-remainders amongst the surviving sons in case of the death of any of such sons without such issue, charged nevertheless with the payment of rentcharges of 50*l.* per annum to each of the three surviving daughters of Mr. and Mrs. V. Pryor for their lives, and of their respective and present husbands, and also of the widower of the deceased daughter for his life, with the ultimate remainder to the right heirs of Mrs. Pryor."

The drafts of the appointment and re-settlement were, after some alteration, settled by counsel. Some correspondence took place on the subject of the proposed arrangement, and in one letter Mr. Arthur Pryor asked Mr. Veasey to explain the nature of the *proposed trust*. Mr. Veasey in answer to such letter wrote and informed Mr. A. Pryor that the appointment was to be made to the sons *upon the understanding* that they immediately afterwards re-settled the property in a particular manner.

The name of Thomas Pryor, one of the sons, was afterwards struck out of the draft because he was under age. The name of another son, Richard, was also struck out as he refused to adopt the proposed plan, and wrote to Mr. Veasey stating his objection. Mr. Veasey forwarded his letter to A. Pryor, who thereupon sent the following letter, dated the 27th of March, to Mr. Veasey: "I cannot imagine anything more fair than the settlement of the Lambeth property; however, this cannot alter my brother's views; with me it is a simple matter of duty to propose the plan in question. My mother asked me for my advice. I advised, and strongly, as I think you know, it should be left to the eldest, subject to burden and entailed on issue or heirs male. You know my intentions were to carry out my mother's wishes, and thence came the plan now in question, the first not being thought feasible."

Eventually, by an indenture dated the 18th of June 1846 (written by mistake for

1847) V. Pryor and J. A. Pryor, his wife, in exercise of the power given to them jointly by the settlement of 1808, appointed the property comprised in that settlement to two of their sons, Felix and Arthur, in fee, as joint-tenants; and by another indenture, dated the 19th of June 1847, Felix and Arthur Pryor re-settled the property upon trust, after the death of V. Pryor and J. A. Pryor, to secure an annuity of 50*l.* to each of their three sisters for their respective lives, for their separate use, without power of anticipation, and also an annuity of 50*l.* to their brothers Richard and Thomas, or their assigns, during their joint lives; and after the decease of either of them, to the survivor or his assigns during his life; and, subject to such annuities, upon trust for the four sons of the marriage during their respective lives, in equal shares as tenants in common; and after the death of each respectively, upon trust for his child or children as therein mentioned, and, on failure of issue of all the sons, upon trust for J. A. Pryor, her heirs and assigns.

The two last-mentioned deeds were both executed at the same time in June 1847.

On the death of J. A. Pryor a question arose whether the appointment made by the indenture dated the 18th of June 1846 was a valid exercise of the power; and a bill was filed by the trustees of the settlement of June 1847, praying that the rights and interests of all parties in the hereditaments comprised in the indenture of the 19th of June 1847 might be ascertained and declared.

Mr. Willcock and *Mr. Surridge*, *Mr. Roll* and *Mr. Darby*, *Mr. Daniel* and *Mr. Fooks*, for various parties who desired to set aside the appointment, cited the following authorities:

Topham v. the Duke of Portland, ante, 257.

Birley v. Birley, 25 Beav. 299; s.c. 27 Law J. Rep. (N.S.) Chanc. 569.

Tucker v. Sanger, M'Cle. 424.

In re Marsden's Trust, 4 Drew. 594; s.c. 28 Law J. Rep. (N.S.) Chanc. 906.

Salmon v. Gibbs, 3 De Gex & Sm. 343; s.c. 18 Law J. Rep. (N.S.) Chanc. 177.

Sir Hugh Cairns, *Mr. Wickens*, *Mr. Giffard* and *Mr. Macnaghten*, in support

of the appointment, cited the following authorities :

Sugden on Powers, 670.

White v. St. Barbe, 1 Ves. & B. 399.

Goldsmid v. Goldsmid, 2 Hare, 187 ;
s. c. 12 Law J. Rep. (N.S.) Chanc.
113.

Re Gosset's Settlement, 19 Beav. 529.

M'Queen v. Farquhar, 11 Ves. 467, 479.

Mr. Rasch appeared for the trustees.

WOOD, V.C.—In cases like the present, no doubt, great difficulties frequently arise; but here the point is too clear to leave any doubt on the subject; in many cases the distinction may be very fine as to whether or not the appointment is what it ought to be, an appointment by the parent to a child, an object of the power, the child being desirous that some settlement should be made, and being conscious, or we will say agreeing and concurring in the settlement; or whether it is as in this case, that the child really has no voice in the matter, but acts simply as a trustee, and is merely the instrument selected by the parent to enable him to make an appointment which is beyond the scope of the power; the authorities do not depend upon the question, whether it be from a corrupt motive, or whether it be from an honourable and reasonable motive. Nobody imputes corrupt motives to Mrs. Pryor, and I should be sorry that any suggestion of the kind should be made. The appointment is made to the two brothers, and they, by a subsequent deed, make the settlement in favour of their sisters and in favour of the grandchildren who are not objects of the power. I apprehend that, although the parent may, as far as moral considerations are concerned, wish to provide for the remote issue, yet the rule of law which prohibits the parent from having any power of providing for that remoter issue, prevents what was here done from being done at the sole will of the parent; if it is done at all it must be done in a *bonâ fide* manner by an appointment to one of the objects of the power, and a settlement by that object of the power he thinking it reasonable that the provision should be made. In all cases where a parent appoints to a child, and the child marries, the question is very

simple and easy to deal with. It may be the very thing the child desired, and although there may be parental influence exercised if the property were the child's own property, without any appointment at all taking place, yet if properly exercised, no one could complain. The case of *Goldsmid v. Goldsmid* is a case that goes further in some respects than any of the other cases, although in principle it does not go beyond them. In that case there really was nothing on the face of the transaction to shew that it was not what it purported to be, namely, an appointment to the widow and a desire on her part to make a re-settlement in the manner described: in all cases the Court would be anxious to uphold a transaction of this kind, unless it clearly can get behind it. But if upon the whole transaction the evidence is clear, not that the appointment would not have been made (which would be a difficult point to determine, because that rests in the breast of the appointor) unless the appointor had arranged *à priori* that the appointee should re-settle the property, but that the appointment was made upon a condition or was made on the understanding (which is the same thing as a condition) that the property was to be re-settled immediately in a manner that is prescribed by the appointor, such appointment is void. I apprehend it would be a fraud on the donee of the power, supposing that the donee of the power had the right to make such an appointment, for the appointees to have held the property upon other trusts; and it would be also a fraud upon the objects of the power that the donee of the power should be able to direct an application of the property to any object which is not within the scope of that power. In most cases that can be suggested on this subject very fine distinctions occur. If we can arrive at the principle that the settlement to be valid must be really made with the concurrence or at the desire of the appointee, and not at the direction of the donee of the power; and if the principle is to be carried to this length, that the Court has gone to the extent of assuming that, in the absence of evidence of a contrary intention, it shall be assumed to be the act of the appointee, yet if evidence is produced that the re-settlement is not the

act of the appointee, but the intent and direction of the donee of the power, then the case does not fall within the principle, and the re-settlement is void. Now, in my opinion, the evidence in this case is too clear to admit of any doubt or contradiction. From the instructions given to Mr. Veasey, there is a clear indication on the part of Mrs. Pryor as to what her intentions were. Mr. Veasey takes these instructions from the person who says, "I mean to do this," and the property is to be appointed to the sons upon an express condition. Then afterwards there is the letter from Mr. A. Pryor, asking what is the nature of the trust. How could he deny the trust? How can he say, "I am going to exercise my judgment"? How can he say, "I am not a mere trustee"? When Mr. A. Pryor asks, "What is the trust I am to execute, for I don't know?" can any one possibly call that Mr. A. Pryor's settlement? Then there came afterwards what is important to refer to, namely, a correspondence between one of the sons and Mr. Veasey, which was a source of annoyance to A. Pryor; there were four sons—one of them died—and then the name of Mr. Thomas Pryor was struck out of the deed of 1846, because he was at that time under age, and the name of Richard Pryor, who was originally made a party, was afterwards struck out in consequence of his withdrawing. As to the son who was under age, no one could suppose that he was capable of making an agreement. And it is clear from Mr. A. Pryor's letter to Mr. Veasey, on the 27th of March, what his views were. He says in effect, this is not the plan that I desired; I desired a different plan; these are my mother's intentions, and I think it my duty to carry them into effect. Mr. Richard Pryor knows that he is to be a trustee; he says he will not be a trustee on these terms.

It appears to me to be as plain as possible that the case is brought within the rule that if an appointment is made to a person upon the express trust that he is to hold for others, who are not objects of the power, that appointment cannot stand, and it must fail *in toto*. Therefore the estates comprised in the settlement of 1808 will be held in trust for the several persons interested under that settlement in default of appointment.

KINDERSLEY, V.C. } PINCE v. BEATTIE
July 23, 30.

Solicitor—Bonus by Way of Commission beyond the Costs—Settled Account.

By agreement in writing between a solicitor and his client it was stipulated that the former should have 5l. per cent. commission on the gross amount of property recovered by him for the latter, in addition to his costs:—Held, that the stipulation was contrary to the policy of the law, and that the solicitor must refund the amount received by him for commission, though included in a settled account.

The plaintiff in this suit claiming an interest in the residuary property of Margaret Blair Pince, employed the defendant to recover it for him, as his solicitor, Beattie insisting that a settlement should be made on the plaintiff's wife and children; and it was agreed between them by a memorandum in writing, dated the 14th of December 1853, that in consideration of Beattie agreeing to investigate the claim, and if possible to establish the rights of the plaintiff under the will, or in the estate of certain members of his family, and make the necessary advances for legal and other expenses, and towards the maintenance and support of the plaintiff's wife and family, pending the same, and the consequent risk which Beattie would incur on account thereof, the plaintiff, for himself, his executors or administrators, agreed with Beattie, his executors, administrators and assigns, to pay to him, by way of addition to his proper legal charges, a sum of money equivalent to 5l. per cent. on the gross amount recovered by him, his heirs, executors or administrators, during the investigation, or by professional exertions, and charged the estate therewith, Pince to do all necessary acts to ratify the agreement as previously agreed by Beattie, his heirs, executors, administrators and assigns. (Signed) F. B. Pince. Witness, Frederick William Byles. In August 1854, Beattie recovered by a compromise 611l. 14s., and received that sum by a cheque from Messrs. Gordon & Co., the solicitors employed on the other side, and in the same month paid the plaintiff 700l., and 400l. was afterwards made the

subject of settlement, whereby that sum was vested in the defendants Beattie and Thomas Wilkins, in trust for the plaintiff and his wife and children. The defendant Beattie had made out an account wherein he credited the plaintiff with the 611*l*. 14*s*. and debited him with his costs and expenses, the money which he, Beattie, had handed over to him, and 80*l*. 11*s*. 10*d*. for 5*l*. per cent. commission under the agreement of the 14th of December 1853, and this being balanced was signed by the plaintiff. This bill was filed against the trustees, the wife and children, praying the rectification or establishment of the settlement, and that the trustees might pay the costs; 100*l*. had been brought into court.

Mr. Glasse and *Mr. W. H. Terrell*, for the plaintiff, abandoned the relief sought as to setting aside or rectifying the settlement, and contended that with regard to the 5*l*. per cent. commission, that could not be allowed, even if the account was treated as settled, the stipulation for commission being contrary to the policy of law.

Mr. Bailly and *Mr. Swinburne*, for the defendant, argued that the bargain as to commission, if it was part of a settled account, could not be disturbed.

Mr. Glasse was heard in reply.

Authorities cited—

Strange v. Brennan, 15 Sim. 346; s. c.

2 C. P. Cooper, 1; 15 Law J. Rep.

(N.S.) Chanc. 389.

Tolson v. Judge, 3 Drew. 306; s. c.

24 Law J. Rep. (N.S.) Chanc. 785.

Nanney v. Williams, 22 Beav. 452.

Walker v. Smith, 29 Ibid. 394.

O'Brien v. Lewis, ante, p. 569.

KINDERSLEY, V.C.—As to the account against Beattie, it appears there was a settled account in January 1855, with the plaintiff's receipt, which, subject to one item, concluded the transaction. This was an item of 80*l*. 11*s*. 10*d*., charged by Beattie on an agreement, and the question is whether the plaintiff has now a right to challenge it, although it formed part of the settled account. It appears from a case of *Strange v. Brennan*, that the Vice Chancellor of England and Lord Cottenham decided that it was against the policy of the law, not only that a solicitor,

while acting as such, should take a present or gratuity from his client over and above the amount of his costs, but that he should enter into any stipulation to become solicitor on the terms of getting a better benefit than he would get by the costs, which, according to the rules of law, he was entitled to charge; and, therefore, that being established, it must be held that the contract between Pince and Beattie was illegal, and ought not to have been entered into. Although, therefore, that formed an item in a settled account, the plaintiff is entitled to recover that back.

[IN THE HOUSE OF LORDS.]

1863.

March 19, 23. } ATKINSON v. HOLBY.

Will, Construction of—Implication of Cross Remainders in Tail.

A testator devised certain real estates to his four granddaughters, by name, for their respective lives, in equal shares, with remainder to trustees to preserve contingent remainders, "with remainder in equal shares to the use of the children of my said four granddaughters, and the heirs of their bodies, such children of my said granddaughters taking their mother's share as tenants in common in tail, remainder to the survivors of such children, and in default of issue by my said granddaughters," then over. There was a devise of residuary real estate in similar terms, except that the remainder next following that to the children of the granddaughters as tenants in common in tail was thus expressed: "To the survivors or survivor of such children and the issue of their, his or her body in tail":—Held (reversing the decision of the Lords Justices, and affirming the decision of the Master of the Rolls), that under the words "in default of issue by my said granddaughters," the four granddaughters, and not their children, took by implication, subject to the prior limitations, estates tail in both classes of property, with cross-remainders between them in tail.

This was an appeal from a decree, made by the Lords Justices in a cause of *Atkinson v. Barton* (1), upon a question as to the

(1) 31 Law J. Rep. (N.S.) Chanc. 410.

construction of the will of Richard Ness, late of Pickering, in the county of York, dated the 15th of April 1799. The object of the cause was to obtain a partition of the estates devised by the testator, between the appellant and Ann Barton, a late respondent, according to their respective rights under the will, as should be declared by the Court of Chancery.

The facts of the case were as follows : The testator had two daughters, Elizabeth and Faith, of whom the former died without having had any issue. Faith married a Mr. Kirby, and had two sons, John and George, and six daughters, viz. Ann, Fanny, Faith, Elizabeth, born in the testator's lifetime, and two others born after his death. By his will the testator devised certain estates to his daughter Elizabeth for life, with remainder to the use of her children, and then for default of such issue, after the decease of his said daughter, to John, the eldest son of his daughter Mrs. Kirby, for his life, remainder to the children of John in tail ; in default of such issue, to George, the second son of his daughter Mrs. Kirby, for his life, with remainder to his children in tail. The will then proceeded as follows : " With remainder to Ann, Fanny, Faith and Elizabeth, the other children of my said daughter Faith, for their respective lives, in equal shares, the remainder to the said Robert Kitching and William Mitchelson and their heirs during the lives of the said Ann, Fanny, Faith and Elizabeth, in trust to preserve the contingent remainders hereinafter limited. The remainder (in equal shares) to the use of the children of my said four granddaughters and the heirs of their bodies, such children of my said granddaughters taking their mother's share as tenants in common in tail, remainder to the survivors of such children ; and in default of issue by my said granddaughters, I give all the same estates hereinbefore devised to such persons as would be entitled to the same in case I died intestate and without issue." The testator then gave and devised the residue of his real estate to his daughter Faith, for her life, and after her decease to John, the eldest son of Faith, for life, with remainder to the children of John in tail, with remainder to George, the second son of Faith, for life, with remainder

to the children of George in tail ; and the will then proceeded as follows : " And for default of such issue, I give the same premises to the said Ann, Fanny, Faith and Elizabeth, for their respective lives, in equal shares, remainder to the said Robert Kitching and William Mitchelson (the trustees), and their heirs, in trust to preserve the contingent remainders hereinafter limited ; the remainder (in four equal shares) to the use of the children of my said four granddaughters, and the heirs of their bodies, such children of my said granddaughters taking their mother's share as tenants in common in tail ; remainder to the survivors or survivor of such children, and the issue of their, his or her body in tail, and in default of issue by my said granddaughters, I give all the same estates last devised" to certain uses in favour of his daughter Elizabeth Ness, and her children.

The testator died in June 1799, leaving his daughters and their children named in his will him surviving. Elizabeth Ness, one of the daughters, died in September 1853, without issue, and Faith Kirby, the other daughter, died in 1839. John and George, the two sons of Mrs. Kirby, died without issue. Ann Kirby married Mr. William Atkinson, and died in March 1820, having had issue two children only, namely, the appellant, and Ann Barton, the late respondent, who married William Barton, also a late respondent, both since deceased. Fanny Kirby died in June 1853 ; Faith Kirby (the granddaughter) in December 1857 ; and Elizabeth Kirby in August 1858 ; all without having been married.

On the death of Elizabeth Kirby, the question arose upon the construction of the will of the testator. The appellant contended that, by the will of the testator, estates tail in remainder after the prior limitations were created by implication, in Ann Atkinson, Fanny Kirby, Faith Kirby and Elizabeth Kirby, the four granddaughters of the testator, with cross-remainders between such four granddaughters in tail ; and that according to the true construction of the will, and in the events which had happened, the appellant was absolutely entitled to seven equal eighth parts of the estates of the said testator, as well those specifically devised as those devised in general terms ; and that the late

respondent, Ann Barton, was entitled as tenant in tail to the other one equal eighth part of the said estates.

The late respondents, William Barton and Ann his wife, contended that by the will of the testator cross-remainders in tail were by implication created amongst the classes of children of the testator's granddaughters, and that according to the true construction of such will, and in the events which had happened, the estates of the testator as well those specifically devised as those devised in general terms, belonged to the appellant and Ann Barton, the two children of the testator's granddaughter, Ann Ness Atkinson, in equal moieties, as tenants in common.

By certain indentures all the estate or estates in tail of the appellant and Ann Barton respectively, in the premises devised by the will, were duly barred.

In 1861 the appellant filed his bill in Chancery, praying that his rights and interests and those of Ann Barton in the estates devised by the will of the testator, Richard Ness, might be ascertained and declared; and that all necessary directions might be given for partitioning and dividing the said estates between the appellant and Ann Barton, according to their respective rights and interests therein as declared by the Court of Chancery.

Shortly after the bill was filed, and before an appearance was entered thereto, William Barton died, leaving Ann Barton, his widow, him surviving.

The cause was heard before the Master of the Rolls (2), who decided that upon the true construction of the will, the three fourth parts or shares of the estates of the testator, as well those specifically devised as those comprised in the residuary devise contained in the will, which by the will were limited to the children of the testator's three granddaughters, Fanny Kirby, Faith Kirby and Elizabeth Kirby, and who respectively died without issue, vested in the testator's four granddaughters, Ann Kirby (afterwards Atkinson, the mother of the appellant and Ann Barton), and Fanny Kirby, Faith Kirby and Elizabeth Kirby as tenants in common in tail, with cross-remainders between them in tail; and that,

(2) 31 Beav. 272; s. c. 81 Law J. Rep. (N.S.) Chanc. 411, note (1).

according to the true construction of the will of the testator, and in the events which had happened, the appellant was then entitled for an estate in fee-simple to seven equal undivided eighth parts or shares of the said estates of the testator, and that Ann Barton was entitled for an estate in fee simple to the remaining one equal undivided eighth part or share of the same estates.

Upon appeal, the Lords Justices decided that according to the true construction of the will, and in the events which had happened, the appellant was entitled for an estate in fee simple to one equal undivided moiety of the said estates of the testator. And that Ann Barton was entitled for an estate in fee simple to the remaining one equal moiety of the same estates.

Ann Barton afterwards died, having, by her will, devised her real estates to James Mitchelson (who afterwards disclaimed the trusts of the will) and to the respondent, John Holtby, against whom the suit of *Atkinson v. Barton* was ordered to be revived.

The present appeal was brought from the decision of the Lords Justices.

The Solicitor General and *Mr. Nalder*, for the appellant; and *Mr. Hobhouse* and *Mr. F. J. Wood*, for the respondent, supported the contentions before mentioned in their respective behalf.

The following authorities were referred to:

- Clache's case*, Dyer, 330, b.
- Vanderplank v. King*, 3 Hare, 1; s. c. 12 Law J. Rep. (N.S.) Chanc. 497.
- Rabbeth v. Squire*, 4 De Gex & J. 406; s. c. 28 Law J. Rep. (N.S.) Chanc. 565.
- Stanley v. Lennard*, Amb. 355; s. c. 1 Eden, 87.
- Savile v. Lord Scarborough*, 1 Swanst. 537; s. c. 1 Wils. 239.
- 2 *Jarman on Wills*, 2nd edit. 456.
- Gallini v. Gallini*, 3 Ad. & E. 340; s. c. 4 Law J. Rep. (N.S.) Exch. 37.
- Pride v. Fooks*, 3 De Gex & J. 252; s. c. 28 Law J. Rep. (N.S.) Chanc. 81.
- Roddy v. Fitzgerald*, 6 H.L. Cas. 823.
- Roe d. Wren v. Clayton*, 6 East, 628.
- Morse v. Lord Ormonde*, 1 Russ. 382; s. c. 4 Law J. Rep. Chanc. 158.
- Ashley v. Ashley*, 6 Sim. 358; s. c. 3 Law J. Rep. (N.S.) Chanc. 61.

Doe v. Halley, 8 Term Rep. 5.
Goodright d. Docking v. Dunham,
 Dougl. 264.
Malcolm v. Taylor, 2 Russ. & M. 416.

LORD CRANWORTH.—My Lords, this is one of those cases which involve that with which all Courts are so much embarrassed from time to time, namely, the duty of putting a construction upon a will framed in very imperfect and inadequate language. In this case the Master of the Rolls has adopted one construction, and the Lords Justices have adopted another. The appeal comes from the Lords Justices, therefore, to this House; and we are to say whether we think the view of the Lords Justices or that of the Master of the Rolls was correct. I confess that I could have wished, if one may venture to have a wish upon the subject, that I could have adopted the views of the Lords Justices, because one has a leaning towards equality of distribution; but we must not suffer a feeling of that sort at all to influence our judgment. Putting aside, then, such feelings, I confess it appears to me that it is impossible to come to any other conclusion than that the Master of the Rolls was right.

Before I state, very shortly, the reasons for which I come to this conclusion, I wish to make one observation, although it may be an unnecessary precaution: the heir-at-law is not before this House, and has not been before the Courts below, either that of the Lords Justices or that of the Master of the Rolls. In all probability, the heir-at-law has no claim whatever. The Lords Justices seem to have thought so, and the Master of the Rolls seems also to have been of the same opinion; but it is proper, I think, that we should say that our decision does not prejudice any person who is not before this House or was not before the Courts below. If he has any right—if it be a right paramount—all that will come hereafter.

All that we have to decide, I think, is practically this: In the interposition of certain estates, in order to fill up something which we cannot call a gap in this will, are we to adopt one construction, or are we to adopt the other? Are we to say that we are to interpose an estate tail in the granddaughters, or are we to say that,

according to the view of the Lords Justices, we are to interpose an estate tail in the children of the granddaughters, each stirps having cross remainders between them? In the first place, I call your Lordships' attention to the argument of Mr. Hobhouse upon the construction of this will. His first argument was, that these four granddaughters took estates for life as joint tenants; that they did not take estates each in a fourth, or that taking estates each in a fourth, at all events, there was a survivorship to them, so that they took estates each for her own life and the life of the survivors or survivor; and he argued that mainly upon the expression "with remainder." The whole estates had been previously given by the testator to the grandsons, and to their issue, and they had none; and then as to the whole estate, the testator says it is "with remainder to Ann, Fanny, Faith and Elizabeth, the other children of my said daughter, Faith, for their respective lives, in equal shares." Mr. Hobhouse contended that that meant the whole estate. Then the will goes on—"remainder to the trustees to preserve the contingent remainders." Mr. Hobhouse's argument was, that these granddaughters took the estates amongst them, so that they were to go to the survivors or survivor; and that the whole estate went over to the trustees and their heirs, to preserve contingent remainders—not one-fourth to preserve the contingent remainders of Ann, and one-fourth to preserve the contingent remainders of Fanny, and one-fourth to preserve the contingent remainders of Faith, and one-fourth to preserve the contingent remainders of Elizabeth; but that the whole went over with that object. I cannot concur with that view of the case. I think it is as plain as language can make it, that each of these parties took estates as tenants in common, and that the remainder to the trustees to preserve, in the strictest way, *reddendo singula singulis*, is to preserve contingent remainders; remainder to Ann Ann's, and to Fanny Fanny's, and so on to each of the others; it is exactly as if it had been remainders as to one-fourth to Ann, with limitations afterwards as to the other fourth of the estate to Faith, and as to the other fourth to Elizabeth.

That, I think, can admit of no manner of doubt; and if there was a doubt up to the period of the will in which this disposition is made for the children or grandchildren, that disposition of itself puts it beyond all doubt, for the remainder is given in equal shares to the use of the children of the granddaughters and the heirs of their bodies, such children of the granddaughters taking their mother's share, as tenants in common.

It is abundantly clear, therefore, that this is a gift, in default of the issue of the sons, to the four granddaughters as tenants in common for life, each for her life, and upon the death of each to the trustees and their heirs during her life, to preserve contingent remainders; and the remainder, as to the share of each, to the use of her children as tenants in common in tail; remainder to the survivors or survivor of such children. Now, I agree with the view that was taken of the case, both by the Master of the Rolls and the Lords Justices, that the "survivors of such children" must mean the survivors of the children of each class, the children of each grandchild. Then comes the disposition which has given rise to the present question, "and in default of issue by my said granddaughters, I give all the same estates to such persons as would be entitled," so and so. What does that mean? When is that gift over to take effect? The Master of the Rolls used the words "such issue," saying, that we must fill up the gap that is created by that gift over, by interposing a gift as tenant in tail to those persons who had previously taken life estates, not an estate tail, which is to supersede the gift to the children, but (as in *Gallini v. Gallini*) which is to come after the estate in remainder. The Lords Justices said, "No, not so: We shall interpose an estate, carrying over the shares of each class, each stirps of children over to every other stirps, so that eventually the same object may be effected, by not letting the estate go over so long as any such issue remains." Sir G. T. Turner, with his usual precision, puts the point very clearly, thus: He says, "The estates here to be implied may be either estates tail in the granddaughters, with cross-remainders between them, or estates tail in the children of the granddaughters, with cross remainders between such children; for either of such estates

would effect the purpose to be accomplished." I certainly understand his Lordship to mean by that, by implication, to say, that if either of those ways would not necessarily effect the object, that cannot be the right construction. Now, it appears to me to be abundantly clear that the construction which is contended for, namely, estates tail in the children of the granddaughters, with cross-remainders between such children, would not necessarily effect the object to be accomplished. In the course of the argument I took the liberty of interrupting Mr. Hobhouse, to point out what appeared to me to be an insuperable difficulty in that construction, namely, that if any of the daughters died, or supposing that they had all survived the prior estates for life in the parent and the brother (which they did not; I think the parent survived them all), and one of them had come into possession, and then afterwards died without issue, what is to become of her share? I am assuming for the time that none of the others had any issue. There would have been an intestacy. The object, therefore, of implying cross-remainders would have been defeated. Just the same would have happened if the only one of the daughters who had issue, Mrs. Atkinson, instead of dying in the lifetime of her three sisters, had survived them; and if her children had died in her lifetime, leaving issue, according to the construction of the Lords Justices, it would have effected no object at all.

It is upon these very short grounds that it appears to me that the construction which the Master of the Rolls put upon these words was the accurate construction, and that, consequently, what your Lordships are called upon to do, is to reverse the decree of the Lords Justices, and to affirm the decision of the Master of the Rolls.

I do not involve the case in any unnecessary disquisition as to any of the other cases that have been cited. The trite observation, that the construction of any one will aids very little in the construction of another, is peculiarly applicable, as it appears to me, to this case. I abstain from doing so the more readily, because I observe that the Lords Justices do not put their construction upon any authority which they consider as binding upon them; but, on the contrary, they put their construction

upon the general ground, that they think it ought to be so; and so treating the question simply with reference to the peculiar circumstances of this case. Therefore, I think it my duty to move to reverse the decree of the Lords Justices, and to remit the case, with a declaration that the construction put upon the case by the Master of the Rolls was correct.

LORD CHELMSFORD.—From the difference of opinion which has prevailed in this case, it is impossible not to feel that it is one of some difficulty; but after the best consideration that I have been able to give to it, I have come to the conclusion that the Master of the Rolls was right in the view which he adopted, and, consequently, that the decree of the Lords Justices cannot be supported.

The question is, whether in the construction of a particular and residuary devise (for they are substantially the same) in the testator's will, after a limitation to the granddaughters for their respective lives, in equal shares, the remainder in four equal shares to the use of the children of the granddaughters and the heirs of their bodies, such children of the granddaughters taking their mother's share as tenants in common in tail, with remainder to the survivors or survivor of such children, and the issue of their, his, or her bodies in tail, the words following, "in default of issue by my said granddaughters," require an implication of an estate tail in the granddaughters, or in the children of the granddaughters; and in either case with cross-remainders between them?

Now, up to a certain point there is no difference between the learned Judges who have decided this case, and who have given any reasons for their opinions. They agreed that the proper reference of the word "such" in the clause, "remainder to the survivors of such children, and the issue of their, his, or her body in tail," is not to all of the children of the granddaughters taken collectively, but to the children taking their mother's share. The Master of the Rolls thought that this provided for cross-remainders between the children of the granddaughters, and therefore that the rule laid down in *Clache's case* and the case of *Rab- beth v. Squire*, prevented the implication of cross-remainders between those same objects

in different events; and that the words "in default of issue by my said granddaughters," must, therefore, upon the presumed intention of the testator, give an estate tail to the granddaughters, and not to their children. I do not think it necessary to resort to those cases upon which the Master of the Rolls has founded his opinion, because some difficulty may be raised as to their application to the present case. But I think His Honour's conclusion may be supported upon other grounds. My mind has been very much impressed by the peculiar wording of the clause upon which the implication depends, and also by the consequences which might possibly result from the construction contended for by the respondent.

Now, the words to be construed are not "in default of such issue," which might create more difficulty, and which words certainly cannot be inserted in a limitation, but "in default of issue of my said granddaughters," which certainly point much more in the direction of an estate tail to be raised for the granddaughters, than for their children. In the choice between two conflicting implications, the effect of adopting one in preference to another must not be overlooked. If one would lead to unreasonable consequences, and the other would avoid them, the latter implication has a presumption in its favour in an attempt to ascertain the probable intention of the testator. The consequence of adopting the implication for which the respondent contends might be to let in the children of a granddaughter in the lifetime of their mother. Sir J. L. Knight Bruce admits that this would be so, unless cross-remainders were to be implied between the granddaughters also—"an implication," his Lordship says, "which certainly would be open to some difficulty;" but, he adds, "having regard to the plain intent, that the children of the granddaughters should take the inheritance, I think that little, if any, weight is due to this objection." With very great deference, I must say, that not the plain, but the probable, intent of the testator appears to me to be perfectly different; and I think that the construction adopted by the Master of the Rolls may be supported upon three different grounds:—First, that the issue of the granddaughters, and not the issue of their children, are in terms pointed at by the clause in question;

secondly, that the opposite construction would lead to unreasonable consequences, and would not, therefore, be likely to have been intended by the testator; and, thirdly, that the implication contended for by the respondent would not, as has been pointed out by my noble and learned friend on the woolsack, cover events which are extremely likely to arise. Sir G. J. Turner considered that it was a circumstance adverse to the implication of an estate tail in the granddaughters "that it would be in their power to prevent the shares of the estates limited to them and their children from going over to the children of the other granddaughters; and it would be in their power also to prevent the estates going over in entirety, according to the ulterior limitation, and thus in both respects to defeat the plain intention of the will." I think that the answer to those remarks is to be found in the observations of the Solicitor General, and in the references to the case of *Stanley v. Lennard*, and the observations of Tindal, C.J., in the case of *Lord Scarborough v. Savile*. Upon these short grounds, I agree with my noble and learned friend on the woolsack, that the decree of the Lords Justices should be reversed, and that the decision of the Master of the Rolls should be affirmed.

LORD KINGSDOWN.—I entirely concur with your Lordships in the conclusion at which you have arrived. I have so great respect for an opinion of Sir G. J. Turner, delivered after much consideration, that I cannot help entertaining some doubts, however confident my own opinion may be. But it appears to me that the Lord Justice in this case has founded himself mainly upon a principle which I cannot conceive to be consistent with the ordinary rules of law, namely, this:—He said, "I prefer the construction in favour of the issue of grandchildren, upon this ground, that if you give an estate tail to the parents, the parents would be able to bar the estate tail, and defeat the issue altogether." That reasoning would apply almost to every case. As I observed in the course of the argument, if you enlarge an estate for life to the first taker, in order to let in all his issue, where you have done that you enable the first taker to defeat, not only the issue specially named, but all the issue which is so let in. It seems to me, not only that the effect which has

been mentioned to your Lordships would be very inconsistent with the intention of the testator in cases which might be put, but also with the language which the testator has used in the will "in default of issue by my said granddaughters," which point more distinctly to estates tail in the grandchildren. I confess it is upon that ground that I agree with the judgment which has been given by the Master of the Rolls. I am not much influenced by the difficulties which he felt as to *Clache's case*, and the others which he mentioned. But on the whole, with no hesitation other than that which arises from the circumstances which I have mentioned, I entirely concur with what has been proposed by my noble and learned friends.

Decree appealed from reversed.

ROMILLY, M.R. }
June 23, 25. } BURY v. BEDFORD.

Trade-Mark — Assignability — Right to use.

J. B., while trading as a manufacturer, acquired the right to use a particular corporate trade-mark containing the letters J. B. He subsequently entered into partnership, and by the articles then executed, it was agreed that the trade-mark should be a partnership asset, and that it should be lawful for the parties thereto, at the end of the partnership, to use the mark for the remainder of their lives, either alone, or in partnership with any other persons. The firm having fallen into difficulties, all the assets and all the estate and effects joint and separate of the partners were assigned by them to trustees, who subsequently assigned to H. B. the assets of the old firm, including all the right which they could assign of using the trade-mark. Upon bill filed by H. B. to restrain J. B. from using the trade-mark, or granting the use of it to others,—Held, that J. B. was entitled to use it himself, or to allow any person in partnership with him to use it; but that an injunction must be awarded to restrain J. B. from granting the use of the trade-mark to any person not in partnership with him.

Whether the trade-mark was one which could properly be assigned, quære; but

held, that J. B. had by his acts precluded himself from setting up, by way of defence, that he had no power to assign it.

This was a bill claiming the exclusive use of a trade-mark, and seeking to restrain the defendant from using it, or granting the use to any other person.

The defendant, John Bedford, previous to 1856, carried on the business of a steel-manufacturer in Sheffield, at the Regent Works and at Oughtibridge, under the style of "John Bedford." While so trading the Cutlers' Company there awarded him a mark to be used in his business. It consisted of the figure of a lion couchant, surmounted by crossed arrows, with four initial letters, viz., "J. O. B. S," within the spaces formed by the crosses of the arrows, but which four letters were to be read, "J. B. O. S," signifying "John Bedford, Oughtibridge, Sheffield." The defendant also purchased the exclusive right to, and the use of, the trade-mark of William Ash & Co.

By articles of partnership, dated the 6th of July 1859, and executed by Edward James Bury, of the first part, William Tarleton Bury of the second part, the defendant J. Bedford of the third part, John Jesson of the fourth part, and Richard Allinson of the fifth part, it was (*inter alia*) agreed, that the parties thereto should become co-partners at the Regent Works aforesaid and elsewhere, for the term of ten years from the 30th of June 1859, under the style or firm of Bedford, Burys & Co., on the terms and conditions, that all goods, steel and merchandise, which should thereafter be manufactured or sold by the partnership, should be marked with the corporate mark granted to the defendant, with or without the name "John Bedford," or "Bedford" alone, or with such other name or mark, or otherwise, as the parties should thereafter mutually agree upon, and all such corporate or other marks, except the name John Bedford or Bedford, should be deemed the property of the co-partnership during the continuance thereof and of the lives of the parties thereto, in manner thereafter mentioned. Provided always, that the death of any partner during the co-partnership should not prejudice or affect the co-partnership in the use of any corporate mark or name; and it was declared that the

corporate mark granted to the defendant should thenceforth be treated as a partnership asset, and that it should be lawful for the "*parties thereto, or any of them, at the end or other sooner determination of the co-partnership, to have the free use and enjoyment of the mark for the remainder of their lives, either alone or in partnership with any other person or persons.*" And, further, that in case J. Bedford should die during the continuance of the partnership, the surviving partners for the time being should pay to his executors or administrators the sum of 500*l.* in lieu of all claim in respect of the mark, which sum of 500*l.* the surviving partners agreed as between themselves should be taken from the profits of the concern and added to the share of capital of the defendant, and be payable and paid in like manner as the capital belonging to him on the day of his decease. "And the defendant covenanted with the parties thereto, that the corporate mark granted to him should at all times thereafter be used and enjoyed by the partnership and by the parties thereto in manner aforesaid, and should become and be the property of the co-partnership, and be treated like the other assets of the concern." The articles contained no covenant not to assign the trade-mark.

The business was carried on according to the articles, using the corporate trade-mark until November 1861, when the co-partnership having become embarrassed the partners executed and registered a deed dated the 18th of November 1861, whereby (under the designation of the debtors) they conveyed and assigned to trustees all the real estates, messuages, works, lands, hereditaments, rights and premises, "stock-in-trade, goods, merchandise, materials, tools, implements, fixtures, books of account, debts, claims, monies, securities, stocks, vouchers, papers, household furniture, linen, plate, china, and other household effects," and "all other the personal estate and effects of the co-partners jointly, and of each and every of them separately," upon trust to sell the same in the manner therein mentioned, as a going concern, for the benefit of the creditors of the partnership.

Doubts afterwards arose whether the last-mentioned indenture was a legal dissolution of the partnership; and, in consequence, on the 16th of January 1862, the partners

executed a deed which declared that the partnership and the articles was and were dissolved from that day forth, so far as regarded the partners *inter se*, but not otherwise.

The trustees carried on the business under the trusts of the indenture of the 11th of November 1861. Early in the year 1862, the plaintiff Henry Bury offered to purchase the business, and that offer was accepted by the trustees and the creditors. By an indenture dated the 12th of March 1862, and executed by the trustees of the deed of the 18th of November 1861 of the first part, Edward James Bury and William Tarleton Bury of the second part, Priscilla Susan Bury of the third part, and the plaintiff of the fourth part, after reciting (*inter alia*) that certain portions of the partnership property had been delivered to the plaintiff, it was witnessed that, in consideration of 32,849 $\frac{1}{2}$., the trustees conveyed and assigned to the plaintiff whatever of the partnership property might not have been effectually passed to him by such delivery; and also all the estate, interest and demand of the trustees, which they had or might have any power to assign or transfer in and to, or respecting the estate, right and premises expressed to be thereby assigned; and in particular all the separate rights and interests of the several partners, which under or by virtue of the deed of the 18th of November 1861, or otherwise, were assigned to or were vested in the trustees, and which they had or might have any power to assign or transfer to and in the corporate mark of the corporation of Cutlers, and to and in all other corporate or trade-marks belonging to or used by the firm, or the right of using such corporate marks, or any of them, upon the expiration or other sooner determination of the partnership.

The plaintiff entered into possession of, and carried on the business of, the works as the successor to the partnership, and used the corporate trade-mark. He subsequently discovered that the defendant had entered into negotiations with Messrs. Butcher & Co., a firm in the steel trade, in Sheffield, for granting to them the use of the corporate trade-mark, and accordingly filed this bill, praying that the defendant might be restrained from using

or granting, or attempting to grant, to Messrs. William Butcher & Co., or to any persons whomsoever, the right to use the corporate trade-mark granted to him by the Cutlers' Company, or the mark of "William Ash & Co.," or other marks of the firm of Bedford, Bury & Co., in any manner whatsoever, or from otherwise preventing or hindering, or attempting to prevent or hinder, the plaintiff or his agents from having or enjoying the sole and exclusive use of the said trade-marks; and for general relief.

The defendant, by his answer, admitted that the affairs of the partnership had been regulated by the articles of partnership of the 6th of July 1859; but he alleged that it was understood by all parties that he agreed, so far as he was able, to give his partners certain rights jointly with himself in the corporate trade-mark granted to him. He not only did not claim a right, but expressly repudiated any right to assign such corporate trade-mark; and said that the solicitors who acted for his partners Edward James Bury and William Tarleton Bury, in reference to such partnership, had full and express notice previously to the execution of such partnership deed that the Cutlers' Company and their law clerk held such corporate mark not to be assignable by him, and that both he himself and his solicitor considered that, if any clauses were inserted which proceeded on a different footing, the same would be inoperative, and could have no legal value or effect.

The defendant also said that the balance-sheet produced to the creditors prior to the execution of the deed of the 11th of November 1861, did not purport to include, nor was such deed intended by him, or, as he believed, by any of the parties thereto, to assign, and it did not assign, any right to use such corporate trade-mark; and it did not contain any restriction of his right to continue to use the corporate trade-mark granted to him. The solicitor of his partners, Edward James Bury and William Tarleton Bury, on the execution of the deed of the 18th of November 1861, was, as the defendant believed, fully aware not only that such deed was not intended by any of the parties thereto to deprive the defendant of the right to use the corporate trade-mark granted to him, but that a treaty was then

on foot for the recommencement of business by himself and some former partners of his under a new partnership.

The defendant further alleged, that the plaintiff was the cousin of his late partners, Edward James Bury and William Tarleton Bury, and the brother-in-law of the former of those two gentlemen ; and that the solicitor of his late partners acted as the solicitor for the plaintiff on his purchase, and that he had full notice that both the Cutlers' Company and the defendant denied the assignability of the corporate trade-mark granted to him ; that their assignees did not claim any right to prevent the defendant from using such corporate trade-mark, and entertained great doubts whether they had any, and if any, what right or interest in such trade-mark that was capable of assignment to the plaintiff, who did not purchase from them on the footing that he should have an undisputed right to the exclusive use of the corporate or other trade-marks granted to the defendant, but only on the footing that he should have such right, if any, as the assignees were able to give him under the assignment to them.

The defendant also denied the plaintiff's right to the absolute ownership, or the exclusive use of the trade-mark granted to him, and submitted to the judgment of the Court whether the plaintiff was entitled to claim the exclusive use of the trade-mark. He did not deny the right of his late partners, during their respective lives, or the right of any other person (including the plaintiff) who might be in co-partnership with them or either of them, to use such corporate marks during the respective lives of his late co-partners ; and he submitted that he was entitled now to grant the use of the trade-mark to any person he might think proper.

The plaintiff, on the 4th of November 1862, applied for an injunction in the terms prayed for by the bill ; but the Master of the Rolls considered that, as the defendant had not by his assignment shewn an intention to deprive himself of the use of the trade-mark granted to himself, and as the deed contained no covenant by him not to use it, he ought not to be restrained from using it. His Honour, however, observed that the defendant had clearly no right to assign the trade-mark to Messrs. Butcher,

and that the latter would have been restrained from using it if they had been parties to the suit.

The cause now came on for hearing.

Mr. Selwyn and *Mr. Bury*, for the plaintiff.—The proposal to give Messrs. Butcher the right to use the trade-mark granted to John Bedford, as if they were in possession of the business carried on by him, was a fraud upon the public. This trade-mark had been made the subject of a contract between the plaintiff and his partners, and between them and their assigns. All parties were acting on it, and one of those parties, though he was the grantee of the trade-mark, could not be allowed to say that all his acts and deeds were of no avail, and that the nature of the property did not allow of its being dealt with. It was at once a breach of faith and a fraud upon the public. Trade-marks were property ; they were the subject of assignment, and corporate trade-marks were subject to all the rules which affected personal property.

Mr. Hobhouse and *Mr. Rendall*, for J. Bedford.—It is necessary to consider not only the law, but also the impression of its effect upon the minds of the parties at the date of the contract. The objects proposed to be carried out must also not be lost sight of. The case of *Hall v. Barrows* (1) shewed that a mark, when it denoted personal manufacture as distinct from a local manufacture, was not the subject of a sale. The word "property" was not strictly applicable to a trade-mark ; but still, a trader could ask that his use of it might be protected. The Court would never allow one man to gain an advantage upon the reputation of another. No assignment of this trade-mark had been made to Messrs. Butcher ; they were only to use it under the direction of Mr. Bedford, and in such manner as it was secured to J. Bedford by the deed of partnership of the 6th of July 1859. It was an asset of the firm so long as the firm lasted, but upon its termination the right to use it devolved upon all the partners, and each was at liberty to use it, individually or in partnership : each of the five partners therefore might have established a partnership with a right to use the trade-mark. The right which the defendant now

(1) *Ante*, 548.

claimed was the right to use the trade-mark, either by himself or in partnership with any other person. He did not deny the plaintiff's right to use it. The deed of partnership did not contain any covenant not to assign. It was necessary therefore to bear in mind those cases in which distinctions had obtained between an agreement to do a particular act, and an agreement to do that act with a further agreement not to do any act at variance with the affirmative part of the agreement. In the one case, an injunction had been refused; and in the other an injunction had been granted, but merely for the specific performance of the negative term of the agreement in its own terms. The Court had held, that it could not enforce an affirmative stipulation by injunction. Trade-marks in effect were not capable of assignment except that they could be made the subject of use during the continuance of a partnership in which the person to whom it was granted was a member. The defendant had always denied the right to assign a trade-mark, and he certainly now insisted upon his right to use the mark himself, as well as in partnership with other parties.

The cases referred to were—

Hall v. Barrows, ante, 548.

Motley v. Downman, 3 Myl. & Cr. 1; s. c. 6 Law J. Rep. (N.S.) Chanc. 308.

Churton v. Douglas, Johns. 174; s. c. 28 Law J. Rep. (N.S.) Chanc. 841.

Lumley v. Wagner, 5 De Gex & Sm. 485; s. c. 1 De Gex, M. & G. 604; 21 Law J. Rep. (N.S.) Chanc. 898.

The Cutlers' Company's Acts—

21 Jac. 1. c. xxxi.—1623.

31 Geo. 3. c. lviii.—1791.

41 Geo. 3. c. xcvi.—1801.

54 Geo. 3. c. cxix.—1814.

23 & 24 Vict. c. xliii.—1860.

The MASTER OF THE ROLLS.—A trade-mark was granted to Mr. Bedford by the Cutlers' Company; he afterwards entered into partnership with four other persons, and by the articles they mutually agreed that all the corporate and other trade-marks used by Mr. Bedford should be the property of the partnership during its continuance, and for the lives of the

parties thereto in manner thereafter mentioned; this was followed by a clause which provided that, so long as the partnership lasted, the mark was to be part of the property of the partnership. Another clause provided that when the partnership ceased the parties should have the free use and enjoyment of the mark for the remainder of their lives, either alone or in partnership with any other person or persons. Therefore persons who claimed under those partnership articles knew that any one of the parties thereto was entitled from the determination of the partnership to use the mark, either alone or in partnership; it was also provided that it was at all times to be used and enjoyed by the partnership, and by the parties thereto, and that it should become and be the property and be treated like the other assets of the concern. The partnership got into difficulties, and in November 1861 the parties made an assignment of all their property in favour of their creditors. I am of opinion that the right to use the mark passed by that assignment, subject to the provisions contained in the original agreement with the partnership. It passed because they agreed that it should be treated like the other assets of the concern, and all the property was assigned for the purpose of being made available for the benefit of creditors. For the purpose of so making the property available, the trustees carry on the business for a few months. During that time nothing turned upon the use of the trade-mark, because, no doubt, the business was then carried on for the benefit of the five persons who are called the debtors, of whom the defendant is one. They afterwards sold the whole of this property to the plaintiff. There was a deed executed on the 16th of January 1862, whereby the five partners agreed upon the subject, and, at all events, to dissolve the partnership; and from that period the partnership was dissolved.

The question is, what was the effect of the assignment of the trade-mark? Did the person to whom it was assigned acquire the right to the exclusive use of it, or only the right to use it? Those things are separate and distinct. Undoubtedly, any person who has a trade-mark which he may lawfully assign, may assign the use of it to another, and the assignor may enter into a cove-

nant either expressed or implied, that he does not intend to use it himself. In that case the assignee would have the exclusive use of the trade-mark. In this case there was a right on the part of the trustees to assign the use of the trade-mark to any person they thought fit; but at the same time I am clear that they did not give the person who bought it an exclusive right to use it. The purchaser bought it with a knowledge of the deed of the 16th of July 1859, which expressly stated "that it should be lawful for the parties, upon the determination of the partnership, to have the free use and enjoyment of the mark for the remainder of their lives, either alone or in partnership." That means, that they may severally have the right of using it; and therefore the person who bought it, not having any covenant from Mr. Bedford (I do not know whether he has or has not from the others), gets nothing more than a right to use the trade-mark himself; but he does not get the exclusive right to use it. I am assuming that the trade-mark is assignable; at all events, whether it be assignable or not, it does not lie in the mouth of one of the partners to say that it is not assignable for that purpose, or to that extent.

The argument for the defendant as to the assignment was founded upon a mistake. It was said that Mr. Bedford had always repudiated the assignment. Consider the meaning of an assignment of a trade-mark. It is nothing more than that the assignor allows the assignee the right to use the trade-mark. There is no other meaning to the word assignment. The assignment may be effected by an instrument more or less formal; but the thing is actually assigned at the moment when another person than the original owner is permitted to use the trade-mark, for either a shorter, or it may be for a longer period of time. In both cases it is equally an assignment, and it is impossible for Mr. Bedford to say that he did not assign this trade-mark to the partnership, when he gave them full power to use it, and to treat it as part of the partnership assets. He cannot say that they did not then acquire the right to enable another person, for valuable consideration, to make use of that mark. It appears, therefore, that the allegations which he has put

forth in his answer are founded on a mistake. As to them, it was well observed, to be a claim in derogation of his own grant, because, if the allegations were correct, the trade-mark could not be assigned, that is to say, the use of it allowed, to any person whatever. But it is obvious that Mr. Bedford had parted with the use of it to the partnership. It is also obvious that the partners, at the conclusion of their partnership, might, in dealing with the partnership assets, treat this mark as they could any one of the other partnership assets: that is to say, they might enable a person to make use of it, though they could not enable him to have the exclusive use of it. When I look at the proceeding with Mr. Butcher, I am of opinion there was an assignment of the trade-mark. It was an assignment of the trade-mark for a particular period, not defined, but for so long a time as they between them might agree, that Mr. Bedford should act as the traveller and agent of Mr. Butcher on the continent, for the purpose of selling his goods and allowing him to make use of that trade-mark during that period of time, in consideration of receiving a salary of 500*l.* a year and commission. That was an assignment of a trade-mark—not an absolute assignment of all his interest in it; but still it was an assignment of the trade-mark. It is clear that it was not a partnership, for Mr. Bedford was not liable to any debts or losses, and he was not entitled to participate in any of the profits. The only question then on this part of the case is, whether by these partnership articles Mr. Bedford reserved to himself the right to assign the trade-mark? and I am of opinion that he did not. The property was given to the partnership; and if it were not for the clauses which specify that he is to have the free use and enjoyment of the trade-mark, it is obvious that the whole of the property in it would have passed to the partnership. I have throughout been assuming that this trade-mark is one of those capable of assignment; and assuming it to be so, he assigned it absolutely to the partnership, and agreed that it should be partnership assets. If it had not been for the clause in the articles which provided, "that it should be lawful for the parties, or any of them, at the end

or other sooner determination of the co-partnership, to have the free use and enjoyment of the trade-mark," my opinion would have been that the whole of his interest in the mark would have passed, and that he could not afterwards have used it; and that the exclusive right to the use of the trade-mark would have been granted to the trustees, and conveyed by them to the plaintiff. But that clause makes all the difference possible; and in my opinion Mr. Bedford has raised a contention which he was not entitled to raise.

That makes it unnecessary to go into the distinction made in *Hall v. Barrows*, between the trade-mark which merely applies to a particular place, or a particular spot, as in *Motley v. Downman*, where there were tin-works attached to a particular place. Suppose, for example, a man were to establish iron-works in Monmouthshire, and call them the Pontypool Iron Works, and that such was the name given to them upon the sale of the business. Then the sale of the trade-mark pointing out the Pontypool Iron Works would properly pass. But what I entertained considerable doubt about was whether a trade-mark which did not designate a spot, but merely a name, or the initials of a name, as in the case of *Hall v. Barrows*, where it indicated the name of Bramah, Barrows & Hall, could properly be assigned to anybody. At the hearing of the motion for an injunction in this case, I was of opinion that "J.B." meant "John Bedford," and that it was not properly assignable. But it is not necessary to enlarge further upon that question, because I am clear, that, even assuming the trade-mark to be one that can properly be assigned, the question is determined by the partnership articles; and even if it is not such a trade-mark as can properly be assigned, it is not open to the defendant Mr. Bedford to say so; for he has done all he can to assign it to a qualified extent, both by the articles and the licence given to Messrs. Butcher & Co., and he therefore cannot complain of the trustees making use of it, or selling it to any person who thinks fit to use it. If there be any persons who have a right to come forward and complain in respect of this mark, and say that the public may be deceived by supposing that other persons than those who really manufacture the articles designated by it are the true

manufacturers of them; such an application must come on the part of the public, through the intervention of the Attorney General. He would be the proper person to sue; but whether any such application would succeed I am far from expressing any opinion. This, however, is clear, that no such proceeding can be taken by Mr. Bedford. He literally claims in a great measure the exclusive right to use this trade-mark, and to make any arrangement he pleases with respect to it, for in his answer he says: "It is not assignable, that he always said it was not assignable, and he adds that he may give any person a licence and leave to use it." He has said so practically by his actions, though in the case of Messrs. Butcher, he was not to be one of the partners, and though they do not come within the express clause of the partnership articles, I am of opinion that the partnership articles comprise the whole of his interest in this particular trade-mark, with the single exception of the reservation of the use of the mark by himself, either alone or in conjunction with any other partner. That reservation does not extend to the enabling him to assign it to anybody; by which I mean, to give a person the power of using it who is not a co-partner with him—who is not a person with whom he is engaged in a partnership, where there is a mutuality of profit and of loss.

In my opinion, therefore, the plaintiff's case succeeds on one point and fails on another. The plaintiff has claimed, on the one hand, the right to exclude the defendant from the use of this trade-mark. That I am clear he is not entitled to do. On the other hand, he has sought to exclude the defendant from assigning it, which it is plain he had attempted to do when this bill was about to be filed, but which, when the bill was filed, and in consequence of its being filed he abstained from completely doing. I think the proper order to be made in this case (the assignment to Mr. Butcher being at an end) is this:—"Declare that, upon the true construction of the partnership articles, and of the conveyance by the trustees, so far as the partners are concerned, that the trustees have a right to assign the use of this trade-mark to any person who shall become the purchaser thereof, and that each of the partners have also the power to use

the trade-mark either alone or in conjunction with any of the partners themselves, except so far as they have precluded themselves from so doing by any act of their own. Then, the defendant undertaking not to assign the trade-mark to any person whatever, declare that he is entitled to the use of it either by himself alone, or in partnership with any other person; no further order; no costs on either side, and stay all further proceedings, but with liberty to either party to apply." I add that, because, if it should appear hereafter that the defendant attempts to assign the trade-mark, the plaintiff will be able to come for an injunction. At the same time, he is at liberty to use the trade-mark himself, and I shall not restrain him from so doing. I do not order the injunction, because the defendant, upon the bill being filed, put an end to his agreement with Messrs. Butcher, and he now undertakes not to assign the mark in future. I have explained what I meant by the term "assignment," and the order now made will, under the circumstances, be as binding on the defendant as if an injunction had been granted against him. With respect to the trade-mark of William Ash & Co., I think that is not the subject of this suit, and I make no order at all as to that. My observations apply only to the trade-mark granted by the Hallamshire Cutler's Company.

Mr. Selwyn then asked that the plaintiff might be allowed the costs of the long affidavits which had been filed on the part of the defendant.

Mr. Hobhouse.—These affidavits were relevant to the issue. It might, however, be taken as a general observation that some parts of affidavits were always irrelevant.

The MASTER OF THE ROLLS.—I have read the affidavits, but they contain nothing to induce me to alter the conclusion I have come to as to the costs of the suit. There are, undoubtedly, some statements in them which are not evidence; and much even in that of the plaintiff which is superfluous. There is, however, very little which, having regard to the issues raised and accepted on both sides, may not fairly be considered as relevant. If I were in such cases as this to deal in a spirit of extreme nicety and

great severity with the affidavits, the result would be, that they would have to be settled by counsel. That would tend to great additional expense, and perhaps sometimes fail in attaining the correct elucidation of the truth. I have frequently found that, from an affidavit somewhat carelessly drawn, a fact appears throwing accidentally considerable light upon the case. I am not, upon the whole, disposed to make any alteration in the order I have made; and I can give no costs on either side.

LORDS JUSTICES. }

July 1, 28 ;

Aug. 4. }

WALLACE v. AULDJO.

Husband and Wife—Wife's Equity for a Settlement—Bill by her to enforce, and Death before, Decree—Rights of her Children.

The mere filing of a bill by a married woman to enforce her equity to a settlement is not sufficient to confer upon her children a right to a settlement in the event of her death.

A married woman filed a bill to enforce, for the benefit of herself and children, her equity to a settlement out of property to which she was equitably entitled; but she died before decree. The children filed a bill after her decease claiming a settlement:—Held, by the Lords Justices, affirming a decree of one of the Vice Chancellors, that all benefit of the wife's suit was lost by her death; that the rights of the husband were the same as if she had never instituted it; and that the bill in the suit of the children must be dismissed, with costs.

Steinmetz v. Halthin (1) overruled.

This was a suit, instituted by the children of Louisa Wallace, praying the settlement of certain property on them, and setting forth that Louisa Wallace, the plaintiff's mother, in her lifetime, had filed a bill, to enforce on her behalf and on that of her children a settlement of that property; but that, on the 19th of November 1861, she died, and no decree had been made in her suit.

(1) 1 Glyn & J. 64.

The facts, in a narrative form, may be stated thus: In the month of May 1827 Miss Louisa Auldjo married with the defendant, George Wallace, previously to which, namely, on the 21st of that month, articles in writing was entered into, by which Mr. Wallace agreed, in consideration of the intended marriage, to settle all the property to which Louisa Auldjo was then entitled to her sole and separate use, but no other settlement was entered into between them either before, upon or after their marriage. Mrs. Wallace was not, at the date of the articles, entitled to any property; but after the marriage she was allowed the sum of 200*l.* per annum by her father; Mr. Wallace's income was 350*l.* a year, in addition to his professional gains.

Mr. Auldjo, the father of Mrs. Wallace, made his will, dated the 1st of July 1831, and thereby, after bequeathing certain pecuniary and specific legacies to his wife, and making provisions for her by way of annuity, gave and bequeathed unto Edward Rose Tunno and his son, John Auldjo, the sum of 13,333*l.* 6*s.* 8*d.*, 3*l.* per cent. consols, to be held by them, upon trust, that they should, during the life of his daughter, pay the dividends to her for her separate use, without power of anticipation, and after her decease, in trust for her children as she should appoint; and in default thereof, in trust for the said children on their attaining twenty-one; and after devising his real estate to his wife and his sons to sell and convert the same, he directed that the residue of the trust-moneys should be transferred unto his sons, Thomas Rose Auldjo, James Alexander Auldjo, John Auldjo and Henry Auldjo, and the lawful issue of such of them as should die in his lifetime.

The testator made several codicils to his will, in which, amongst other things, he directed that two sums of 200*l.* per annum and 100*l.* per annum should, after his wife's decease, be added to the sum he had already granted to his daughter Louisa during her life, and subject to the same rules and principles as would govern his will.

The testator died in January 1837, leaving his widow and five children all surviving.

Alexander Auldjo died in 1839 intestate and unmarried, leaving his mother and his

brothers and sister Thomas Rose Auldjo, John Auldjo, Henry Auldjo and Louisa Wallace, his sole next-of-kin.

The widow died in 1857, and by her will gave to trustees the sum of 3,000*l.* to pay the interest thereof unto her daughter Louisa Wallace for her life for her separate use, without power of anticipation; and after her decease upon trust to pay the capital as she should by deed or will appoint, and in default to her children on attaining twenty-one.

Upon the death of the widow, the share of Louisa Wallace in Alexander Auldjo's property, consisting of his share in the two several sums of 9,083*l.* 6*s.* 8*d.* consols and 20,000*l.* consols, which had been set apart to answer the annuity bequeathed to the testator's widow, and in the proceeds to arise from the sale of the unsold portions of the testator's estates, amounting to 2,000*l.* or thereabouts, fell into possession.

The bill stated that Mr. and Mrs. Wallace lived separate, and that Mrs. Wallace, being advised that she was entitled to have a settlement made of her share of these two sums of 9,083*l.* 6*s.* 8*d.* and 20,000*l.* three per cent. consols, upon herself and her children, applied to the defendants George Wallace and Thomas Rose Auldjo to join in executing it, but they declined to do so; that in consequence of this refusal she filed her bill against Thomas Rose Auldjo and George Wallace, and Henry Auldjo and John Auldjo, praying for a settlement; that, after filing this bill, communications took place between her solicitors and the solicitors of Mr. Wallace, whereby it was proposed that the funds in dispute should be divided between them in equal shares, the share of Louisa Wallace to be settled on herself for her life, and after her decease for the benefit of her children; that Louisa Wallace expressed herself satisfied with this arrangement, as it would in some measure provide for her children; that, pending the final ratification of this arrangement, which the plaintiffs alleged that Mrs. Wallace looked upon as concluded, and took no further steps in the suit, she died, namely, on the 19th of November 1861, and the defendant George Wallace refused to have the settlement executed.

The bill further stated that, in consequence of Mrs. Wallace's death, the original

suit became defective; but the plaintiffs submitted that they were entitled to have the benefit of it, and of this suit taken as a supplemental suit; and they prayed that it might be declared that the said Louisa Wallace was entitled at and before her decease to have a settlement made on herself and her children of her share in the above-mentioned sums, and of the proceeds to arise from the sale of the real estates of the testator, and that the defendants George Wallace and Thomas Rose Auldjo might be decreed to pay and divide between the plaintiffs such sums of money and stocks as they would have become entitled to if a settlement had been made on the said Louisa Wallace and her children according to the rights of the said Louisa Wallace, and that Thomas Rose Auldjo might be restrained from paying over Mrs. Wallace's share to her husband.

The cause was heard in May by VICE CHANCELLOR KINDERSLEY, who held, that in order to confer upon children the right to a settlement out of their deceased mother's property, there must have been, in the lifetime of the latter, some decree or order of the Court, or other step converting the mother's equity to a settlement into a trust for the benefit of herself and her children, and that the mere filing of a bill by the wife could not have that effect; and the Vice Chancellor therefore dismissed the bill, with costs (1.)

(1) The judgment of the Vice Chancellor, delivered on the 1st of June, was as follows:—The doctrine of what is commonly called the wife's equity to a settlement, is an innovation on the common law right of the husband, which has been introduced by a process of judicial legislation carried through many years. But, in its application, it involves many curious anomalies. The origin of the doctrine, no doubt, was this: that if this Court had in its hands a fund which belonged to a married woman, and the husband came to ask this Court to give him the fund *jure mariti*, the Court considered that before the fund was handed over to the husband it should be seen that a reasonable and proper settlement was made on the wife for the benefit of herself and children by way of provision for them, because otherwise the husband might spend her money and leave his wife and children destitute. By degrees this doctrine became extended, and at last to cases in which the property was not in the hands of the Court at all, but in the hands of trustees. Then the question arose, whether a wife, by her next friend, could file a bill to claim that equity. There was some

From this decree the plaintiffs appealed. *Mr. Glasse* and *Mr. Pontifex*, for the appellants, cited the following authorities (which had been referred to in the Court below):

Lady Elibank v. Montolieu, 5 Ves. 737; s. c. *White & Tudor's Lead. Cas.* 1st edit. p. 341.

Murray v. Lord Elibank, 10 Ves. 84; s. c. 13 *Ibid.* 1; 14 *Ibid.* 496.

Steinmetz v. Halthin, 1 Glyn & J. 64.

Groves v. Clarke, 1 Keen, 132; s. c. 5 Law J. Rep. (N.S.) Chanc. 353.

De la Garde v. Lempriere, 6 Beav. 344; s. c. 12 Law J. Rep. (N.S.) Chanc. 472.

Lloyd v. Mason, 5 Hare, 149.

Baldwin v. Baldwin, 5 De Gex & Sm. 319.

Baker v. Bayldon, 8 Hare, 210.

Lovett v. Lovett, Johns. 118.

Osborn v. Morgan, 9 Hare, 432; s. c. 21 Law J. Rep. (N.S.) Chanc. 318.

Eedes v. Eedes, 11 Sim. 569; s. c. 10 Law J. Rep. (N.S.) Chanc. 199.

Lloyd v. Williams, 1 Madd. 450.

In re Erskine's Trust, 1 Kay & J. 302; s. c. 24 Law J. Rep. (N.S.) Chanc. 327.

Mr. Hobhouse and *Mr. Charles Hall* opposed the appeal on behalf of the husband, *Mr. Wallace*, and cited—

Barker v. Lea, 6 Madd. 330.

Whittem v. Sawyer, 1 Beav. 593.

Macaulay v. Philips, 4 Ves. 15.

Napier v. Napier, 1 Dru. & W. 407.

hesitation on the part of Lord Loughborough, in the well-known case of *Lady Elibank v. Montolieu*, as to whether a bill could be filed by the wife; but it was determined that it could, and that has ever since been established. Now, the existence of the right of the wife does not by itself impress a trust upon the property. The right which a wife has the moment that any property comes to her absolutely, is a right to insist upon having a settlement made. But the existence of that right in the first instance does not impress a trust upon the property itself. It is only a right to require that the trust shall be created for her for the benefit of herself and her children. Before the property is impressed with a trust in her favour, it is necessary that some action should be taken by her. What action on her part is necessary to raise a trust, or rather how far that action must have been carried, is the question; but some action must have been taken by her and carried to some certain point, or else no trust exists. If the property is in the hands of trustees, it is not enough that she should give them notice, in however formal and regular a manner, that she demands a settlement, notwithstanding such notice, the trust

Spicer v. Spicer, 24 Beav. 365; s. c. 26 Law J. Rep. (N.S.) Chanc. 704.

Mr. Berkeley appeared for the trustees.

Mr. Glasse was heard in reply.

LORD JUSTICE KNIGHT BRUCE (Aug. 4.)

—In this suit the plaintiffs, the children of the late Mrs. Wallace, claim against her husband and their father a settlement of, or out of, certain personal property in value between 2,000*l.* and 3,000*l.*, to which she was equitably entitled, but not for her separate use, and to which he in her right

immediately before her death was, and as her administrator, or having a right to be her administrator, ever since her death, and now is, equitably entitled, subject only to such right (if any) as she had, and subject to any rights which the present plaintiffs in the character of her children had to a settlement. Mrs. Wallace in her lifetime instituted a suit in this Court for the purpose of enforcing her equity, which suit was in existence at her death; and if she had not in her lifetime instituted any suit, it is plain and clear that, all things

may with impunity hand over the property to the husband. She cannot enforce a settlement for the benefit of herself alone; it must be for the benefit of her children as well as herself. And yet, if she carried her action far enough to establish a trust for herself and children, she may at any time before the settlement is complete waive and defeat it, not only as to her own interest, but also as to that of her children. Now, it has often been observed that, by reason of the existence of these strong anomalies in the doctrine of the wife's equity to a settlement, and the application of it, it is vain to attempt to reason out on general principles any question that arises under the doctrine, for it may be that the conclusion which by that process of reasoning upon general principles would be arrived at, would be found to be at variance with the conclusion which could be arrived at from reasoning in the same way from other propositions well established with respect to this doctrine. So the reasoning would be baffled, and the conclusion would not be worthy of being trusted. And it has been observed, therefore, that all that can be done in dealing with each case as it arises is to endeavour to ascertain what has been the practice of the Court with reference to the particular question, and of course that practice can only be deduced from the decisions that have been made, and the opinions expressed by learned Judges in pronouncing those decisions. Now, there is no doubt that there are two points at least well established with reference to this doctrine. The one is, that if the wife dies before a bill is filed, giving to the Court jurisdiction or dominion over the fund, the children have no right to require a settlement; they can file no bill after her death, nor raise any claim. The other, which is equally clearly established, is this, that if a decree or order has been made by the Court, referring it to the Master under the old practice, or to a Judge in chambers under the new practice, to approve a proper settlement, and the wife dies before anything further is done, the children are entitled to the benefit of that decree or order, and may file a bill to enforce such settlement, as the wife, if still living, would have been entitled to. Now, the question in the present case is this. A bill has been filed by Mrs. Wallace, and nothing more. Is the filing of that bill sufficient to create a trust so that the children of Mrs. Wallace can now file a bill to enforce such settlement as she, if living, could have enforced? Sir J. Leach was of

opinion that if any bill ever was filed in the wife's lifetime, which brought the fund, or the share of it to which the wife was entitled, under the dominion of the Court, although the wife died immediately after the filing of the bill, and before anything further had been done or said by anybody about a settlement, the children were entitled after her death to enforce a settlement. That was his opinion, and he so decided in *Steinmetz v. Halthis*. The reasoning which led him to that conclusion seems to have been this. The question, as he says, which was to be determined was, what proceeding must have been taken in order to impress on the property a trust in favour of the wife and children. Now, according to the general principles of the Court, if in any ordinary case a person files a bill to assert any right of property, or to enforce any trust, his right is not created by the decree. The decree only declares what his right was at the time of filing the bill. His right is independent of the decree. These are, no doubt, plain general principles of the Courts of equity. And Sir J. Leach went on to apply that principle to the question of the wife's equity to a settlement, and came to the conclusion that that equity does not depend on the decree; the decree only decides what her right was at the time of the filing of the bill; from that moment the trustee could not safely dispose of the property without the direction of the Court; and thence he drew the conclusion that a trust attached at the moment of filing the bill, and that the filing of the bill created the trust. The consequence of that process of reasoning was, as Sir J. Leach held, that not only where the wife files a bill actually asking for a settlement to be made upon her, but where the property to which she has become entitled is a share of a deceased testator's estate, and a bill is filed by anybody to administer that estate, inasmuch as from that moment the Court has jurisdiction over the property, and the trustees could not in safety part with it without the authority of the Court from that moment, although neither had the wife asked for a settlement, nor had any one surmised whether she ought to have one, not only the right to have a settlement exists, but by reason of filing that bill there was a trust attached to the wife's share of the property in favour of herself and her children, which trust her children, if she died immediately after filing the bill, might enforce after her death. Now that reasoning starts with the assumption

else being the same, the bill filed by the present plaintiffs would have been unfounded and without title. Unless supported, therefore, by the suit of Mrs. Wallace, it will fail wholly. But Mrs. Wallace did not bring her suit to an end. There was not in her lifetime any decree, nor was there any order in it whatsoever, nor even any answer, as I understand. The defendants to her bill appeared to it previously to her decease; but neither the bill itself, nor any appearance to it, bound her to

anything, nor was anything whatever decided against her husband in any way. Assuming, therefore, that if she had in her lifetime prosecuted her cause to a hearing, she would have obtained a decree for a settlement against him—a question, perhaps, under the circumstances of the case, reasonably arguable—I think that all possible benefit from the suit was lost to herself and her children by her death happening when it did, and that the rights of her husband then became, and now are, to all

that you may in all cases apply the general principles of the Court to questions arising with regard to the wife's equity to a settlement. That is not the case. It is not safe to do so with regard to so anomalous a doctrine, and other Judges have taken the same view that I do, which is, that Sir J. Leach tacitly made an assumption which cannot be supported. If a man is entitled to a share of property under a will, and files a bill to assert his right, or insist that some trust in his favour is created by the will, and gets a decree in his favour, it is perfectly true, as Sir J. Leach says, that the decree does not create his right; but is it not equally true that the filing of the bill did not create his right? His right must have existed before the filing of the bill. It existed, of course, from the time when the testator died, under whose will he was entitled to share. That was the origin and creation of his interest. It was no more the filing of the bill that created the trust or the right in him, than it was the decree that created any right in him. But further, it is to be recollected, that when a woman becomes entitled to any property absolutely, as a share of property under a will, what she becomes entitled to by virtue of the will is not a trust in equity, in the sense of a trust or right of property, for the property all belongs at law and in equity *prima facie* to the husband; but what she is entitled to is, that notwithstanding and against the marital right she has a right to take some action or to have something done for her which shall establish a trust upon that property in her favour. That is the nature of what is called the wife's equity to a settlement before anything has been done upon it. Therefore to reason on such a right from the case of a person who has got a right of property or a trust actually created under a will or other instrument is to reason in a manner which has been deprecated by learned Judges, and is unsafe. You must put general principles aside, and must simply work out from the decided cases what is the law of this Court with regard to the wife's equity. Several Judges have dissented from the views of Sir J. Leach. In *De la Garde v. Lempiere* the wife was entitled to a legacy under her father's will, and a bill was filed for the administration of his estate, and the common decree was made, after which the wife died, there never having been any suggestion about a settlement. *Steinmetz v. Halkin* was cited, but Lord Langdale considered that Sir J. Leach's reasoning could not be maintained, and that the

children would have no right. In *Lloyd v. Mason* the observations of Sir J. Wigram shew that he was of opinion that it was not the filing of the bill, but the decree which impressed a trust upon the property. In *Osborn v. Morgan*, Lord Justice Turner (then Vice Chancellor) had to consider the question, and I have caused the bill in that case to be examined, and it appears that the bill filed by the wife was for the express purpose of having her settlement out of two funds, one in possession and one in reversion, enforced by the order of the Court, and not, as the report would lead us to suppose, merely a bill for administration. It was in reasoning out the question as to her right to her settlement of the fund in reversion, that Lord Justice Turner made the observations from which it is clear that he did not hold with Sir J. Leach that the mere filing of a bill had the effect of impressing a trust upon the property. Besides, we have the clear and strongly expressed opinion of Lord Eldon in *Murray v. Lord Elibank*, that "the principle must be that the wife obtained a judgment for the children, liable to be waived if she thought proper; otherwise to be left standing for their benefit at her death." Now, how did she obtain a judgment on this bill? Filing a bill contains no judgment, but it is the decree which is in fact a judgment in favour of the wife and children. If the wife, having obtained that judgment, dies before completion, and without having done any act to waive for herself and her children the benefit of it, then it is the benefit of that judgment which the children are entitled to, and which they may file a bill to enforce. In *Lloyd v. Williams*, which was the case of a contract between the wife on the one hand and the assignees of the husband on the other, Sir T. Plumer, after sifting all the authorities up to that time, and examining the Registrar's book and the records of court, came to the conviction that the principle laid down by Lord Eldon was the true one. A contract may stand in the place of a decree, and be as good as a decree; but if there be no contract—and there is none in the case before me—nothing but a decree will be sufficient. Now, with these authorities before me, I feel no hesitation in coming to the conclusion that, inasmuch as Mrs. Wallace died before any decree was made in the bill filed by her, there was no trust impressed on the property at her death, and that therefore her children are not entitled to file a bill to enforce a settlement. I must, therefore, dismiss the bill with costs.

intents and purposes, the same as if her suit had never existed. Judicial opinions have not been uniform upon this point, as the reported cases shew; but reason and analogy, as well as the preponderance of authority, appear to me to be strongly in favour of the view which I have stated, and, accordingly, I cannot dissent from the dismissal of the present bill, although I should have preferred its dismissal without costs, and should have taken that course were I now hearing the present case originally, instead of on appeal.

LORD JUSTICE TURNER.—I have read through the cases upon this subject, and the Vice Chancellor's judgment, and I find it impossible to say anything upon the question before us which would not be a mere repetition of what has been already said. It was attempted to distinguish this case on the ground that a bill had been already filed by the wife during her lifetime, and of the discretion of the trustees having, as it was said, been thereby taken away. But, whether the discretion of the trustees was taken away or not, I can find no answer to the argument that there can be nothing binding on the marital right of the husband until the decree is made. I think, therefore, that the appeal is wholly groundless, and that it ought to be dismissed.

WESTBURY, L.C. }
July 15, 30. } NICKISSON v. COCKILL.

Legacy—Priority—Charity—Marshaling Assets—Discretionary Power of Sale.

The circumstance that legacies are payable immediately is not per se sufficient to give them priority over legacies the payment of which is postponed.

A testator gave to trustees all his real and personal estate, with power, "if they should consider it advisable, but not otherwise," to sell his real estate, or any part thereof, and upon trust to realize the personal estate and invest the proceeds of the real and personal estate and pay the income to his wife for life; and after her death he gave out of the investments directed to be made certain general and charitable legacies, the charity legacies to be paid out of his personal estate only;

and after giving the income of the residue to A. C. for life, he directed his trustees, after the decease of the said A. C. out of his personal estate to raise and pay a further charitable legacy of 500l. The wife died, and the personal estate and proceeds of sale of certain portions of the real estate which had been sold by the trustees were insufficient for payment of all the legacies:—Held, first, that the legacies payable at the death of the wife had no priority over the 500l. legacy payable at the death of A. C.; secondly, that the charitable legacies ought to be first provided for out of the pure personal estate; and, thirdly, that the trustees were bound to exercise their power of sale over the real estate to the extent necessary for providing for the general legacies.

Arthur Harry Johnson, of Gresham Street, in the city of London, by his will, dated the 17th of September 1849, after giving certain specific and pecuniary legacies, and, amongst others, a legacy of nineteen guineas to the treasurer of the British and Foreign Unitarian Association, to be paid out of the testator's personal estate only, and to be applied for the advancement of the objects of that association, and making a devise to Solomon Maw and Winter Cockill of all estates vested in him as trustee or mortgagee, subject to the equities affecting the same, proceeded as follows:

"I give, devise and bequeath unto the said Solomon Maw and Winter Cockill, all my real estate, (except what may be vested in me as a trustee or mortgagee,) and also all my stocks, funds, mortgages, policies of insurances, and all other my personal estate not hereinbefore disposed of: to hold the same unto and to the use of the said Solomon Maw and Winter Cockill, their heirs, executors, administrators and assigns, according to the respective nature of the same property, upon the trusts following (that is to say), as to my real estate to let and manage the same, and receive the rents and profits thereof, with power to grant leases of the same, on such terms as my trustees shall think advantageous and proper, and with power also (if they shall consider it advisable but not otherwise) to sell my said real estate, or any part thereof, by public or private sale, in such manner, at such time or times, and for such prices as they

shall think proper, they investing the net produce of such sale or sales (after defraying the expenses of effecting the same) in manner hereinafter mentioned. And as to my residuary personal estate upon trust to realize (at their discretion both as it regards time and mode) such part thereof as shall not consist of money or securities, with power to compound or allow time for payment of debts owing to me, and to adjust and settle by arbitration or otherwise all questions relating to debts owing or claimed to be owing by or to me. And upon further trust, out of the produce of my residuary personal estate, to pay my debts, funeral and testamentary expenses, the legacies hereinbefore bequeathed, and all expenses attending the performance of the trusts of my will. And to invest in the public funds or at interest on government or real securities, the residue and surplus of the produce of my said personal estate, and also the net produce of my said real estate if and when sold, with full power to alter, vary and change as occasion may seem to require, all such stocks, funds and securities, and also any stocks, funds or securities of which I may die possessed. And I declare and direct that my said trustees shall pay the income of my said real estate (until a sale thereof) and of the produce thereof if and when sold, and also the income of the stocks, funds and securities constituting or arising from my residuary personal estate, to my said wife or her appointees during her life, for her separate use, and so as not to be subject to the control or engagements of any future husband, and without power to sell, charge or anticipate the growing payments thereof, (for which purpose I declare that her receipts or those of her appointees for such income shall be effectual and the only effectual discharges for the same); and after the decease of my said wife, I direct so much of the said stocks, funds and securities to be sold as will be sufficient for the payment of the following legacies, which I give and bequeath and direct to be paid as soon as may be after my wife's death, namely, a legacy of 500*l.* to my wife's niece Alice Cockill, a further legacy of 300*l.* to the said Solomon Maw, a legacy of 50*l.* to my nephew George Maw, a further legacy of 100*l.* a-piece to each of my five cousins, Ann Nickisson, Frances Johnson, Susan Turner, Mary Ann

Johnson, and Charles Johnson, and a legacy of 100*l.* to the rector and churchwardens for the time being of the united parishes of St. Mary Haining and St. Michael, Wood Street, in the said city of London, such last-mentioned legacy to be paid out of my personal estate only, and to be invested by my said trustees in the public funds in the names of the said rector and churchwardens, who shall expend the yearly income thereof in the purchase of meat, potatoes and coals, and distribute the same on the 24th day of December, in every year, amongst such six poor persons residing in the parish of St. Mary Haining only, as in their discretion they shall consider most necessitous and meritorious. And I declare and direct that my said trustees shall after my wife's death and after paying the several last-mentioned legacies, pay and apply the income of the remainder of the said stocks, funds and securities, and also the income of my said real estate (if not then sold, and until a sale thereof and of the produce thereof if and when sold) in manner following, namely, one-half thereof during the said Alice Cockill's life, and the whole thereof after her decease, for the maintenance, education and benefit of the child, if any, of which my wife may be enceinte at my death, and the remaining half thereof during the life of such child (and the whole thereof after the decease of such child, or in case of there not being such child) unto the said Alice Cockill or her appointees during her life; all such payments to her to be for her separate use, and so as not to be subject to the control or engagements of any husband whom she may marry, and without power to alien or anticipate the growing payments thereof, (for which purpose I declare that her receipts or those of her appointees for such income shall be effectual, and the only effectual discharges for the same); and after the decease of the survivor of them, the said Alice Cockill, and such child, if any, as aforesaid, I declare and direct that my said trustees shall out of my personal estate raise and pay a further legacy of 500*l.* to the treasurer for the time being of the said British and Foreign Unitarian Association, to be applied for the advancement of the objects of that association."

The testator then directed his trustees to stand possessed of his said real estate if not

then sold, or of the produce thereof if sold, and also of the residue of his said stocks, funds and securities (after paying the legacies aforesaid), upon certain trusts for the children of Alice Cockill, with ulterior trusts for the benefit of his nephews therein named.

The testator died on the 27th of October 1855, and his will was proved by Solomon Maw and Winter Cockill, who got in the personal estate, and paid the funeral and testamentary expenses and debts, and such of the legacies as were payable on his death, and sold certain portions of the real estate.

The testator's widow died on the 5th of February 1860, without having had any child.

The bill was filed, by Ann Nickisson, against Winter Cockill and the executors of Solomon Maw (who was alleged to have died without accounting to his co-executor) for payment of her legacy of 100*l.*; and the personal estate being insufficient for the payment of all the legacies given by the will, the questions arose, first, whether the real estate unsold was made applicable to the payment of the general legacies; secondly, whether the proceeds of the real estate which had been sold was so applicable; and, thirdly, whether the legacies payable on the death of the testator's widow were payable in priority to the 500*l.* given to the British and Foreign Unitarian Association on the death of Alice Cockill, which had not yet taken place.

Vice Chancellor Kindersley held that the trustees had an entire discretion, not only as to manner, time and place of sale, but as to whether they should sell at all, and that there was no charge of legacies on the unsold part of the real estate; that the produce of the sale of the real estate which had been sold was applicable to the payment of the general legacies; that the testator had marshalled the assets in favour of the charity legacies; and that the legacies given on the death of the widow were entitled to priority over those payable at the death of Alice Cockill.

The British and Foreign Unitarian Association appealed from this decision.

Mr. Anderson and *Mr. Busk*, for the appellants, argued that the postponement of the legacy till the death of Alice Cockill

gave no priority to those which were payable at the death of the testator's widow.

They referred to—

Bench v. Biles, 4 Madd. 187.

Miller v. Huddleston, 3 Mac. & G. 513; s. c. 21 Law J. Rep. (N.S.) Chanc. 1.

Robinson v. Geldard, 3 Mac. & G. 735; reversing s. c. 3 De Gex & Sm. 499; 18 Law J. Rep. (N.S.) Chanc. 454.

Pritchard v. Norris, 4 W. Rep. 733.

Tempest v. Tempest, 7 De Gex, M. & G. 470; s. c. 26 Law J. Rep. (N.S.) Chanc. 501.

Mr. Glasse and *Mr. Roxburgh* appeared for the trustees.

Mr. Baily and *Mr. Batten*, for the plaintiff and other legatees, supported the decision of the Court below, and contended that the 500*l.* legacy was only to be paid out of what should remain after satisfying the earlier legacies—

Crooke v. De Vandes, 9 Ves. 197.

Mr. Anderson replied.

The LORD CHANCELLOR (July 30)—after reading the will—said, that upon the question, whether the charity legacies payable on the decease of Alice Cockill were postponed to the other legacies, he was unable to concur with the learned Vice Chancellor. He thought it clear that, although the legacies were deferred, they must yet rank with those which were directed to be immediately paid. He was therefore of opinion that the trustees of the will were bound to make provision for the 500*l.* legacy to the British and Foreign Unitarian Association at the time when they provided for the others. He was also of opinion that the two first-given charity legacies were not entitled to preference over the third charity legacy. But then another question arose, which was of some novelty: the trustees had sold part of the real estate, and invested the proceeds in the funds, and the proceeds therefore had become assets for the payment of the general legacies, but had not been sufficient for the payment in full of those legacies, after providing for the charity legacies out of the pure personality. The Vice Chancellor had held that the power of sale given to the trustees was purely

discretionary, and that they could not be required to exercise it for the purpose of providing for the general legacies. The point was one of some nicety; but although his Lordship agreed with the Vice Chancellor that the power was merely discretionary, yet he thought that power and that discretion were given to the trustees to be exercised for the purposes of the will; and inasmuch as the proceeds of the sale were at once devoted by the testator to the payment of the legacies, his Lordship could not but think it was the duty of the trustees, finding the assets insufficient for the payment of the legacies, to exercise that discretion, and sell a further part of the real estate. He was obliged, therefore, to differ from the Vice Chancellor on both points. All the charity legacies stood in priority of consideration, and it was the duty of the trustees to provide out of the personal estate for the 500*l.* legacy, though it was not actually payable till the death of Alice Cockill; and if the other personal estate turned out insufficient for the payment of all the general legacies, they ought not to allow the testator's intention to be frustrated, but to consider that the event in which the power of sale was to be exercised had arisen.

Reverse so much of the Vice Chancellor's order as declares that the legacies payable at the death of the testator's widow are payable in priority to the 500*l.* legacy, and declare that the several legacies, including the legacy of 500*l.*, are payable without preference or priority; and declare that, inasmuch as it appears there was pure personal estate enough for payment of the charity legacies, it was the duty of the trustees to set apart sufficient pure personal estate to answer those legacies, and to apply the rest of the pure personalty, and also the proceeds arising from the sale of the real estate, in payment of the other legacies; and inasmuch as that fund is insufficient for the payment of the legacies in full, declare that it was the duty of the trustees to sell a further portion of the real estate sufficient for that purpose,

ROMILLY, M.R. }
Nov. 6, 10. } MOSSE v. SALT.

Bankers—Customer—Mortgage—Overdrawn Account—Interest—Income Tax.

If bankers take a mortgage security from a customer for a fixed sum owing to them by the latter, the relation of banker and customer ceases thenceforth as to that sum, and it cannot be included in the customer's banking account so as to entitle the bankers to charge compound interest thereon; and in reference to the sum so secured, the mutual rights and obligations are thenceforth those of mortgagees and mortgagor.

Bankers cannot refuse to allow income-tax to a customer upon interest accruing on a mortgage security.

As between a banker and his customer, the mode in which the account has habitually been made out, will be viewed as evidence of an agreement that it should be taken in that way; and in the absence of any special agreement, express or implied, evidence as to the custom of bankers is receivable for the purpose of determining the principle upon which the account is to be taken.

Bankers took a mortgage security for a fixed sum owing to them by a customer, and subsequently continued the mortgage debt as part of the general account between them, which embraced various dealings and transactions, making rests and charging compound interest. The Court directed the usual accounts to be taken of what was due in respect of the mortgage security, and a separate account of the other dealings and transactions, reserving the question as to the mode in which the latter account should be taken (and more particularly whether with rests or not) for consideration in chambers.

The plaintiffs in this suit were the Rev. Samuel Tenison Mosse and Elizabeth his wife, and the defendants were John Salt and William Salt, co-partners in business as bankers in Lombard Street, under the style of "Stevenson, Salt & Sons."

The Rev. Samuel Tenison Mosse borrowed a sum of 1,600*l.* of the Equity and Law Life Assurance Society, and by a deed, dated the 1st of July 1846, he secured the repayment thereof to Messrs. Senior,

Cooper & Capron, as trustees for the society, with interest at 5*l.* per cent., by a mortgage of a policy of assurance, in the same society for 1,600*l.*, at the annual premium of 50*l.* 1*s.* 4*d.*; and of his life interest in a sum of 10,000*l.*, to which he was entitled under his marriage settlement; and of his reversionary interest in a sum of 4,000*l.*, to which, under his marriage settlement, he was entitled, upon the decease of himself and his wife, in the event of there being no child of the marriage.

Mr. Mosse, previous to 1846, had an account with the defendants' banking firm, and being indebted to them upon an account stated and settled, he by an indenture, dated the 5th of November 1846, covenanted to pay the sum of 2,678*l.* 8*s.* 1*d.*, with interest from the date of the deed, at the rate of 5*l.* per cent. per annum, on the 5th of May 1847; and Samuel T. Mosse and Elizabeth his wife at the same time assigned all the interest, dividends and proceeds to accrue due during the life of Elizabeth Mosse, in respect of the share to which she was entitled in the residuary estate of Catherine Walhouse, deceased. By the same deed Mr. Mosse assigned a policy of assurance in the Clergy and Mutual Assurance Society for 1,500*l.* to Messrs. Salt; and they also declared that they held another policy of assurance, which they had effected on the life of Mr. Mosse in the Church of England Assurance Society for the sum of 2,000*l.* as a further security for the money advanced. By the same indenture Mr. Mosse covenanted, in case the 2,678*l.* 8*s.* 1*d.* should not be paid on the 5th of May then next, that he would pay interest after the rate of 5*l.* per cent. per annum, by equal half-yearly payments on the 5th of May and the 5th of November in every year. He also covenanted to pay the premiums and such other sums as should be necessary to keep on foot the policies of assurance.

By another indenture, dated the 29th of December 1847, the plaintiffs as a further security for the said sum of 2,678*l.* 8*s.* 1*d.* assigned to Messrs. Salt all the interest, dividends and annual produce to accrue due during the life of Elizabeth Mosse upon one-sixth share of the residuary estate of Ann Walhouse.

Both these securities were subject to a

proviso making the same void on payment of the sum of 2,678*l.* 8*s.* 1*d.* with interest.

The bill alleged that in April 1848 the property in the above securities which, among other property, consisted of 182 North Staffordshire Railway shares, fell into possession; and that the defendants thenceforth received the dividends and income in addition to the income of other property of Mr. Mosse; and that they had always been in a position to keep down the interest of the mortgage debt, and to pay the premiums on the policies.

Messrs. Salt, in 1852, proposed to take a transfer of the mortgage for 1,600*l.* from Messrs. Senior, Cooper & Capron. They accordingly wrote to Mr. Mosse:

"London, 15th November 1852.

"Dear Sir,—Referring to your letter of the 5th inst., we write to inform you that we have intimated to Messrs. Rooper & Co. our intention of paying off the Equity and Law Life on the 1st of January next, and taking up all their securities. If all is arranged to our perfect satisfaction we propose charging only 4*l.* per cent. on the whole debt after that period. We hope to hear you approve this, and remain, &c.

"Stevenson, Salt & Sons."

Mr. Mosse assented to the arrangement, and by an indenture, dated the 1st of January 1853, Messrs. Senior, Cooper & Capron, in consideration of 1,600*l.*, assigned to Messrs. Salt the mortgage debt, and also all the property comprised in the indenture of the 1st of July 1846, subject to the equity of redemption subsisting in the same.

In March 1853 Mr. Mosse was entitled to the advowson of Tisbury, in the county of Wilts, under a grant from Lord Arundell, for the residue of a term of nine years, at a peppercorn rent, and renewable from nine years to nine years without fine during the life of Lord Arundell, until the church should become vacant, with a bond from Lord Arundell binding himself to pay Mr. Mosse, his executors, administrators or assigns, 1,000*l.*, with interest after the rate of 4*l.* per cent. per annum, from the 22nd of March 1836 to the day of payment, in case no vacancy in the church should occur during the life of Lord Arundell, and in consequence Mr. Mosse

should be deprived of his right of presentation and patronage.

On the 13th of March 1853 Mr. Mosse requested Messrs. Salt to advance him 1,059*l.* on the security of the advowson of Tisbury, which they agreed to do upon having it secured by a mortgage, with an immediate power of sale. The money was accordingly advanced, and a mortgage was executed, which also contained a further charge on the property which Mr. and Mrs. Mosse had previously mortgaged to the defendants.

Up to the end of 1854 the defendants charged interest at 4*l.* per cent., both on the 1,600*l.* and the 1,059*l.*; but the deeds omitted to confine the bankers to that amount, and in January 1855 the plaintiff received the following letter:

"London, Jan. 3, 1855.

"Dear Sir,—We inclose your account to the end of last year, and are sorry to add, that in consequence of the change in the money market, we shall be obliged to raise your interest to 5*l.* per cent. for the future.

"We remain, &c.,

"Stevenson, Salt & Sons."

The plaintiff alleged that pecuniary difficulties prevented his opposing this.

Immediately after the mortgage of the advowson of Tisbury, Messrs. Salt, through their solicitors, with a view to effect a speedy sale, intimated that an absolute and perfect title should be made to the next presentation in lieu of the renewable grant and bond. Mr. Mosse objected, and this led to much correspondence; but Mr. Mosse finally assented on the terms in the following letter:

"2, Storey's Gate, March 8, 1854.

"Dear Sirs,—I enclose you the particulars of Tisbury, and express my consent to your taking an absolute presentation to the living instead of the grant and bond we have from Lord Arundell, provided you can get a good marketable title to it, and also that it is not to be sold at least for three months without my approval of the price, and which, I have no doubt, cordial co-operation with me will effect within that time to our mutual satisfaction.

"I am, &c. S. T. Mosse."

A grant of the next presentation was afterwards obtained from Lord Arundell

and his son, but not a good marketable title, they not being in a position to give one.

An agreement was afterwards entered into for the sale of the next presentation for 3,300*l.* consols, but the defendants' solicitors inserted no reservations or special conditions with respect to the title, the consequence of which was that large expenses were incurred without the privity of Mr. Mosse, in the attempt to make out the title, which failed, and was abandoned.

The defendants paid these costs, and charged them against the plaintiff.

The purchase was afterwards completed, and after some delay the defendants sold the 3,300*l.* consols, and received 3,242*l.* 2*s.* 6*d.* as the proceeds.

After the sale of the stock, the solicitors of Messrs. Salt sent an account of the sums which they claimed to have paid out of the purchase-money; they also sent their bill of costs for investigation and the following account.

"Payment and expenses in respect of the next presentation to the vicarage of Tisbury.

1857.	£	s.	d.
Nov. 11. Paid Mr. Scott Turner bill for abstract, &c. of the Arundell title ...	40	6	0
20. Paid Messrs. Powell & Son, in discharge of debt incurred on account of the church at Tisbury and costs ...	42	0	0
Interest thereon to October 1858...	1	18	2
21. Paid into court, being portion of Mr. Humphries' claim, for which he had brought action in respect of former sale ...	23	0	0
Interest thereon to 18th Oct. 1858	1	0	10
Mr. Bagster's bill for commission on sale to Capt. Hutchinson ...	83	11	6
	£141	16	6
Messrs. Barker, Bowker & Peake's bill to expenses ...	336	6	4
	£478	2	10

Mr. Mosse wrote to the solicitors complaining "that the bill was a heavy and serious affair," at the same time he enclosed a cheque for the money paid as per account, 141*l.* 16*s.* 6*d.*

This led to a correspondence, which resulted in the solicitors dividing their bill of costs into two, one for business done on the instructions of Mr. Mosse, which he paid, and the other was their bill on which Messrs. Salt were primarily liable for the sale of the next presentation, with a few

items struck out which reduced it to 274*l.* 17*s.* 6*d.*

This sum was chiefly made up of the costs of the attempt to make a title to Tisbury advowson; the plaintiff objected, and claimed to have them deducted and the bills taxed, but notwithstanding Messrs. Salt paid the bill without deduction or taxation.

Messrs. Salt in the mean time made further advances on the securities subsequent to that of the 1st of July 1846.

The plaintiffs by their bill alleged as follows:

That the accounts sent to Mr. Mosse were sometimes yearly and sometimes for shorter periods. These accounts treated the mortgage debts as sums due to the bankers on overdrawn accounts, and after setting off the annual income and other monies received by them against the mortgage debts and disbursements on the other side, they charged interest on the balance, and added that interest to the principal in the succeeding account.

That the defendants never allowed income-tax on their charge for interest on their debt, though it had been deducted from the several sources of income.

That the income of the property realized was sufficient to keep down the interest and to satisfy all other payments in respect of the principal, and that it left a balance which the bankers impounded and applied in reduction of their debt.

That the plaintiff throughout was embarrassed, and the defendants' solicitors acted on his behalf, that on the 9th of November 1855, the bankers wrote to him, stating that they should be obliged to raise the rate of interest to 6*l.* per cent.; but that on the 11th of June 1856, they wrote that they hoped not to raise it beyond 5*l.* per cent.; but that the plaintiff lately discovered that the interest shortly afterwards was raised to 6*l.* per cent., and that he had ever since been charged with interest at that rate.

That the account between them had always been an open and running account, and that from the last account rendered, it appeared that the defendants claimed a balance of 2,040*l.* 12*s.* 5*d.*, but that it would have been much smaller if proper allowances had been made.

Upon these statements the plaintiff prayed that proper accounts might be taken

of the mortgages and of the monies received on account of the property comprised in the securities, and that he might be allowed the income-tax charged against him, and that after the 1st of January 1853, the defendants were only entitled to charge interest on the principal sum for the time being due, at the rate of 4*l.* per cent. only. It was also asked that the accounts might be taken as between debtor and creditor on the footing of mortgage transactions, and that the defendants were not entitled to compound interest.

It further asked for a declaration that the defendants were not entitled to charge the plaintiff with such portion of the solicitors' bill of costs as related to the inquiry into the title of the advowson of Tisbury, and that the plaintiff might be allowed such sums. It also asked that the bills of costs if necessary might be taxed, and that the property and the securities might be assigned and given up to the plaintiff on payment of what was due.

The defendants by their answer stated as follows:

That the plaintiff opened a banking account with them without any special agreement as to terms, and that it was opened and throughout carried on according to the usual recognized mercantile custom adopted in dealings between London bankers and their customers.

That such custom was and is in cases where the customer overdraws his account for the banker in balancing and making up the account at his accustomed periods to charge on the balances due to him from day to day from the customer, interest on such balances computed at the following rates (*videlicet*): at the rate of 5*l.* per cent. per annum for and during so many days, as the rate of interest charged by the Bank of England on discounting bills (hereinafter called the Bank rate of interest) was at or under the rate of 5*l.* per cent. per annum; but when the Bank rate of interest ranged higher than 5*l.* per cent. per annum, then for and during so many days as that Bank rate is and continues above 5*l.* per cent. per annum, to charge the customer interest on his aforesaid balances at and after such higher Bank rate of interest, and when making the periodical rests in the account thenceforth to turn such interest into prin-

cipal and to carry forward and place to the debit of the customer in one sum and as principal thenceforth carrying interest, the amount debited against the customer on making the rest. Other part of such custom was and is, for the banker from time to time to deliver or send to the customer, if resident in London, his pass-book containing his account, or if resident in the country a copy of his account with such banker when so balanced, each such account commencing with the balance appearing at the foot of the last preceding balanced account to be due to the banker from the customer; and each account or copy of account so delivered or sent, becomes and is deemed and taken to be, by and according to the aforesaid custom, a stated and settled account as between the banker and customer and binding between them, unless in the course of a reasonable time next following the receipt of the account or copy of account by the customer, an objection or objections thereto is or are, by or on his part made, delivered or sent to the banker. That the only variation in the aforesaid custom of bankers is, that some of the London bankers charge their customers interest at the rate of 1*l.* per cent. per annum higher than the bank rate of interest for and during the days when such bank rate of interest is at or over 4*l.* per cent. per annum, but that they by such charge of the additional 1*l.* per cent. did not deviate from the custom as stated.

That such custom of bankers had been adopted and acted on in their dealings with Mr. Mosse, and that they throughout, on the faith and reliance thereof, made advances and payments to and for him and on his account, and abstained from compelling him to pay, and gave him time for repayment of the debt from time to time due from him on their dealings. That in 1845 they, as his bankers, advanced Mr. Mosse 2,150*l.* to pay for railway shares, upon a written promise to repay it in one month; that this fact led to his over-drawing his account; that further sums had since been paid to his order which increased the debt, and that in making up his account at the end of the year they charged according to the custom on the daily over-drawn balances, and made the accustomed annual rest in his account, and that they stated at

the foot in one sum the amount due from him for principal and interest as the sum or balance standing to his debit on or as on the last day of the year 1845, and that they sent a copy of such account to Mr. Mosse on the 6th of January 1846.

That a similar account was made out immediately previous to the securities given for the sum of 2,678*l.* 8*s.* 1*d.*, without any objection having been at any time made to them, and that the securities of the 5th of November 1846 and the 29th of December 1847 proceeded on the footing of such accounts, and contained a covenant to pay not only interest at 5*l.* per cent., but also the premiums on the policies. That as the plaintiff's debt to them increased, they being desirous to increase their security, paid off Messrs. Senior, Cooper & Capron, and took a transfer of their securities, but that they had to pay not only the 1,600*l.*, but also an additional and unexpected sum of 114*l.* 11*s.* 6*d.*, which on settlement was found to be due, and which, for want of time, was not included in the security, and that they did so under the impression that Mr. Mosse would take measures to pay off or reduce his debt. They also said that they only proposed to reduce the interest to 4*l.* per cent. conditionally on the bank rate of interest continuing below the rate of 4*l.* per cent. at which it then was, but that no agreement to that effect was made.

That Mr. Mosse purchased the advowson of Tisbury as a speculation, and to avoid law proceedings he asked Messrs. Salt to advance 1,059*l.* to help him to meet the purchase-money, which they did, but only upon the condition that it should be immediately re-sold, and that accordingly a mortgage of the advowson, dated the 21st of April 1853, for that amount was executed to them, with a power of sale to secure the repayment of the 1,059*l.*, with interest at 5*l.* per cent., on the 21st of September next.

They also said that the monies comprised in the securities were not loans upon mortgage, but advances made by them in a course of business between banker and customer, to be dealt with according to the custom between banker and customer. If however they were limited by their securities to 5*l.* per cent. on the sums comprised therein, still they insisted that they were not precluded as bankers from charging on

his overdrawn account interest on the balances due from time to time thereon after the bank rate of interest, and according to the custom aforesaid.

That the title to the next presentation to Tisbury was not satisfactory; that attempts to rectify it were made under the directions and with the approbation of Mr. Mosse; that he corresponded with the intending purchasers and finally made an unrestricted contract to sell, but that in 1858 before the title was completed, and pending the objections to such title, the incumbent died, upon which they were waived and the purchaser's nominee was inducted to the living; and, on the 11th of October 1858, six months afterwards, the 3,300*l.* consols were sold and realized 3,242*l.* 2*s.* 6*d.*, which they received.

That Messrs. Bowker delivered their bills of costs, one of which was paid by Mr. Mosse, and the other by Messrs. Salt, as Mr. Mosse omitted to take any steps for its taxation.

The defendants then said that the accounts were banker's accounts between them and Mr. Mosse, and that they were sent in yearly and occasionally at shorter periods, but always once a year, without any objection being made to them, and that they were always in the usual form according to the custom of bankers with their customers, and that the monies for which they had security were treated as sums due on an overdrawn account, and that the plaintiff was charged with interest computed on the balances overdrawn and due from time to time on his banking account, and they submitted that such a course of dealing was proper, and that the accounts so settled prior to 1859 were settled accounts.

They also said, that it was the custom of bankers not to make any deduction or allowance in the customers' accounts for income-tax in respect of interest on overdrawn accounts of customers; that it would add to the labour and embarrassment of bankers in their business; that the customer was not damnified in the end, as if otherwise the business with the customer would be arranged to meet the objection; and the government was not damnified, as the banker in his return of profits paid the income-tax on the interest he charged against the customer. They further said, that the retention of the accounts by Mr.

Mosse prevented this objection from being now made; that the income of the plaintiff came into their hands as bankers; that the plaintiff had a drawing account, which was more frequently overdrawn than otherwise; that the annual income of the property in the securities was not sufficient to keep down the interest on the money advanced, and satisfy the other payments to which it was liable. That the plaintiffs were justified in charging the bank rate of interest on the overdrawn banking account, and that they were not bound to apply any small temporary balance in discharge of their debt; and if they were to be treated as mortgagees, they were not bound to take their debt in driblets; and they claimed the benefit of the customary mode of dealing between banker and customer.

The cause came on upon a motion for a decree.

Mr. Selwyn and *Mr. Loudon*, for the plaintiffs, the Rev. Samuel Tenison Mosse and his wife.

Mr. Lloyd and *Mr. Pole*, for the defendants, Messrs. John and William Salt.

The cases cited were—

Lord Clancarty v. Latouche, 1 Ball & B. 428.

Rufford v. Bishop, 5 Russ. 346; a. c. 7 Law J. Rep. (N.S.) Chanc. 108.

Henniker v. Wigg, 4 Q.B. Rep. 792.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS.—It is necessary, in all these cases, to distinguish between what is a banking account, as between banker and customer, and what is an account as between mortgagor and mortgagee; and there can be no question that, when a banker and customer carry on a banking account for a series of years upon a certain specified system, assuming it to contain nothing illegal, the Court will assume that there is an agreement between the customer and the banker that the account shall be kept upon that principle. In *Lord Clancarty v. Latouche* it is distinctly stated, that that acquiescence does not amount to a settlement of account. When it is simply a banker's account, it amounts to an agreement as to the mode in which that account should be kept; but it does not at all amount to a settlement of

account; neither can it be so treated, because a person would be at liberty to dispute and contest items, though not the principle upon which the bank account is kept. Is this then a question on the mode of keeping a banking account, or is it a question between mortgagor and mortgagee? My opinion is, that this is not a security for the balance of a banker's account. To come to that conclusion, I must alter the deed, which I cannot do. But it is the security for the sum of 2,678*l.* 8*s.* 1*d.*, the balance of an account settled up to the 12th of October 1846. It is quite immaterial what there was due before, as both parties agreed upon the amount then due; and they have executed a deed upon that basis, and the proof is, that Messrs. Salt treat it as a sum secured by the deed, on which interest was to be paid. The mode in which they have kept the account is one that cannot be sustained. Not only by the deed is it expressly stated that the whole property shall be redeemable on the 5th of May, if the principal and interest up to that time is paid; but in fact, in keeping the accounts Messrs. Salt charge interest upon that mortgage sum on the 1st of January following, making a balance of account. So that on the 5th of May, although the amount would be very small, yet the principle is clear, that there would be interest charged as due on the 1st of January, although, by the deed, it was not due till the 5th of May; and there would be interest running upon that until the following year.

I am therefore of opinion, that none of these deeds are a security for the balances of the banker's account, as it may be from time to time; but they are all securities for a fixed and given sum. In the absence then of express contract, it is not open to the defendants to charge compound interest upon them; and they cannot, in keeping these accounts, charge the interest due upon a particular day, and then say that interest runs upon that interest from time to time, bringing that all into one general banking account. That would be to contradict a deed under their hand and seal, which expressly states that this property is given as a security for a fixed sum, and not as a security for the balances due on a running account. The consequence is, that I must

first eliminate from the accounts to be taken between the plaintiffs and the defendants the total amount of that mortgage-debt and the interest upon it, and I shall treat that mortgage-debt as a fixed sum, with a certain arrear of interest due upon it (I was informed, between 1,600*l.* and 1,700*l.*), and, accordingly, I shall calculate the amount due for principal, interest, and the costs relating to the mortgage. In so doing I shall certainly not allow the retention of any sum of money in respect of income-tax. It is said to be a small sum, 60*l.* or 70*l.* for the whole period, but for that period I shall deduct the amount of the income-tax. I entertain no hesitation or doubt upon that subject. It is very true, that in dealings between merchants, the discounting of bills and the like, and loans made for short periods, the income-tax is not deducted, but it is equally clear that according to the mode of taking the accounts (whatever it may be in the city of London) in the Court of Chancery, in all cases of mortgagor and mortgagee, when the Court has once arrived at the conclusion that it is a case of mortgagor and mortgagee, the mortgagor is entitled to deduct from the interest paid to the mortgagee the income-tax which he necessarily has paid either in the shape of deductions from his rents, or from his dividends, prior to that period. Upon what principle, then, is the account to be taken? There is an account between the parties, and looking at the cheques which have passed on both sides, which were handed up to me, there is a banking account. Assuming that to be so, I ought to take the banking account separately and distinctly from the mortgage account. I take the mortgage account as an item by itself: there is a sum of 2,678*l.* 8*s.* 1*d.*, which is due, and there is an amount of interest upon it, less the amount of the income-tax, that is one item. Then there are the remaining dealings and transactions between the parties, to be taken upon the principle of a banking account, and with interest. To that the custom of merchants might apply, but upon that I should require evidence to shew how the account should be taken.

As far as I can judge, from looking at the accounts, I should be of opinion that in taking the account in that form, there

would be a balance due to the plaintiff nearly up to the end of 1853 and the beginning of 1854; then a balance against him to an amount of something like 1,500*l.* to 2,000*l.* for the five following years, and then a balance again in his favour. It is not material for my purpose whether I am right or wrong in that view, but that would be the way in which the account would be taken, and then I should take the account with a view to see what was due as the balance of that account, and set that balance off against the amount of principal and interest due on the mortgage debt. It is clear that in this state of the case, I cannot treat this as a mere mortgage suit for redemption, as at one time I was of opinion it was, but I am clear there were dealings and transactions other than and distinct from the mortgage as between these parties. But in that case I cannot treat it as a simple mortgage account. I must reserve further consideration, and I must necessarily reserve the costs until the hearing on further consideration. I must, however, take the whole of that account, and it will be open to the parties in chambers to give any evidence respecting the custom of merchants, or the custom of bankers, in regard to the mode in which this particular account would have been taken, assuming the whole of the mortgage transaction to be eliminated and taken out of it. There will be a sum of 2,678*l.* 8*s.* 1*d.* added to 1,600*l.* and odd due on the mortgage account. That there will be a balance due to the plaintiff on the other account is obvious—a very considerable balance, which will have to be set off against the other. Should there be any disputed items, they must be gone into upon taking the accounts.

The cases which have been referred to lead to the same conclusion. Not only in *Lord Clancarty v. Latouche*, but also in *Rufford v. Bishop*, the Court expressly stated that if it was a deed to secure a balance of a banker's account, it would then be taken on that basis, but not if it were a mere mortgage security. In *Henniker v. Wigg* it was a bond which is silent on the subject of accounts; it expresses no purpose further than that it was to secure a certain sum, and there the Court was of opinion, upon the dealings of the parties, that the bond was given to

secure the balances of the account as they might arise from time to time. All these cases concur as to the principle on which the account should be taken.

With respect to Mr. Bowker's costs, my impression is, that I must consider the bill item by item, to see if there is any one for which the plaintiff is not liable; this must depend upon his letters, but after those, it seems scarcely possible for Mr. Mosse to say that he did not authorize many of the acts which were done. If so, then all that will have to be done will be to moderate the bill to the proper amount; but considering how familiar the Court is with these cases, it seems an untenable proposition, after those letters, to say that there was not a retainer, or that he did not practically authorize the acts which were done.

I must, therefore, take an account of what is due for principal, interest and costs on the several mortgage securities, and I must also take an account of all other dealings and transactions between the plaintiffs and the defendants, and in taking such account ascertain, what, if anything, is due upon account of Mr. Bowker's bill of costs; then ascertain the balance due on each such account, and set off the one against the other, and reserve further consideration and costs.

LORDS JUSTICES. }
 April 15. } EDWARDS v. WILLIAMS.

Annuity—Solicitor and Client—Annuity Act, 53 Geo. 3. c. 141.—Return of the Consideration stated in Deed.

*A. was entitled under a will to an annuity of 50*l.*, charged upon real estate. She applied to B, a solicitor, to procure a loan of money to meet her present needs. The loan could not be procured from a third person, but B, who was previously unknown to A, agreed to purchase a portion of her annuity. B. was the only solicitor in the transaction, and on the execution of the deed handed to A. his bill of costs, the charges in which were reasonable, and which A. forthwith paid out of the consideration money. Eleven years afterwards, A. filed a bill to set aside the transaction, but one of the Vice Chancellors dismissed the bill with costs, and on appeal,*

the Lords Justices held that the payment of the costs was not a return of part of the consideration money within the meaning of the Annuity Act, and considering that the case was not one coming strictly within the rules applicable to dealings between solicitor and client, and there being no evidence of unfair advantage taken of A. by B, they affirmed the decision of the Vice Chancellor.

This was an appeal, presented by the widow of Mr. Thomas Edwards, against a decision of Vice Chancellor Wood, dismissing her bill with costs. The appeal was presented *in formâ pauperis*. The facts of the case, though somewhat confused, appear to be as follows:—John Lloyd, of Wigfair Uchaf, in the county of Denbigh, deceased, made his will, and by a codicil to it, bearing date the 27th of July 1812, he gave an annuity of 50*l.*, which he charged upon considerable real estates belonging to him in the counties of Denbigh, Flint and Salop, to Thomas Edwards for his life, and upon his death to the plaintiff his wife, for her life. The testator died on the 24th of April 1815, and was survived by Thomas Edwards, who also died on the 5th of March 1833, and the annuity was for some time regularly received by the plaintiff. In the month of September 1842 the plaintiff was in want of ready money, and she applied to the present defendant, Mr. Richard Williams, then and now a solicitor carrying on business in the town of Denbigh, to whom she was up to that time a perfect stranger: she consulted him as to obtaining an advance of 300*l.*, and she at the same time represented to him that she was in great embarrassment, and that she was being sued by her brother for a sum of 100*l.* due to him, which she had no means of paying. The defendant promised to use his best endeavours to procure her the money required, and he at first negotiated a loan with a gentleman named Campbell, but that arrangement could not be completed, and it was then agreed that Mr. Williams should himself make the advance upon the security of her annuity, but the precise nature of that security was now the subject of litigation, whether it was, as alleged by the bill, a "Welsh mortgage," of her annuity, with interest at 6*l.* per cent., or, as the defendant asserted, a sale to him of an annuity of 38*l.*, part of

the annuity of 50*l.*, but redeemable on the usual terms and in the ordinary manner. The deed by which the transaction was effected bore date the 6th of December 1842, and was an annuity deed, the consideration money being 300*l.* On the execution of the deed the defendant paid the 300*l.*, and handed his bill of costs of 27*l.* to the plaintiff, who paid it at once, retaining the difference. It was admitted that the plaintiff and defendant were, previously to August 1842, unknown to each other, and that he was the only solicitor employed. It was disputed between them whether he advised her that she should employ other professional assistance, and also whether the deed was fully explained to her; but from the judgment of the Lords Justices this dispute is unimportant. A memorial of the deed was duly executed pursuant to the Annuity Act.

On the 21st of October 1846 and the 2nd of June 1848 the plaintiff executed similar deeds under similar circumstances, by which she disposed of the remainder of her annuity of 50*l.*, but no memorial of the last deed was ever executed.

In 1852 the defendant instituted a suit in the Court of Chancery against the plaintiff, setting out the transactions between them, and praying an account of what was due to him; and the Master of the Rolls made a decree in his favour, but expressly without prejudice to any proceedings which Mrs. Edwards had then taken, or might thereafter take, to set aside the deeds of 1842, 1846 and 1848, or any of them.

In 1853 the plaintiff, Mrs. Edwards, filed her bill, but did not cause it to be served upon the defendant at that time. It was amended on the 5th of March 1858 and then served.

On the hearing of the cause Vice Chancellor Wood ordered the deed of 1848 to be delivered up to be cancelled, on account of no memorial having been registered; but in other respects his Honour dismissed the bill, and the plaintiff now appealed.

Mr. Dreury and *Mr. A. E. Miller*, for the appellant, argued that the transactions were not sales but mortgages; that the plaintiff had never been properly informed by her solicitor, the defendant, of their true nature; that such a transaction taking place under such a state of circumstances,

could not be permitted to stand, especially between a solicitor and client, the price, moreover, being so grossly inadequate; that the bills of costs established the relationship of solicitor and client, and that those bills shewed that the monies in payment had been in effect retained by the defendant, and not paid by and returned to him; that if this was an annuity transaction the defendant could not be paid his costs out of the consideration money, except under some special agreement which was not alleged; that under the circumstances there had been no improper delay by the plaintiff.

The learned counsel cited and commented on the following authorities:

Blackie v. Clark, 15 Beav. 595; s. c.

22 Law J. Rep. (N.S.) Chanc. 377.

Williamson v. Goold, 1 Bing. 234; s. c.

1 Law J. Rep. C.P. 78; 7 Moore, 579.

Hawkins v. Bennet, 30 Law J. Rep. (N.S.) C.P. 193.

Gresley v. Mousley, 4 De Gex & J. 78;

s. c. 28 Law J. Rep. (N.S.) Chanc.

620; 31 Law J. Rep. (N.S.) Chanc. 537.

53 Geo. 3. c. 141. s. 6.

Mr. Welford, for the respondent, was not called upon.

Mr. C. M. Roupell appeared for the trustee.

LORD JUSTICE KNIGHT BRUCE observed that this case, when stripped of the technical jargon by which it was of necessity surrounded, was one merely of a loan on insufficient security, where the risk which had been incurred by the lender was compensated in the usual manner. His Lordship did not think that there had been any infringement of the provisions of the Annuity Act; the return contemplated by the act was such a return as in reality reduced the consideration money, and not the payment of a fair charge like this. Therefore the case did not come within the act, and presented no analogy to that of *Williamson v. Goold*. Nor could he view the case as one strictly between solicitor and client. It happened, it was true, that one of the parties was a solicitor, and the other of them had had no legal advice except from that solicitor; but there had existed no previous relation of solicitor and client between them, and therefore that confidence, which was the

basis of the rule of the Court in similar cases, did not appear to have existed, and his Lordship could not consider that this case came within that rule. Moreover, he thought that there was no evidence whatever that any unfair advantage had been taken of the plaintiff, and looking at the fact that the original bill was filed in 1853, but that no proceedings were taken under it, and that nothing whatever had been done until 1858, his Honour's decree ought not to be disturbed.

LORD JUSTICE TURNER was of the same opinion as to the Annuity Act, which had not been transgressed. Upon the question of inadequacy of consideration, his Lordship said that no such case was made by the bill, nor was any such case established upon the evidence, and the Court could not entertain that question. His Lordship then examined and commented upon the evidence, which, as he considered, shewed from the conduct of the parties that the defendant's representation of the transaction was the right one, and that it was in reality a sale and not a mortgage. Nor did he think that in a case like this, which was substantially a loan of money, anything could be presumed from the circumstance that costs had been paid by the borrower. On the question of solicitor and client, he did not consider that any such breach of duty was shewn as could have the effect of avoiding the sale, especially when regard was had to the circumstance that, except in this single transaction, the defendant was a stranger to the plaintiff. Upon these considerations the appeal ought to be dismissed; but, as the plaintiff was suing *in forma pauperis*, there could of course be no order as to costs.

ROMILLY, M.R.

March 5.

LORDS JUSTICES.

May 29;

June 2.

In re TILLEARD.

Bills of Costs—Taxation—General Items—Explanations—Costs preparatory to obtaining Act of Parliament.

A solicitor, who has included in his bill of costs a lump or gross sum, may on taxation before the Master supply a detailed

statement shewing how the sum is made up, and the Master may allow such of the items contained in the detailed statement as are proper, not exceeding in the aggregate the gross sum originally charged; but the Master can in no case allow more than the original amount.

Six railways, forming parts of a general system, were projected by the same persons. An act of parliament was obtained authorizing the construction of two only, the other four being abandoned, and the special act provided that the expenses, costs and charges of obtaining and passing the act, and incidental and preparatory thereto, should be paid by the company:—Held, that the costs incurred in relation to the abandoned railways were to be regarded as costs incidental and preparatory to the obtaining of the act, and were properly payable by the incorporated company.

This was the petition of the Great Northern and Western (of Ireland) Railway Company, to review the taxation of several bills of costs of Messrs. Tilleard & Co., their former solicitors, for business done in connexion with the promotion and construction of various lines of railway in the north and north-west of Ireland, and for which it was sought to make the corporate funds of the company liable.

In the year 1856 Mr. Fowler, supported by several noblemen and gentlemen, projected six lines of railway, to be made in the north-west of Ireland: 1. From Tullamore to Athlone. 2. A junction line from Athlone to a proposed dock on the Shannon. 3. From Athlone to Roscommon. 4. An extension or divergent line in lieu of part of that between Tullamore and Sligo. 5. From Roscommon to Castlereagh. 6. From Castlereagh to Boyle and Sligo. All, however, were abandoned, except those numbered 3. and 5, which were authorized by the 20 & 21 Vict. c. lxxxiv, by which act the Great Northern and Western (of Ireland) Railway Company was incorporated. This act contained a clause (section 52.) as follows: "The expenses, costs, and charges of obtaining and passing of this act, and preparatory thereto, shall be paid by the company."

The original promoters employed Messrs. Tilleard as their solicitors, who continued

to act as the solicitors to the company after its incorporation until the year 1859.

Actions having been brought by Messrs. Tilleard against the company for their costs and orders for taxation made, the Messrs. Tilleard carried in their bills, one of which contained the following charges:

"1856, June, to August 1857.—For attendances on the promoters on the formation of the company and in promoting and passing the bill through parliament, including Mr. Freeman's journey in Ireland in October 1856. All attendances on capitalists, engineers, contractors, subscribers and landowners, arrangements with bankers for the deposit, attendances on the parliamentary agents, negotiations with the Great Southern and Western of Ireland and the Midland Great Western of Ireland Railway Companies and voluminous correspondence, the whole extending over the period between June 1856 and August 1857 525*l*."

"1856, October.—Taking the reference, 105 miles, including all attendances connected therewith and payments for railway fares from London, and travelling expenses and other incidental expenses and gratuities for information 525*l*."

The solicitors, previous to the taxation, carried in a rider to the bill of costs, stating in detail the particulars and charges which made up each of these items. In explanation of the first item of 500 guineas the rider shewed details amounting to 789*l*. 9*s*. 6*d*., and in explanation of the second item details amounting to 457*l*. 7*s*. 5*d*. The Court had previously refused to allow this rider to be added to the bills of costs as part thereof; but the Taxing Master admitted it to shew the way in which the two lump items of 500 guineas had been made up, and he allowed in respect of the first item 521*l*. 8*s*. 6*d*., and in respect of the second 355*l*. 9*s*. 5*d*.

The sums so allowed included various charges for business done and expenses incurred prior to the formation and incorporation of the company in relation to the four abandoned railways, which the company contended were not properly chargeable against them under section 52. of the special act of the company. They were, therefore, dissatisfied with the Master's certificate, and objected (amongst other things), first, to the admission of the rider in support of the

lump items in the bills, and to the consequent allowance of those items in whole or in part; secondly, if the rider was admissible, it ought not to have exceeded in amount the lump items in support of which it was brought forward, and ought not to have contained charges which were not within the description of the several lump items respectively; thirdly, to the funds of the company being made liable for charges and expenses incurred prior to the formation of the company, and not relating to the specific object authorized by their act of incorporation; and they now presented this petition, and asked that the Master might review his report.

Mr. Baggallay and Mr. Martineau, for the company.—General items cannot be admitted in bills of costs. If the bills do not explain themselves, they are not proper bills within the 6 & 7 Vict. c. 73. Every charge must be set out in such a manner that the person charged may at once be able to apply to a solicitor and ask for advice; for instance, an omission to name the Court of law in which the business was done had been held to be a good objection to a bill. Here the company asks that the general items may be struck out of the bill on the ground that nothing can be admitted to explain what the bill fails to set out, and because details far beyond the sums charged cannot be admitted to prove the items in the bill. No solicitor can be permitted to say, "If you will not pay what I ask, I will prove that I might have more than I claim, and ask for its taxation." A solicitor is bound by his bill as delivered. The Court so considered it when it refused to admit the rider as part of the bill.

Ivimey v. Marks, 4 D. & L. P.C. 709; s. c. 16 Mee. & W. 843; 17 Law J. Rep. (N.S.) Exch. 165.

Ex parte Tosland, in re Lett, ante, Chanc. 100.

In re Pender, 10 Beav. 390.

Cooke v. Gillard, 1 E. & B. 26; s. c. 22 Law J. Rep. (N.S.) Q.B. 90.

Pigot v. Cadman, 1 Hurl. & N. 837; s. c. 26 Law J. Rep. (N.S.) Exch. 134.

The expenses relating to the abandoned railways cannot be charged against this company.

Mr. Selwyn and Mr. Pole, for Messrs. Tilleard, were not called on.

THE MASTER OF THE ROLLS.—I think the Taxing Master has come to a right conclusion upon both these matters. With respect to the lump sums, the two sums of 500 guineas each, I concur entirely with the conclusion come to in the case of *In re Pender*, that such a sum, by itself and unexplained, must be simply disallowed; but it is open to the solicitor who takes that item in to give evidence shewing what he really has done to justify that item. In addition to that, I am also of opinion, that before taking in such a bill for taxation, if it has not been previously explained, the client is entitled to have that item explained, and the explanation must be given to him for that purpose. I will explain in what way I consider this rider, as it is called, to be not a part of the bill of costs, and yet properly introduced before the Master. If a solicitor sends a bill in to a client, the client is entitled to have it vouched before taxing it. He says to the solicitor, "I do not understand one of your items; explain that to me." Then the solicitor gives him a letter of explanation; that explanation both parties are at liberty to make use of before the Master, though, in fact, it forms no part of his bill. It appears, that on the occasion when taxation of the bill was asked for, I held that these riders formed no part of the bill, and I am still of that opinion. If the question had arisen before the Taxing Master to augment the 500 guineas to the amount of 789*l.*, he was not at liberty so to do. The solicitor says, "All I claim in respect of this is 500 guineas. You ask for an explanation; you are entitled to an explanation, and I explain to you how it is made up. It is made up of items in respect of which I insist I was entitled to charge 790*l.* I did only charge 525*l.*" That does not alter his bill. His bill is still 525*l.*, and he cannot claim any more than that; but he is entitled to take all these items in for the purpose of vouching and explaining how they make out the 500 guineas which did form part of the bill when I directed this very taxation; and if the Taxing Master had allowed more than the 500 guineas upon it, I should have said that was an

improper allowance, and ought to be disallowed with respect to the excess beyond the 500 guineas. The cases which have been cited do not satisfy me that I ought to come to any different conclusion in this case. The case of *Ivimey v. Marks* does appear to me a very strong case; but if it be law that a solicitor cannot be allowed items in a bill of costs for law business done because he has not stated the court in which it was done, or he has mis-stated it, or that it was a lump sum with an improper item,—in that view of the case, I ought not to have directed the taxation at all. It was a reason for saying there should be no taxation, that it was a bill that could not be paid or taxed; and you might bring your action at law, and could not recover it. I do not think any of the cases lead to that result; and the case that Mr. Baggallay has pressed strongly upon me of *Pigot v. Cadman* states this: that where a client requires his bill of costs to be taxed, he is entitled to have the whole bill before him; and, for instance, in the very case before me, assuming nothing else to have arisen, if Messrs. Tilleard & Co. had applied the monies which were paid to them on account, which appears to have been 5,000*l.* or 6,000*l.*, to the payment of particular items in the bill, or so much of the bill up to a certain point as Messrs. Tilleard & Co. thought fit to attribute it to, and had only delivered the bill for the rest, then the Court would have said, that will not do, you must deliver the bill for the whole; and you must say how much you have received in respect of the whole of that bill. In *Pigot v. Cadman* a solicitor had been employed by a client in certain transactions at law and in Chancery, in respect of which he ought to have made out one entire bill, and to have stated how much he had got upon the taxation in Chancery. Instead of that, he cuts off the items which had been taxed in Chancery which he had got paid; he excludes those from the bill, and only puts in the remaining items; that is not the mode. Obviously, he ought to have made out the whole bill, and stated how much of it he had got paid; and I have no doubt the Court came to a right conclusion on that occasion; but I am still of opinion that, upon an ambiguous item or a lump item a client is entitled to an

explanation before the bill is taxed; and even if he does not, the solicitor may afford it; and when the bill comes to be taxed, though the solicitor cannot alter the amount of the item in the bill of costs, he is at liberty to use the explanation given by him. It appears to me, the Master has come to a correct conclusion in what he has allowed in respect of these two sums.

I think the Master is also right in respect to that which seems to be the most important part of this case, namely, the allowing the costs which were incurred by the solicitor in relation to the line from Tullamore to Athlone, and from Castlereagh to Sligo, which were preliminary steps. In the first place, it is to be observed that a matter of this description ought to be treated liberally: the clause in the act says "the expenses, costs and charges of obtaining and passing this act, and incidental and preparatory thereto, shall be paid by the company incidental and preparatory to the passing of this act." There were some landed gentlemen and proprietors in various parts of Ireland, who entertained the notion that it would be very desirable to have six lines of railway connected and united together, but it was impossible to tell whether it would be desirable to have all or whether it would be desirable to have but one, without having a survey and examination made of the ground, and they have them all six examined, and they give notice respecting them all, but on reflection they consider that only two are likely to pay, and accordingly they abandon the other two and adopt those two. Now, I am not clear that to a very great extent the examination of where the railway ought to stop is not incidental and preparatory to the preparation of the railway itself. What places it ought to avoid, where it ought to stop, and to what point it ought to continue, is to some extent incidental and preparatory to the preparation of the bill for the railway which is actually carried. But I think this case does not turn upon that. I think it turns on the acquiescence of the directors of the company. The Master of the Rolls then proceeded to consider certain circumstances of part payment and acquiescence on the part of the directors, which he held to preclude them from disputing these charges, and dismissed the petition with costs.

The Company appealed from the decision of the Master of the Rolls, upon the question of the allowance of the cost and expenses relating to the abandoned lines, and their appeal was heard before the Lords Justices on the 29th of May and the 2nd of June—the same counsel appearing as at the Rolls.

Mr. Baggallay and *Mr. Martineau*, in support of the appeal, argued that the costs of the contemplated works which had been abandoned, were in no sense of the term “preparatory” to the act which subsequently passed the legislature. The Great Northern and Western of Ireland Railway Company, in point of fact, had no connexion with the original scheme proposed, and the expenses incurred had been so incurred by Messrs. Tilleard & Co., on the responsibility of the parties who instructed them, and those gentlemen must look to those parties, the promoters of the scheme, for remuneration for their services.

Mr. Selwyn and *Mr. Pole*, for Messrs. Tilleard & Co., were not called upon, but during the appellants’ argument in reference to a doubt expressed by Lord Justice Knight Bruce respecting the liability of a company to be sued in respect of services rendered by a solicitor before the existence of the company; they cited :

Carden v. the General Cemetery Company,
5 Bing. N.C. 253; s. c. 8 Law J. Rep.
(N.S.) C.P. 163.

LORD JUSTICE KNIGHT BRUCE.—Although the line of railway for the construction of which the act was actually obtained was considerably shorter than that which was originally contemplated, yet the latter was included in the greater scheme, and the costs claimed by the solicitor extended to matters connected with the whole line, and must be considered upon the meaning of the act as relating to so much of the line as had obtained the sanction of parliament; therefore the Taxing Master has taken a correct view of the matter, and has well expressed it, and the adoption of his conclusion by the Master of the Rolls is perfectly right. It was at one time a question whether in strictness the demand of a solicitor could be made directly against the Company, a body which had no existence when the bill of costs was incurred; but it

has been now for many years the habit to consider this class of demand in the light of a continuing demand for preliminary or preparatory costs. In my own opinion, also, it appears fair to say, that, as soon as the act passed, a liability from the company to the solicitor was constituted.

LORD JUSTICE TURNER.—I am of the same opinion. It cannot be said that these costs are the less preparatory to the act obtained because they extend to matters beyond the line to which the act applies. It is clear that this act was at first intended to apply to a more extensive scheme, which was afterwards abandoned or reduced. The costs in question were costs preparatory to the obtaining of the act, although the act was in reality granted for only two of the lines originally projected. The act of parliament of the company provides that the expenses preparatory to the obtaining of the act should be paid by the company, and if any doubt existed upon the point, it would be removed by the circumstance that the promoters of the original scheme were themselves amongst the directors of the present company.

ROMILLY, M.R. }
Feb. 24, 26. } CADDICK v. COOK.

Mortgage—Foreclosure—Practice.

Upon the hearing of a foreclosure suit it appeared that two only out of three tenants in common beneficially entitled to the equity of redemption were before the Court:—Held, that the Court could neither decree a sale nor a partial foreclosure.

The plaintiff was ordered to pay the costs of the day to the defendants who appeared.

This bill was filed by Edward Caddick, as a mortgagee having the legal estate, to obtain either a sale or foreclosure of the mortgaged property.

The mortgagor by his will, dated the 30th of December 1852, had devised the mortgaged premises to Messrs. Silk and Aukretts, upon trust for his wife during her widowhood, and after her death or second marriage, upon trust to apply the rents for the maintenance of his children; and after the

copyright, and that H. was entitled to an injunction accordingly.

The object of this suit was to prevent any infringement of the plaintiff's copyright under the following circumstances :

The plaintiff, John Camden Hotten, of No. 121B, Piccadilly, was a bookseller who devoted his time to the collection of scarce books, tracts and ancient manuscripts. Hotten had composed and published a series of catalogues of his books, tracts, &c., entitled "A Handbook to the Topography and Family History of England and Wales: being a descriptive account of 20,000 most curious and rare books, old tracts, ancient manuscripts, engravings and privately-printed family papers, relating to the history of almost every landed estate and old English family in the country, interspersed with nearly 2,000 original anecdotes, topographical and antiquarian notes. The labour performed by J. C. Hotten. The books, &c. now on sale, each article having a small price affixed. Meret qui laborat. London, J. C. Hotten, Piccadilly." Such catalogue contained notices and descriptions of the various works offered for sale by Hotten. And many of the descriptive parts and notices were emanations of his own mind; others had been communicated to him by his literary friends; but all the descriptions and notices were written and composed by Hotten.

In May 1863, Thomas Arthur, a bookseller, published a catalogue resembling the plaintiff's, with the following title: "Part 98. Topographica Curiosa, 1863. Bibliotheca Anglia, Wallia, Scotia et Hibernia (*sic*). A catalogue of an interesting collection of books and tracts, relating to the history, antiquities, topography, dialects, &c. &c. of England and Wales, with some privately-printed works. Also many curious works on the early history and topography of Ireland and Scotland, the whole arranged under counties. Now on sale for cash only, by Thomas Arthur, 45, Booksellers' Row, Strand, London."

On examination it appeared that part of T. Arthur's catalogue was copied verbatim from Hotten's, other parts were only colourable imitations of Hotten's catalogues. Under these circumstances a bill was filed by J. C. Hotten against T. Arthur and the

printers employed by him, by which it was prayed that T. Arthur, his servants and agents, might be restrained by injunction from selling or exposing for sale or distributing, and from causing to be sold or exposed for sale or distributed, and from being in any way concerned in selling or exposing for sale or distributing, any copies or copy of the above-mentioned catalogue or any part thereof, or any other catalogue containing any other matter or thing compiled and written by the plaintiff appearing in the plaintiff's catalogues, or any or either of them.

Sir Hugh Cairns and *Mr. E. B. Lovell*, for the plaintiff, submitted that the plaintiff's copyright had clearly been infringed, and that on the authority of *Mawman v. Tegg* (1) he was entitled to an injunction.

Mr. Tripp and *Mr. E. Macnaghten* contended that it was a well-known custom in the trade for booksellers to copy one another's catalogues, and the defendant had acted on this custom. The profits made by the sale of the catalogue were quite insignificant, and the Court would not interfere to prevent trivial trespasses—*Saunders v. Smith* (2). It was doubtful whether copying parts of a work of this nature, as had been done by the defendant, was piracy—

Sweet v. Benning, 16 Com. B. Rep. 459; s. c. 24 Law J. Rep. (N.S.) C.P. 175.

Bramwell v. Halcumb, 3 Myl. & Cr. 737.

Mr. Bristowe, for the other defendants, the printers.

Wood, V.C. (without hearing a reply) said that the question raised in this case appeared to be very simple. The catalogues published by the plaintiff were not mere dry lists, but contained descriptions written by the plaintiff of the books offered for sale. Supposing these descriptions had been composed by some author and printed in a bookseller's catalogue, it was clear that the author would have a copyright in them, and no other bookseller could reprint such descriptions without infringing that right. Mr. Hotten was both author and publisher of these catalogues, but that could make no difference in his rights; he had expended

(1) 2 Russ. 385.

(2) 3 Myl. & Cr. 711; s. c. 7 Law J. Rep. (N.S.) Chanc. 227.

next friend—*Guy v. Guy* (2). In *Upton v. Johnson*, at the Rolls in 1860, but not reported, an application on behalf of an infant without a next friend stood over until one was appointed.

Mr. W. W. Cooper, in reply, asked leave, in case the Court should think the motion irregular, to amend—and cited *Daniell's Practice*, 2nd edit. p. 81, in support of the motion.

KINDERSLEY, V.C.—As a general rule an infant must be represented by a next friend on every application by the infant, and the only question is whether the case of *Furtado v. Furtado* varies the general rule, or whether it turned on its own peculiar circumstances. *Furtado v. Furtado* was an application by a defendant to the Lord Chancellor to discharge, on the ground of irregularity, an order that had been made, on motion in the Court below, to remove the next friend, the defendant not having appeared on the motion, and having a right to be before the Court upon the question whether the person who up to that time was responsible to him for costs, should be discharged. The infant had appeared by counsel on the motion, the defendant had not, and the next friend may have consented to this order, but that does not appear by the report. The order was made on notice of motion, signed by the solicitor originally retained by the next friend, to carry on the suit. So that there was the same irregularity as there is in the present case; and it was contended by the counsel applying to discharge the order, that the solicitor was a stranger; but that argument does not apply here, for here there is a solicitor on the record, which is different from the old practice. The clerk in court was the organ of communication, a function which is now exercised by the solicitor on the record; so that there is now, if anything, better ground for saying that the course taken is regular than before; but I should hesitate very much to admit, in the absence of authority, that any solicitor might come, and, taking upon himself the responsibility, move to discharge the next friend. In *Furtado v. Furtado*, for anything that appears

to the contrary, the next friend may have consented to the order; and moreover the application here is to remove not only a next friend, but a person who has been appointed, by order of the Court, guardian of the person and fortune of the infant and receiver in the cause; and I do not think that Lord Cottenham would have decided that such an application could be made by any solicitor. Then, regarding the wide difference between that application and the present, the most important point of which is the removal of the guardian and receiver, I do not think that the case of *Furtado v. Furtado* established the rule, that in any case in which a next friend is necessary, a solicitor may come forward and ask the Court, on his own responsibility, to make an order in the cause to remove not only the next friend, but also the guardian and receiver. Therefore, as, in the absence of *Furtado v. Furtado*, the general rule has always been that the application must be by the next friend in every case, I cannot grant this application; indeed, on petition days it is one of the commonest things to send back a petition presented without a next friend. The notice of motion should be amended, by inserting the name of a next friend for the purposes of this application; and I am of opinion that there should be a next friend in every case, except where the matter is of such urgency that the interest of the infant requires that the application should be granted without.

Mr. W. W. Cooper said that he did not think there was now that pressure.

KINDERSLEY, V.C.—I will give you leave to amend your notice of motion, by inserting the name of a next friend.

WOOD, V.C. }
July 9. } HOTTEN v. ARTHUR.

Copyright—Injunction.

A bookseller, H, wrote and published a descriptive catalogue of books; another bookseller, A, published a descriptive catalogue in which many of the descriptions were copied verbatim from H's catalogue:—Held, that such copying was an infringement of H's

(2) 2 Beav. 460; s. o. 9 Law J. Rep. (N.S.) Chanc. 289.

rity of Lord Eldon's decision in *Boehm v. Wood* (4). It was resisted on the authority of *Blyth v. Elmhirst* (5), and Sir J. Leach, V.C., feeling himself embarrassed by the cases which had been cited not being reconcilable, directed the motion to be made before the Lord Chancellor. This was accordingly done; and Lord Eldon,—after observing that “the rule which had been adopted of late years to direct a reference to the Master in the first instance upon the question of title, did not prevail where the performance was resisted on other grounds; but that when the Court had gone the length of deciding that, it would take great care to look into the answer, for the purpose of seeing whether those grounds of defence were substantial or frivolous,”—said that he would do so in that case. Having done so, he, on a subsequent day, said, “The objection which has been made to this motion is, that this is not a case in which the defendant puts the matter upon the question of title merely; but insists that time was of the essence of the contract, and that if a good title can now be made, he is not bound to take it. . . . It seems to me, that the short way of disposing of this case will be to set the cause down upon bill and answer, and discuss the point, whether the nature of the property does not make time of the essence of the contract.” But notwithstanding the way in which Lord Eldon dealt with that case, the rule of the Court remained unaltered, that unless the other grounds of defence were manifestly frivolous, it was not the practice of the Court, on the application of either party, to make a reference upon an interlocutory motion. It had been said, however, that Lord Langdale decided the contrary in *Foxlowe v. Amcoats*. But no cases appeared to have been cited before Lord Langdale; and the only authority referred to was the 5th General Order of the 9th of May 1839 (Consolidated General Orders, Order XX.). The words “without prejudice to any question in the cause,” were probably taken from the language of that Order, and the case did not appear to have been decided by Lord Langdale on any distinctly raised and considered principle.

(1) 4 J. & W. 419.

(5) 1 Ves. & B. 1.

(6) 12 Ves. 17.

He did not think that the present was a case for a reference on such a motion as that now made; and the motion must be refused with costs.

From this decision the company appealed, and the appeal was heard before the Lords Justices on the 10th of July, the same counsel appearing as in the Court below. For the appellants the cases cited before the Vice Chancellor were again relied on, and those of *Blyth v. Elmhirst*, *Boehm v. Wood*, *Withy v. Cottle*, and Order XX. of the Consolidated Orders, all before referred to, besides the case of *Gompertz v. —* (6), and Lord St. Leonards's *Vend. and Pur.* p. 351, 14th edit. were quoted.

The counsel for the respondent, the plaintiff, were not called upon.

LORD JUSTICE TURNER.—An order for preliminary inquiries on the motion of a defendant cannot be made either under the General Consolidated Order XX., or, in my opinion, under the general practice of the Court. A defendant to a vendor's suit for specific performance is, by the fact of his moving for such an inquiry, endeavouring to take upon himself the conduct of the plaintiff's suit—a course for which there is no precedent, and which might occasion great inconvenience. But whether such an order can ever be made upon the motion of a defendant or not, it is quite clear that the order which is the object of the present motion cannot be made. In the present case the defendants have set up as a second defence to the suit a notice given by them to rescind the contract on the ground that the plaintiff has not made out a good title within due time; and until the Court has decided upon the reasonableness of that notice, which cannot be done upon this motion, it is impossible to say what inquiry as to title it will be proper to direct. There is no authority for dividing or splitting up a case in the manner proposed, and to make such an order as that now sought would possibly involve great and unnecessary expense. The motion must be refused, with costs.

LORD JUSTICE KNIGHT BRUCE.—I am of the same opinion.

STUART, V.C.
March 9, 11.
LORDS JUSTICES.
June 23;
July 23.

LODGE v. PRICHARD.

Administration — Partnership — Bankruptcy — Joint and separate Creditors — Priority.

Where one of two partners has died, and after his death the surviving partner has become bankrupt, and the joint creditors have received a dividend under the bankruptcy out of the joint estate, but have not been paid in full, they will, in the administration in Chancery of the estate of the deceased partner, be entitled to come against so much only of his estate as may remain after payment of his separate creditors.

This suit, with several others, was instituted for the administration of the estate of the late Adam Lodge, of Liverpool, merchant, who died in 1837.

At the time of his death, Adam Lodge was in partnership with Robert Graves, as a ropemaker, under the style or firm of Graves & Co., and there was then due by that firm to their bankers, Messrs. Moss & Co., a sum of about 7,500*l*. Shortly after Lodge's death Graves became bankrupt. The above sum not having been paid at the period of the bankruptcy, Moss & Co. received a dividend out of Graves's estate, in respect of it. Graves's partnership as well as separate estate had been exhausted, and a balance still remained due to Moss & Co., in respect of the debt due to them by the firm of Graves & Co.

Lodge's estate was not yet wholly administered, and there were separate creditors of his still unpaid; but his estate, which was unadministered, was not sufficient for the payment of his separate creditors as well as the debt of Messrs. Moss.

The question, therefore, was whether Messrs. Moss were entitled to share *pari passu* with Lodge's separate creditors, or whether the latter were entitled to priority over Messrs. Moss.

Mr. Malins and *Mr. Sidney Smith*, for a separate creditor of Adam Lodge, contended that Moss & Co. should be postponed until Lodge's separate creditors were paid in full.

They referred to—

Gray v. Chiswell, 9 Ves. 118.

Ridgway v. Clare, 19 Beav. 111.

Mr. Southgate and *Mr. Druce*, for Messrs. Moss & Co. referred to—

Ex parte Sadler and Jackson, 15 Ves. 52.

Ex parte Bauerman, 3 Deac. 476.

Cowell v. Sikes, 2 Russ. 191.

Ex parte Kennedy, 2 De Gex, M. & G. 228.

Mr. Bacon and *Mr. Kay*, for the executors, and *Mr. Greene*, *Mr. Busk*, *Mr. Walford* and *Mr. Surridge*, for other parties.

STUART, V.C.—What is here asked, would, if yielded to, disturb that which is understood to be the settled rule of the Court in cases of this kind.

Where there have been two partners, and one has become bankrupt, and the other, a solvent partner, died before the bankruptcy, and there are joint debts of the partnership, if there be an administration in bankruptcy of the partnership estate, and an administration in this Court of the separate estate of the deceased partner, I consider it settled most clearly, not only by the case of *Gray v. Chiswell*, but by subsequent decisions, that the joint creditors who have received only part payment out of the joint estate under the bankruptcy, although they may come in as separate creditors upon the estate of the deceased partner, cannot come in *pari passu* with the separate creditors of the deceased partner. *Cowell v. Sikes*, unless upon very close examination, seems to disturb this view, but in fact it does not. The judgment of Lord Gifford in that case affirms the principle upon which *Gray v. Chiswell* was decided. He says, "The only authority on which it has been attempted to support this petition, is the case of *Gray v. Chiswell*, where creditors, having joint demands against two persons, of whom the survivor became bankrupt, were permitted to prove against the estate of one who was dead and to come in for payment of what was due to them upon the surplus which remained after satisfying these separate debts. There the Lord Chancellor did not permit the joint creditors to come in *pari passu* with the separate creditors, and that part of the order which is relied upon as furnishing a precedent here does not seem to have been opposed."

Lord Gifford, stating that this was what was decided in *Gray v. Chiswell*, does not affect to disturb it; and Lord Eldon, before whom the case of *Cowell v. Sikes* came upon a petition, which was not regularly a petition of appeal, gave his final judgment in these terms: "In the circumstances of this case, the proceedings at law and the state of the funds, I think the creditor may prove against the separate estate," which he no doubt may. But does that prove that he is to be paid *pari passu* with the separate creditors? It certainly does not. I find in a case of *Ridgway v. Clare*, before the present Master of the Rolls, the principle is laid down exactly in the same terms as in *Gray v. Chiswell*.

The Master of the Rolls (2) says: "Suppose the surviving partner insolvent, either there is a bankruptcy or an insolvency, in either of which cases the case of *Gray v. Chiswell* is precisely in point; and there the joint creditors must resort, in the first instance, to the joint fund, and can only come against so much of the separate estate as will remain after paying the separate creditors." That is a very recent decision, and affirms the principle so clearly that, in my opinion, it ought not to be disturbed. The surprise of Lord Eldon and Lord Thurlow in the earlier cases was, that joint creditors were allowed to come in at all.

In this case, I have no doubt upon the subject; and if it be necessary to have a declaration, I shall declare that the joint creditor is entitled to claim only upon so much of the estate of the testator, Adam Lodge, as shall remain after paying the separate creditors of Adam Lodge.

Messrs. Moss & Co. appealed from this decision, and the appeal was heard on the 23rd of June.

Mr. Southgate and *Mr. Druce*, in support of the appeal, argued that the debt was joint and several; and that, therefore, the appellants must stand on the same footing as the other creditors of the testator.

Mr. Bacon and *Mr. Kay*, for *Mr. Prichard* and *Mr. Colburn*, the executors, asked that the costs of those gentlemen might be provided for in the first instance.

Mr. Malins and *Mr. Woodroffe*, for *Mr. Robert Morrall*, a separate creditor, supported the order of the Vice Chancellor.

(2) 19 Beav. 116.

Mr. Druce was heard in reply.

The following authorities, in addition to those above referred to, were cited:

Ex parte Geller, 2 Madd. 262.

Ex parte Birley, 1 M. D. & De Gex, 387.

Ex parte Kendall, 17 Ves. 514.

Ex parte Clay, 1 Montagu on Partnership, p. 223.

Larkins v. Paxton, 2 Myl. & K. 320.

Morrice v. the Bank of England, 3 Swanst. 573.

LORD JUSTICE TURNER (July 23).—The question upon which we reserved our judgment in this case relates to the rights of joint creditors against the separate estates of deceased partners. It arises thus—Adam Lodge, the testator in the cause, died in the year 1837. He was at the time of his death a partner in the firm of Graves & Co. Soon after his death, Graves, his only surviving partner, became bankrupt. The appellant is the surviving partner of the firm of Moss & Co., who were the bankers of Graves & Co. Graves & Co. were largely indebted to Moss & Co. at the time of the testator's death. This debt was proved by Moss & Co. under the commission against Graves, and some dividends have been received by Moss & Co. upon this proof; but the dividends so received have not been sufficient to satisfy the debt. No further dividend is coming under the commission, and the balance of the debt due to Moss & Co., after deducting the dividends received, has been proved against the estate of Lodge, under the decree in these suits. The separate creditors of Lodge have also proved their debts under the decree; and the question is, whether the debt proved by Moss & Co. ought to be paid out of the estate of Lodge *pari passu* with the debts proved by his separate creditors; or whether his separate creditors ought first to be paid in full, and the debt of Moss & Co. to be paid only out of what may remain of the estate after such payment. The Vice Chancellor Sir John Stuart has decided this question in favour of the separate creditors, and we have now to dispose of it upon appeal from his decision. The question as to the rights of joint creditors against the estates of deceased partners has always been felt to

be one of much difficulty, and I am not sorry, therefore, to find that the state of the authorities renders it unnecessary for us to consider the grounds on which the question, if untouched by the cases, ought to be decided. The question is, I think, covered by the authorities. It has long been settled in bankruptcy that the joint estate is to be applied in payment of the joint debts, and the separate estate in payment of the separate debts, any surplus there may be of either estate being carried over to the other. This rule may, perhaps, proceed upon this ground—that the joint estate is clearly liable, both at law and in equity, for the joint debts; at law by reason of the survivorship, and in equity by virtue of the rights of the partners *inter se* to have it so applied, and that the separate estate is as clearly liable, both at law and in equity, for the separate debts, and that the carrying over the surplus of the one estate to the other, although it may not strictly work out the rights, may afford the best means of adjusting the complications which arise from the joint estates being liable to the separate debts only so far as the interest of the partners from whom the debts may be due may extend, and from the separate estates if taken for the joint debts having recourse over against the joint estates, and which arise also from the equities between the partners; but whether this rule is strictly correct it is not for us to say. It has undoubtedly been adopted and acted upon by successive Chancellors for a very great length of time, and we cannot now alter it. According to this rule, therefore, joint creditors cannot touch the separate estate until after payment in full of the separate debts. They take the surplus only after payment of those debts. Now, the jurisdiction in bankruptcy is equitable as well as legal. The rights of creditors, therefore, as settled in bankruptcy, must be taken to be settled with reference to their equitable as well as to their legal rights, and this being so, these rules must, as it seems to me, be held to apply no less to cases in which estates fall to be administered in equity, than to cases in which they fall to be administered in bankruptcy. Accordingly, we find that in *Gray v. Chinnell* the joint creditors were only let in upon the separate estate, after payment in full of the separate debts;

and that case has been constantly recognized and treated as having been well decided. It was so recognized and treated by Lord Eldon, in *Ex parte Kendall*; by Sir William Grant, in *Devaynes v. Noble* (3), and, again, in *Vulliamy v. Noble* (4); by Lord Brougham, on the appeal in *Devaynes v. Noble* (5); and by Sir John Leach, in *Wilkinson v. Henderson* (6). This view of the rights of joint creditors against the separate estates of deceased partners, is also borne out by the form of the decrees of the Court in such cases, of which *Fisher v. Farrington* (7) is an instance; and it is strengthened also by this consideration, that if the joint creditors be permitted to resort to both the joint and separate estates, they are let in upon two funds, whilst the separate creditors are limited to one only. It was said, however, on the part of the appellant, that in the cases above referred to there was joint estate remaining to be administered, and the further rule in bankruptcy, that joint creditors may prove against the separate estate when there is no joint estate and no solvent partner, was relied on in support of the appeal, and contended to be applicable in this case; but in this case there was joint estate, and this rule can be applicable only if it can be made out that the joint creditors are entitled in bankruptcy, when the joint estate has been exhausted, to come upon the separate estate for so much of their debts as may not have been satisfied out of the joint estate. I do not think, however, that the rule in bankruptcy has ever been carried, or can be carried, to this length. If it was, I do not see how any dividend could be made upon the separate estate until the joint estate was wound up, as it would depend upon the produce of that estate whether the joint creditors would come in upon the separate estate; and besides, if this effect be given to the rule, the consequence would be, as I have already pointed out, that the joint creditors would have a double fund to resort to when the separate creditors could resort to one fund only, which would hardly be conform-

(3) 1 Mer. 566.

(4) 3 Ibid. 619.

(5) 2 Russ. & M. 495.

(6) 1 Myl. & K 582; s.c. 2 Law J. Rep. (N.S.) Chanc. 191.

(7) Seton on Decrees, 280, 2nd edit.

able to the ordinary rule of making a just and equal distribution. The cases cited on the part of the appellants, in support of their contention on this point, do not seem to me to bear out their argument. In *Cowell v. Sikes* there was not, and never had been, any joint estate. *Ex parte Geller* was the case of a pledge. *Ex parte Bauerman* goes no further than that the right of the joint creditor to go against the separate estate, where there is no joint estate, is not destroyed by a partner who has become insolvent having been solvent for a limited time; and I see nothing in the case *In re Birley* which can at all help the appellant. It was suggested on his part that the right of the joint creditor to be paid out of the separate estate, where there were no joint assets, arises from the debts being joint and several, and this may well be so; but the debt is several in equity only, and it does not follow that, because there is a several debt in equity, the Court will give the same effect to it as if it were to all intents and purposes a separate debt. The doctrine of marshalling was also sought to be called in aid on the part of the appellant; but Lord Eldon seems to have disposed of that view in *Ex parte Kendall*. Upon the whole case, my opinion is, that the Vice Chancellor's conclusion upon this point is correct, and ought to be affirmed.

LORD JUSTICE KNIGHT BRUCE. — On this point, as it stands in the present case, my opinion has fluctuated; but I concur with the Lord Justice's view upon it.

ROMILLY, M.R. }
May 7, 8. } ELLICE v. ROUPPELL.

Bill to perpetuate Testimony—Stay of Proceedings.

A motion to stay further proceedings in a bill to perpetuate testimony, on the ground that a suit had been instituted in another Court in which the questions in difference might be determined, was refused with costs.

This was a suit to perpetuate testimony. There had been previously a plea by the defendants, setting up by way of defence to the suit the fact that the plaintiffs had filed a bill for relief in another Court, and had

thereby shewn that the case was not one for a suit to perpetuate testimony. This plea was disallowed and directed to stand for answer, with liberty to the plaintiffs to except (1); but on the plaintiffs excepting, the exceptions were overruled on the ground that the plaintiffs had already obtained all the discovery material in the case of a suit of this description (2).

The defendants now moved for the stay of all further proceedings, and asked that their costs might be taxed, and that the plaintiffs might pay them.

The Solicitor General (Sir R. Palmer), Mr. Selwyn and Mr. Swanston, for the defendants.—The suit for relief rendered unnecessary the suit to perpetuate testimony, and the defendants ought not to be harassed by two suits. This suit ought, therefore, to be stayed; and as the defendants had not examined any witnesses, but had confined themselves to the cross-examination of the plaintiffs' witnesses only, they were entitled to their costs—*Blinkehorne v. Feast* (3), — *v. Andrews* (4).

Mr. Baggallay, Mr. Hobhouse and Mr. Cotton, for the plaintiffs, were not heard.

THE MASTER OF THE ROLLS.—This case, singular in its circumstances, seems destined to raise a number of points of pleading. The present motion is, in substance, only the argument of the plea over again. This was admitted; but it was said that upon this motion the defendants were free from the technicalities attaching to the plea. But some rules of pleading must be preserved. Here the defendants, by putting in their answer to the plaintiff's bill, have admitted the plaintiff's right to examine witnesses *in perpetuam rei memoriam*, i. e., they admitted their right to the whole of the decree usually made in such suits. Can the defendants now say that, by reason of some other proceedings of the plaintiff in another Court, they cannot make use of this suit, but that all proceedings ought to be stayed? If it appears upon the face of this bill to perpetuate, that the plaintiff can bring his case before a Court of law, the bill is open to a demurrer, but if the defendant,

(1) *Ante*, p. 563.

(2) *Ante*, p. 624.

(3) 1 Dickens, 153.

(4) *Barnar*. 333.

instead of demurring, puts in an answer to the bill, can he afterwards move to stay the proceedings on the ground that the matter is capable of being tried at law? The answer would clearly be, that the defendant ought to have availed himself of this defence at the proper time by plea or demurrer. The case is the same if after the bill to perpetuate has been filed legal proceedings are commenced, in which case the Court will not allow the defendant to move to stay the proceedings in the suit to perpetuate. No case is to be found in the books in which an order similar to the one now asked for has been made; and, considering the long period of time which elapsed under the old practice, it must not unfrequently have happened that the obstacle originally existing, to prevent the case from being brought before a Court for judicial investigation, has been removed. The plaintiffs' right to examine witnesses has in fact been admitted by the defendants, and the plaintiffs are entitled to the relief usually granted in cases of this nature. The motion must therefore be refused, with costs.

It was subsequently stated to have been arranged that all further proceedings in this suit should be stayed, and that the plaintiffs should pay the taxed costs to the defendants.

KINDERSLEY, V.C. } *In re SMYTH AND*
June 20. } *ARNOLD'S ESTATES.*

*Petition for Leave to file Bill of Review—
Order under Trustees' Relief Act.*

Trustees of a fund to which a lady was entitled for life, with remainder to her children, on her death paid the fund into Court under the Trustee Relief Act, and under orders of the Court three-fourths were paid out. One child then claimed the fund as the only legitimate child, and presented a petition for leave to file a bill of review:—Held, that orders under the Trustee Relief Act stood, pro hac, on the same footing as a decree in a suit, and a probable case being put forward, founded on facts discovered since the date of the orders, leave was given.

This case came on upon a petition for leave to file a bill of review.

The petitioner was the infant daughter of a Mr. Smyth, who, in 1830, being a domiciled Scotchman, went to India, leaving behind him a lady, who, although no ceremony had been performed, was considered to be his wife, according to the law of Scotland. In India he married a Miss Tufton, his wife in Scotland being then alive, who, in 1833, obtained a divorce in Scotland. Mr. Smyth returned to England, and having had three sons by his second wife, was re-married, at Lambeth Church, in 1841; and it was after this re-marriage that the petitioner was born. Miss Tufton was entitled, under her grandfather's will, to certain property, which was vested in trustees, in trust for her for life; with remainder to her children. Mr. Smyth continued to reside and practice as a surgeon in London up to the time of his death, which happened in 1859. The trustees paid the interest of the trust-fund in their hands to Mrs. Smyth (late Miss Tufton) during her life, and when she died paid the fund into court, under the provisions of the Trustee Relief Act. The sons, by orders of the Court, made in the usual way, received their shares on coming of age; but subsequently a question was raised whether, in fact, in the events that had happened, the petitioner was not the only legitimate child, and as such entitled to the whole fund, three-fourths of which had been dealt with (as it was now contended) improperly. This depended upon what Mr. Smyth's domicile was, and this petition was presented for leave to file a bill of review upon that question.

Mr. H. Bagshawe appeared in support of the petition.

Mr. W. W. Cooper, for the sons who had received their shares, argued that it was clear the domicile was Scotch, in which case they were legitimate; and therefore really there was no question to be determined. The orders made were not in a suit, but only under the Trustee Relief Act; and therefore this was not the proper course.

KINDERSLEY, V.C. (without calling for a reply).—The rules of this Court require that if a party desires to file a bill of review, on the ground that new evidence has been discovered, the Court must be satisfied that such evidence has been obtained subse-

quently to the time when the proceeding sought to be impeached took place; and if that is not shewn, leave will not be granted. It is clear that in this case the facts brought forward were not known previously to the orders. Although, however, the Court is satisfied of that, it will not allow the bill to be filed unless a reasonable ground for a claim is shewn. I will not go into the merits of the case, to shew whether the plaintiffs' case involves questions to be solemnly decided by the Court which are incapable of being supported, but purposely abstain from doing that, as the case might be thereby prejudiced; but I think a reasonable ground for a claim is shewn. The only other question is this: That which is sought to be impeached is not a decree in a suit, but only an order made under the Trustee Relief Act, the fund having been paid into court, and the order having been made for payment out of the portion now sought to be got back; and the question is, whether this is a case in which the Court will give the leave asked. I think it is. Where an order is made under the Trustee Relief Act, it is a substitute for a decree; the purpose of the act was, to enable trustees to be safe by bringing the money into Court, and to put the matter into a condition by a cheap mode to dispose of the rights of the parties. The order must be made on the petition; but there can be no order as to costs.

KINDERSLEY, V.C. }
July 7. } Re GADBURY.

Investment in the Joint Names of Husband and Wife—Possession of the Wife.

A wife with the knowledge and approval of her husband, invested money belonging to the latter in the purchase of Government stock in their joint names. Subsequently, under the authority of a power of attorney given to her by the husband, she sold a portion of the stock and kept the money in her custody, and it so remained at the husband's death:—Held, that the stock remaining in the joint names of the husband and wife survived to her, but there being no evidence of an intention on the part of the husband

to make an absolute gift to the wife, that the proceeds of sale of the stock formed part of the husband's general assets.

This was an adjourned summons, taken out under the following circumstances:

Previously to November 1858 Thomas Gadbury had lodged a sum of 1,000*l.* in the hands of Messrs. Whitbread, the brewers, and they having required him to withdraw it; he, in that month, received from them 1,200*l.*, which represented the 1,000*l.* deposited, with interest.

On the 8th and 9th of February 1859 T. Gadbury caused this sum, with other monies in his hands, to be invested in the purchase of 1,250*l.* and 550*l.* new 3*l.* per cents., respectively, making in all 1,800*l.*, the investment being made in the joint names of himself and Mary Ann Gadbury, his wife, by the description "Thomas Gadbury, of Austin Street, Hackney Road, gentleman, and Mary Ann Gadbury, his wife."

In October 1859 Thomas Gadbury, wishing to do something for his family, with a portion of the money so invested, applied to Mary Ann Gadbury to consent to sell out part of it; and it was agreed between them that 800*l.* should be sold out, and that he should lay out the money as he thought fit.

On the 28th of October 1859, Mary Ann Gadbury (having received a power of attorney from Thomas Gadbury for that purpose) sold out 800*l.*, part of the 1,800*l.* stock, which produced 754*l.* cash, which sum was received by her, and she communicated the fact to her husband; but it remained at their house, in her custody, she keeping it in a drawer locked up, until his death, which happened on the 24th of January 1860.

The 1,000*l.*, the residue of the 1,800*l.* stock, remained at the time of Thomas Gadbury's death standing in the joint names of "Thomas Gadbury and Mary Ann Gadbury," as originally invested.

Evidence had been gone into on the summons as to these circumstances, and there was an affidavit of the stockbroker, Mr. Aston; and what appeared to have taken place was in substance this: That when the Messrs. Whitbread paid the 1,200*l.* a consultation took place between

Thomas Gadbury and his wife (he being in very infirm health) as to the manner in which it should be disposed of, and he told her to consult a stockbroker as to the best kind of investment; and she accordingly called upon Mr. Aston on the subject, and his advice was that it should be invested in the joint names of herself and her husband, and this advice she followed.

Mary Ann Gadbury, by her affidavit, stated that she communicated to her husband the fact of her having sold out the 800*l*.

Thomas Gadbury made his will, and thereby, *inter alia*, gave all monies which might be out at interest at the time of his death, after payment of his just debts, equally between eight persons *nominatim*, and a suit having been instituted to administer his estate, in the course of the usual proceedings in chambers several questions arose, upon which this summons was taken out. These questions were, first, whether the 754*l*, the proceeds of the 800*l* stock, did or did not, at the time of the testator's death, form part of his general personal estate? Secondly, whether the 1,000*l* stock, which, at the time of the testator's death, was standing in the joint names of himself and his wife, did or did not form part of his personal estate; or whether Mary Ann Gadbury became absolutely entitled to it by survivorship?

Mr. Everitt appeared for the plaintiff, and contended that the 754*l*, at all events, belonged to the general personal estate of the testator.

Mr. Archibald Smith appeared for Mrs. Calthorpe, a daughter of the testator, and drew a distinction between the case where the husband himself made the investment, and that in which (as here) the investment was made by a wife; in the first case it survived, but not in the second *ipso facto*—*Hoyes v. Kindersley*, 2 Sm. & G. 195.

Mr. Bilton appeared for three other daughters of the testator, and supported the same view.

Mr. Baily and Mr. E. Charles, for Thomas John Gadbury, a son of the testator, and Mrs. Jayes, a daughter, and her husband.

Mr. Glasse and Mr. Beavan, for Mary Ann Gadbury, argued that there was no

question as to the 1,000*l*, and as to the 754*l*, inasmuch as it remained in her custody until the time of her husband's death, it belonged to her absolutely.

KINDERSLEY, V.C.—In this case I have to consider the whole effect of the evidence on both sides; and, having done so, the conclusion at which I arrive is, that what the testator desired was, not that the fund should be invested in any particular way, being a question as to which he could form very little judgment; but his object was to provide for his wife in case she should survive him; and I do not think I can draw from the evidence any intention on his part to make her a present of it, so as to constitute it her separate estate; it was a provision to enure to her, but only in case she survived him. He then put the first portion of the money, and afterwards the second portion, into her hands, asking her to consult a stockbroker, and accordingly she went to a stockbroker in January. The evidence of Mr. Aston confirms that; and there cannot be the least doubt of the accuracy of that statement. She naturally wished it to be in her own name, but he said "That will not do; you are a married woman: put it into the joint names of yourself and your husband, and that will then be joint property." She then consulted her husband, and of course there was no evidence as to that, for it was not probable that any one would be present; but no doubt she did so the moment she got home. He answered, "By all means"; and she went on the 8th of February, and 1,250*l*. was invested, and on the 9th the remaining 550*l*., making the whole 1,800*l*. consols. I have no doubt if the testator had lived ten years from the time at which the investment was made, the 550*l*. itself would have gone to the common income of the establishment; 800*l*. was sold out, and that left 1,000*l*., and no doubt that belongs to her; the only doubt I feel is as to the 754*l*., which arose by sale of the 800*l* stock. If, on the evidence, I thought that the wish of the testator was to create a separate interest (which I do not), then it might be that I should have to hold that inasmuch as it was sold out and kept in her own hands, and the husband never received it, I must consider it still separate

property ; but on the evidence it appears to me, I cannot come to that conclusion, but must hold that it was joint property. By virtue of the power of attorney, it remained in her own hands, in her own box and under her own control ; that is to say, she might have taken it out and thrown it into the kennel if she thought fit ; but the question is, in what light the law will regard such a transaction. In the eye of the law, it was under the husband's control, although it arose from a sale of joint stock : it was in his house, and still formed part of his assets. Therefore, as to the 1,000*l.*, it belonged to Mrs. Gadbury by survivorship, and as to 754*l.*, it remained the property of the husband.

WESTBURY, L.C. }
July 21. } WYLLIE v. POLLEN.

Mortgage—Tacking—Constructive Notice—Solicitor.

In order to affect a principal with constructive notice of facts within the knowledge of an agent, it is necessary not only that the knowledge should be derived from the same transaction, but it must be knowledge of facts which are material to that transaction and which it was the duty of the agent to communicate.

Therefore, the transferee of a mortgage is not affected by the knowledge of the solicitor, acting for him in the matter of the transfer, of an incumbrance subsequent to the original mortgage, so as to prevent him from making further advances, such knowledge not being material to the business of the transfer.

The employment of a solicitor to do a mere ministerial act, such as the procuring the execution of a deed, does not so constitute him an agent as to affect his client with constructive notice of matters within the knowledge of the solicitor.

W., being about to take a transfer of a mortgage, employed P. & L. as his solicitors to investigate the title and conduct the negotiation ; but C., who was the solicitor to the mortgagors, was employed to procure the execution by W. of the deeds of transfer. C. was aware of a judgment debt registered against the mortgagors, but did not communicate the fact to W. W. afterwards advanced a further sum of money and took a further charge.

In a suit for foreclosure,—Held (reversing the decision of one of the Vice Chancellors), first, that the employment of C. did not constitute him the agent of W. so as to affect W. with constructive notice of the judgment debt ; and, secondly, that the knowledge of the judgment debt not being material to the matter of the transfer, it would not have been the duty of C. to communicate it if he had been such agent ; consequently W. took without notice of the judgment debt, and was entitled to tack his further advance.

The question, which arose in a foreclosure suit, was, whether a judgment creditor was entitled to preference in respect of his debt over the further charge of the plaintiffs, who were transferees of a mortgage, the judgment debt being prior in point of date to the transfer, and also to the further charge, but posterior to the original mortgage, and it being alleged that the plaintiffs had notice of the debt at the time of the execution of the transfer.

By an indenture of mortgage, dated the 28th of March 1835, certain freehold hereditaments in the county of Pembroke were mortgaged to William Reynolds for 1,600*l.*, and by two other indentures, dated respectively the 9th and 23rd of December, other hereditaments in the same county were mortgaged and further charged to Sarah Harries for 900*l.* and 700*l.* On the 3rd of September 1852, these mortgages and further charge were transferred to S. H. Walpole and R. Walpole ; and on the 18th of May 1853, the whole of the premises were further charged with the payment of 1,800*l.* and interest to Messrs. Walpole. In 1848, judgment was entered up against one of the persons interested in the equity of redemption for 391*l.* 14*s.* 4*d.*, and the judgment creditor claimed priority in respect of this debt over the further charge of 1,800*l.*, on the ground that Messrs. Walpole, at the time they took the transfer of the mortgages, were affected through their solicitor with notice of the judgment. In proof of this it was contended that a Mr. Cooper, who was the solicitor of the mortgagors, had acted as the solicitor of the Messrs. Walpole, in getting the deeds executed by them. It was not disputed that Messrs. Pemberton & Leigh were the advising solicitors to Messrs. Walpole ; but

Stuart, V.C. held that the act of Cooper in obtaining their signature to the transfer was sufficient to constitute him their solicitor, and so to affect them with his knowledge of the judgment debt. He therefore declared that the judgment creditor was entitled to a valid charge on the share of the judgment debtor in the hereditaments in priority to the plaintiffs' charge of 1,800*l*.

From this decision the plaintiffs appealed.

Mr. Greene and *Mr. Hall*, for the appellants, urged that the employment of Cooper to get the deed executed by Messrs. Walpole did not so constitute him their solicitor in the matter as to affect them with constructive notice.

They cited—

Tylee v. Webb, 6 Beav. 552.

Jones v. Smith, 1 Ph. 244; s. c. 12 Law J. Rep. (N.S.) Chanc. 381.

Lane v. Jackson, 20 Beav. 535.

Fisher on Mortgages, 308.

Mr. Bevir, with whom was *Mr. Malins*, supported the decision of the Court below. *Mr. Greene* replied.

The LORD CHANCELLOR, after stating the case, said—The conclusion of the Vice Chancellor was that Cooper acted as the solicitor of the Walpoles in the business of the transfer in 1852, and on that ground he attributed to them notice of the judgment debt. He was sorry to say he could not concur with the learned Judge either in his conclusion of fact or in his conclusion of law, though it might be sufficient to say he did not concur in the conclusion of fact. It was proved beyond the possibility of a doubt, and was not in dispute, that Messrs. Pemberton & Leigh were Messrs. Walpole's solicitors in the proper sense of the word, but it was constantly the case, that some detached ministerial part of the business was delegated to another solicitor, as was done in this case, and this was not at all inconsistent with their being the principal solicitors and responsible advisers of the client—they were the solicitors who had the duty and office of advising the client, and he who did the mere ministerial part of the business could not be considered the solicitor for the confidential purpose of

advising, and unless he came within that description the doctrine of constructive notice would not apply. The abstracts shewed that they were perused and advised upon by Pemberton & Leigh, and His Lordship considered it proved that they were the real responsible advisers of Messrs. Walpole. The deeds might have been handed over by them to Cooper for the purpose of enabling him to get them executed, but even if that were proved it would not divest them of the character of solicitors to Messrs. Walpole, nor would it constitute Cooper their solicitor. It was quite clear that Pemberton & Leigh acted as their solicitors up to the completion of the transaction, but above all there was the internal evidence of the fact, the *inference rei*; it was impossible to suppose a person would employ two solicitors in the matter. The explanation was to be found in the fact that Pemberton & Leigh permitted Cooper to discharge the ministerial duty of getting the deeds executed, and he had no difficulty in coming to the conclusion of fact that there was no evidence that Cooper was the solicitor of the Walpoles. Then, as to the conclusion of law, His Lordship entirely concurred in the opinion which had been expressed by other Judges (1) that the doctrine of constructive notice ought not to be extended, but ought to be reduced within clear and definite principles, and when that constructive notice was based on the supposed knowledge of an agent, it was necessary not only that the knowledge of the agent should be derived from the same transaction, but it must be knowledge of that which was material to the transaction, and something which it was the duty of the agent to make known to his principal, because the doctrine was based upon the assumption that the agent told him something it was important he should know. But the knowledge by the agent of a fact that at the time was wholly immaterial, would not raise any presumption of its having been communicated. It had been ingeniously suggested that the client ought to have been told of the subsequent incumbency, though immaterial at the time, in order to prevent his making further advances, but it would be too far-fetched an

(1) See 1 Ph. 254.

application of the doctrine to hold that a solicitor advising a client to take a transfer of a mortgage made twenty years ago, was bound to tell him of a subsequent judgment against the mortgagor. No man would hold that a solicitor was responsible to his client for not making that communication, or that the client would be bound by constructive notice in such a case. His Lordship could not therefore hold, even if Cooper had been the solicitor of the Walpoles, that it was his duty to give them notice of the judgment, or that he would be liable for not doing so. On the other hand, if Messrs. Walpole had known of the judgment debt in 1852, they would not have been allowed to make the advance in 1853. It had been said that there was no evidence who acted for Messrs. Walpole in 1853, but though the evidence was somewhat loose, there was some evidence that Pemberton & Leigh acted for them down to 1857. His Lordship therefore held that Messrs. Walpole took the transfer of the mortgages without any notice of the judgment debt, and were entitled to hold the mortgage deeds until they were paid, not only the original mortgage debt but the further advances. The decree must be varied by striking out the declaration that the defendant Richards (the judgment creditor) was entitled to priority, and it would be declared that the plaintiffs were entitled to priority in respect of their mortgage securities, with such further variations as might be consequent thereon. There would be no costs, and the deposit would be returned.

KINDERSLEY, V.C. } *In re* THE STEARIC
July 23. } ACID COMPANY.

Voluntary Winding-up—Advertisement under 19 & 20 Vict. c. 47. Table B. Clause 28.—Official Liquidator.

Notice was given by advertisement that it was intended voluntarily to wind up a company which had adopted the regulations contained in 19 & 20 Vict. c. 47, Table B, by a meeting to be held on a day and at an hour named. The meeting took place. It was resolved to have a voluntary winding-up, and an official liquidator was appointed, who sold property of the company by auction.

On motion by the official liquidator to restrain a creditor from attaching the proceeds in the auctioneer's hands,—Held, that the advertisement, not having stated that an official liquidator was to be appointed, his appointment was invalid, and the motion must be refused, with costs.

This case came on upon a motion for an injunction to restrain Messrs. Nathaniel and John Venner, who were creditors of the company, from proceeding in the Lord Mayor's Court, to attach certain property of the company, which had been sold, in the hands of Mr. Hersee, the auctioneer.

The company was incorporated under the 19 & 20 Vict. c. 47, with short articles of association, incorporating the regulations for the management of the company which are contained in Table B. set forth in the Schedule to the act, the 28th clause of which table is as follows: "Seven days' notice at least, specifying the place, the time, the hour of meeting and the purpose for which any general meeting is to be held, shall be given by advertisement or in such other manner, if any, as may be prescribed by the company."

The company having fallen into embarrassed circumstances issued an advertisement under the above provision that an extraordinary general meeting would be held, and that the purpose of such meeting was that there should be a voluntary winding-up of the company.

The meeting accordingly was held as advertised, at the offices of the company, in Ludgate Hill, and resolutions were passed by which a voluntary winding-up of the company was determined upon, and a person named Heath was appointed to be the official liquidator. Under the powers then conferred upon him, Mr. Heath acted in that capacity, and under his instructions the property, the proceeds of which formed the subject of the present motion, was sold by Mr. Hersee, who received the proceeds. Messrs. Venner then took proceedings, the object of which was to procure an attachment to issue out of the Lord Mayor's Court to attach such proceeds in the auctioneer's hands, and Mr. Heath, the official liquidator, now moved to restrain such proceedings.

Mr. Archibald Smith appeared in sup-

port of the motion, and argued that the property of the company which had been sold being absolutely vested in Mr. Heath, under the act of parliament, as official liquidator, Messrs. Venner had no right to interfere with him in the administration of the company's affairs under the voluntary winding-up. The requisitions of the articles of association had been complied with, the time and purpose for which the meeting was to be held having been duly advertised. This was money in the hands of a garnishee, Mr. Heath being the only legal hand to receive it.

Mr. Roxburgh opposed the motion, contending that the purpose of the meeting had not been stated so as to comply with the requisitions of clause 28. of Table B, [contained in schedule to 19 & 20 Vict. c. 47.] which formed part of the articles of association. The consideration of the question of voluntary winding-up did not necessarily include the appointment of an official liquidator, and of such appointment no notice was given by the advertisement. Under these circumstances Mr. Heath had no title to come to this Court; in fact, his appointment being invalid, he was not official liquidator, and in no other character could he oppose what the Messrs. Venner had rightfully done.

Mr. Archibald Smith was heard in reply.

KINDERSLEY, V.C.—I am of opinion that this motion must be refused. It is true that due notice by advertisement of the intention to have a voluntary winding-up of this company was given, but nothing at all was said about the intention to appoint an official liquidator, which was one object of the meeting to be held. The question is, therefore, whether the appointment of Mr. Heath was valid under the provisions of Table B. It appears to me that inasmuch as the company have in their notice disregarded the fact of their intention to appoint an official liquidator, they have now no right to say that he was duly appointed; and if that is so, then the person now acting in that capacity is not the person sustaining that character. Under these circumstances, the motion must be refused with costs.

KINDERSLEY, V.C. }
July 23.

KELL v. NOKES.

Injunction to restrain an Action for the recovery of Deposit—Jurisdiction.

There is no general rule of practice to the effect that the Court will not, in a suit for specific performance by a vendor restrain an action by the purchaser to recover the deposit.

The purchaser of certain property by private contract having paid his deposit, considered the title defective, and brought an action for the recovery of such deposit. The vendor then filed a bill and moved for an injunction to restrain such action:—Held, that a Court of equity is the proper tribunal to try a question of title, and that on bringing the deposit into court, the injunction must be granted.

The plaintiff in this suit was the vendor of certain leasehold property in Great Suffolk Street, Southwark, comprising a public-house, known as "The Moonrakers," and eight cottages, which he contracted to sell to the defendant for 700*l.*, the lease having less than forty-two years to run, and the property being subject to a ground-rent of 65*l.* Upon the contract being executed the defendant paid a deposit to the plaintiff of 20*l.* Subsequently disputes arose between the parties on the question of title, the plaintiff insisting that it was satisfactory, the defendant that it was not good, and ultimately the defendant (the purchaser) brought an action for the recovery of the 20*l.* deposit, and this bill was filed to restrain that action; and

Mr. Bovill now moved for the injunction, contending that a Court of law had no jurisdiction to deal with such a question, which being a question of title, this Court was the proper tribunal before which it should be tried.

Mr. Toulmin opposed the motion for the defendant, and referred to the case of

Tanner v. Smith, 4 Jur. 310.

Lord St. Leonards' Vend. and Pur. cap. 13.

Dart's Vend. and Pur. 613.

On the general question of jurisdiction, this Court will not restrain an action for the recovery of the deposit. That was established by the case cited.

5 H

KINDERSLEY, V.C. (after stating the facts).—From the case cited I cannot draw the conclusion that where a bill is filed by a vendor against a purchaser for specific performance, an action to recover the deposit cannot be restrained. Certainly no such general proposition is laid down, but that case turned upon its own particular circumstances. The question here is, does the plaintiff shew a good title? and that is peculiarly unfit to be decided by a Court of law, being a matter which although it is a matter of fact, and as such might be determined by a jury, yet the Judge could not deal with it, for although he might express his opinion, the jury have the option to follow it or not as they please. It is not, therefore, that the Judge at common law is not competent to decide such a question; he may be quite competent; but it is not his function in an action for the recovery of the deposit to determine a question of title, but the function of this Court, and not of a jury. This Court, therefore, is the proper tribunal, and the question can only be determined by a decree ordering the return of the deposit in the hands of the vendor. No doubt it is a small sum, only 20*l.* I believe, but that makes no difference, because the same principle will apply as if instead of being only 20*l.* it was a very large sum. Here is a case in which the parties are at direct issue; one says: "I am in the right, I can make a good title"; and the other says, "I am right, and you cannot make a good title." How, then, can the deposit be possibly recovered whilst that question remains undecided? and we must assume that it may be decided in favour of the vendor. On bringing the 20*l.* deposit into court, the plaintiff is entitled to the injunction.

ROMILLY, M.R. }
Jan. 15, 16. } ABSOLUM v. GETHING.

Friendly Societies—Defaulting Treasurer—Trustees—Priority of Claim.

If the treasurer of a friendly society makes an assignment of his estate and effects to trustees for the benefit of his creditors, the circumstance that the trustees of the society have been guilty of negligence in not

auditing the accounts, does not deprive the society of the right conferred by the 18 & 19 Vict. c. 63, to recover out of the estate of the treasurer what is due from him to the society in priority to his general creditors.

The service of a bill filed in this Court to compel payment of what is due from the assignees of a treasurer of a friendly society is a demand in writing, within the meaning of the 18 & 19 Vict. c. 63. s. 23.

The plaintiffs, as trustees of the Female Benefit Society, held at Lower Croesy Ceilog, in the county of Monmouth, filed this bill, against George Gething and William Conway, to obtain payment of a sum of 400*l.* 13*s.* 2*d.*, monies of the society.

This society was formed under the provisions of the 10 Geo. 4. c. 56, as amended by the 4 & 5 Will. 4. c. 40, the object being to provide funds for the support during sickness of the members of the society, and towards defraying the funeral expenses of members at their decease.

On the 8th of December 1840 rules were adopted for the government of the society at a general meeting, which were afterwards duly certified and enrolled at the Sessions.

At the same general meeting William Conway James was appointed the treasurer of the society, and he continued to hold the office until the 31st of May 1861, at which time he had in his hands the 400*l.* 13*s.* 2*d.* belonging to the society.

On the 31st of May 1861 he executed a deed assigning all his property to the defendants as trustees for the benefit of his creditors.

By the 18 & 19 Vict. c. 63. the law relating to friendly societies was consolidated and amended; and by section 5. previously subsisting societies are to enjoy all the exemptions and privileges conferred on societies established under that act; and the 23rd section of the act, so far as material, is as follows:

"If any person already appointed or employed or hereafter to be appointed or employed to or in any office in any friendly society established under this act or under any of the acts hereby repealed, whether such appointment or employment was before or after the legal establishment of such society, and having in his hands or possession, by virtue of his office, any monies or property

whatsoever of such society, shall die, or become bankrupt or insolvent or shall make any assignment, disposition, assignation or other conveyance for the benefit of his creditors, the heirs, executors and assignees of every such officer * * shall, upon demand in writing made by the treasurer or by the trustee or any two of the trustees of such society, or any person appointed at some meeting of the society to make such demand, deliver and pay over all such monies, property, deeds and securities belonging to such society to such person as such treasurer or trustees shall appoint, and shall pay, out of the estate, assets, or effects, heritable or movable, of such officer, all sums of money due which such officer shall have received, before any other of his debts are paid, and before any other claims upon him shall be satisfied."

On the 19th of June 1861 the plaintiffs, as two of the stewards and trustees of the society, gave the defendants notice in writing of the fact that W. C. James, as treasurer of the society, had in his hands 400*l.* 13*s.* 2*d.*, and they demanded payment in priority to all his other debts.

At that time the plaintiffs were not actually the trustees of the society; but they were duly appointed such trustees in accordance with the rules of the society on the 13th of May 1862, and their appointment was forwarded to the Registrar of Friendly Societies, and registered pursuant to the 18 & 19 Vict. c. 63.

This bill was filed shortly afterwards.

The defendants resisted the claim made by the bill upon the following grounds: first, that no notice had been given to them in writing by persons properly trustees of the society. Secondly, that on the appointment of W. C. James to the office of manager, it was provided that he was only to continue during the pleasure of the society upon his giving security to the clerk of the peace for double the sum that might from time to time be placed in his hands by the society—10 *Geo.* 4. c. 56. s. 11. That it was not till the 7th of January 1853 that any such bond had been required, and that in consequence he was not the treasurer of the society, within the meaning of the acts. Thirdly, that the retention of the fund by W. C. James had been sanctioned by Thomas Williams, the secretary; and that

the money ought to be treated as due from him on loan, and not as due from him as treasurer. Fourthly, that the trustees had omitted to audit the accounts, and that in consequence of that omission W. C. James had been able to retain the money in his hands.

Mr. Hobhouse and *Mr. Jessel*, for the plaintiffs, claimed priority under the act.

Mr. Baggallay and *Mr. Whitbread*.—This act assumed to give prerogative powers; it was at once fiscal and penal. It gave an exclusive claim to a debt, and deprived other creditors of their fair share of the assets of the defaulter; it, in fact, made all persons dealing with an official of these societies surety for his official liabilities, whether they had notice of his position or not. It might be wondered that such a power was found upon the statute-book; but it could not be doubted that the act must be construed strictly. Its effect upon creditors was at once harsh and inequitable; the plaintiffs, therefore, must satisfy this Court that every provision of the act had been complied with, and that all the rules of the society had been observed in this case. The laches of the society, the trustees and the secretary, must prevent the plaintiffs from obtaining the decree asked.—

Ex parte the Amicable Society of Lancaster, 6 Ves. 98.

Ex parte Fleet, 4 De Gex & Sm. 52; s. c. 19 Law J. Rep. (N.S.) Bankr. 10.

Ex parte Ross, 6 Ves. 803.

The MASTER OF THE ROLLS said that the plaintiffs were entitled to a decree. The defendants contended that the plaintiffs were not entitled to the benefit of the 18 & 19 Vict. c. 63. s. 23, because there were no trustees of the society, and because no demand had been made in writing. A deed, however, had been produced, which placed the plaintiffs in the position of trustees before the bill was filed, and the bill itself was a demand in writing; no time was named in particular for making such demand. It was also said that the treasurer never gave security for the money in his hands until the 7th of January 1853; that he was not duly qualified; and that the society's neglect had deprived them of all the advantage to be derived from the act. It was, however, clear that he was the duly appointed trea-

surer from the time he gave security up to the time when he executed the assignment for the benefit of his creditors. It was further said, that he had borrowed the money of the society, and that it was not in his hands as treasurer. There was, however, no evidence to support this statement; and the secretary said it never had his sanction.

As to the argument founded on the alleged neglect on the part of the trustees, the 18 & 19 Vict. c. 63. nowhere said that the misconduct of the trustees was to deprive the society of the remedies given to it by the act for the recovery of their money against the estate, assets and effects of the treasurer. It assumed that there had been improper conduct when the treasurer, instead of paying the money into the savings bank, retained it in his hands. The legislature had thought fit, where a number of poor persons were concerned, to say that they should have priority over the other creditors of their officer. All persons, therefore, who dealt with the treasurer knew, or they must be taken to have known, that such was the law, and that his estate was mortgaged to the full amount of what was due from him to the society in priority to all other demands. It could not be said that this was unfair or improper; still at the same time it was true that the act must be construed strictly. The defendants charged the society with neglect, and said that it had omitted to audit the accounts, and that they were satisfied with such information as it had pleased the treasurer to give them; but assuming this, and that they had placed confidence in the treasurer, still they had not lost the advantage given to them by the 18 & 19 Vict. c. 63. The result, therefore, is, that the assets and effects of the treasurer were and must be charged with the money which was due from him when he executed the deed of assignment to the defendants. They must therefore pay the amount to the plaintiffs, with the costs of the suit; and the defendants must be at liberty to retain their costs out of the estate of which they were trustees.

Wood, V.C.

1862.

Nov. 10, 11.

1863.

Feb. 21.

LORDS JUSTICES.

June 23;

July 25.

HOWELLS v. JENKINS.

Will—Election—Compensation to the disappointed Devisees—Inquiry.

A testator was entitled to a moiety only of each of two farms, called T. and P, the remaining moiety of each belonging in equal shares to W. and L. The testator by his will gave "my farm called T." to W. and E, their heirs and assigns, as tenants in common. And he gave them 200l. towards rebuilding and repairing the house, &c. "on my said farm T." He then devised "my farm called P." to the plaintiffs in like manner, but without any similar gift for repairs. After his death L. conveyed all his interest in the two farms to the plaintiffs:—Held (affirming the decision of one of the Vice Chancellors), that W. must elect whether he would take under or against the will.

Held, also, upon his electing to take against the will, that the benefits he would have taken under the will must be apportioned in compensation of the disappointed devisees, in proportion to the value of the gifts which they lost by his election; and the consequential inquiries as to those values were directed in Chambers.

Lewis Jenkins, by his will, dated the 27th of January 1847, gave and devised his farm called Tyr-y-Wain unto and between William Jenkins and Elizabeth Jenkins, and their several heirs and assigns, as tenants in common, and directed that in case either William Jenkins or Elizabeth Jenkins should die without leaving lawful issue at the time of his or her death, the share of the one so dying should go to the other of them, his or her heirs and assigns for ever. And the testator gave unto and between the said William Jenkins and Elizabeth Jenkins the sum of 200l. towards rebuilding and repairing the house, outhouses and other buildings on his said farm called Tyr-y-Wain. And the testator devised his farm called Pedole to Jennet Howells, Ann Roberts and Jennet Jenkins, and their

several heirs and assigns as tenants in common.

Lewis Jenkins at the time of his death was seised of a moiety only of the farms called Tyr-y-Wain and Pedole. W. Jenkins was at that time seised of one undivided fourth part of each of the same farms, and Llewellyn Jenkins of the remaining fourth part thereof. Llewellyn Jenkins, by an indenture dated the 28th of September 1847, conveyed his undivided fourth part in both farms to the use of Ann Jenkins for life, with remainder to Jennet Howells and Ann Roberts, their heirs and assigns, as tenants in common.

Ann Jenkins died in November 1858.

Under these circumstances a bill was filed by Jennet Howells and Ann Roberts against William Jenkins and Elizabeth Jenkins, praying that the rights and interests of the plaintiffs and defendants respectively under the will of the said Lewis Jenkins and under the indenture of the 28th of September 1847 might be ascertained and declared by the Court.

Mr. W. M. James and Mr. Freeling, for the plaintiffs, contended that the defendant W. Jenkins was bound to elect to take either under or against the will. They cited the following cases :

Padbury v. Clark, 2 Mac. & G. 298 ;
a.c. 19 Law J. Rep. (N.S.) Chanc. 533.

Fitzsimons v. Fitzsimons, 28 Beav. 417.

Mr. Willcock and Mr. Hobhouse, for the defendants, cited the following authorities :

Lord Raneliffe v. Lady Parkyns, 6
Dow, 179, 185, 190.

Dummer v. Pitcher, 2 Myl. & K. 262,
274.

Wood, V.C. (Nov. 11), said that the question depended on this, namely, whether the words used by the testator (assuming him to have been the owner of the entirety of the farm Pedole) necessarily implied an intention to devise the entirety. Where a testator possessing but a partial interest in property purported to devise the entirety, the Court was disposed to limit the words to the interest which he possessed ; but that inclination must give way to the plain language of the will. The terms of the devise in this case were as strong as those used in *Fitzsimons v. Fitzsimons*. And the case was strengthened by the gift of 200*l.* for the

purpose of repairs on Tyr-y-Wain ; and the terms of the two devises of Tyr-y-Wain and Pedole being identical, notwithstanding the absence of any gift of money for repairs in the case of the latter, the one might be construed by the other. He must therefore make a declaration that the defendant William Jenkins was bound to elect whether he would take under or against the will—the decree to be drawn up in the alternative, declaring the rights of the several parties according as William Jenkins should elect to take under or against the will.

Feb. 21.—A question having arisen on the minutes as to what would be the result if W. Jenkins elected to take against the will, the case now came on to be spoken to on the minutes.

Mr. Willcock submitted that as the testator devised one-half of Tyr-y-Wain to E. Jenkins, and he had sufficient interest in Tyr-y-Wain to satisfy that devise, therefore E. Jenkins was entitled to that moiety, as her rights could not be affected by W. Jenkins's election.

Wood, V.C. said, that whatever was given up by W. Jenkins must be applied to compensate persons disappointed by his election, and those persons would have against E. Jenkins the same right that W. Jenkins had, namely, to share with her whatever passed under the devise ; it was incorrect to say that one moiety of Tyr-y-Wain was devised to Elizabeth Jenkins.

The Court declared, without prejudice to any question between the defendants, that, if W. Jenkins should elect to take under the will, then the whole of the farm called Pedole would belong to the plaintiffs, and also one-fourth of the farm called Tyr-y-Wain, under the conveyance made by Llewellyn Jenkins ; and that if W. Jenkins should elect to renounce all benefits given or devised to him by the said will, then three-fourths of the farm called Pedole and one moiety of the farm called Tyr-y-Wain would belong to the plaintiffs ; and one-fourth of the farm called Tyr-y-Wain would belong to the defendant Elizabeth Jenkins, and the remaining one-fourth of the said farms would belong to the defendant W. Jenkins.

Against this decision William Jenkins appealed, and the appeal was heard, before the Lords Justices, on the 23rd of June, when the same counsel (except that *Mr. F. J. Wood* appeared in lieu of *Mr. Hobhouse*.) were heard on the appeal. The only additional case cited was *Chave v. Chave* (M.R., May 17, 1830), mentioned by Vice Chancellor Wood in his judgment of the 11th of November 1862, which is more fully reported in 2 Jo. & H. 706. See *Ibidem*, p. 713, note (a).

Their LORDSHIPS expressed their opinion that the decision of the Vice Chancellor was correct in principle, and that his Honour's decree must be affirmed. They considered that, if a person elected to take against a will, the share of the testator's property given to and renounced by him must be applied to compensate those who were disappointed, in proportion to the benefits of which they were deprived by his election.

July 25.—The case was mentioned on the minutes, when the defendant William Jenkins elected to take against the will, and the following were the minutes of the order:

"The defendant William Jenkins, by his counsel, electing to renounce all benefits given or devised to him by the will of Lewis Jenkins, this Court doth declare that three fourth parts of the farm called Pedole belong to the plaintiffs and the remaining one-fourth thereof belongs to the defendant William Jenkins; and that one-fourth part of the farm called Tyr-y-Wain belongs to the plaintiffs, and one other fourth part thereof belongs to the defendant William Jenkins, and that one other fourth part thereof belongs to the defendant Elizabeth Jenkins, subject to the limitation in the said will contained of the last-mentioned one-fourth to the defendant William Jenkins in the event of the death of the said Elizabeth Jenkins without leaving issue living at the time of her death.

"Direct an inquiry, what are the respective values of the one-fourth of the farm called Pedole, of which the plaintiffs have been deprived by the election of the defendant William Jenkins, and of the vested interest of the defendant Elizabeth Jenkins in one-eighth of the farm called Tyr-y-

Wain, and her contingent interest in one other eighth part of the said farm, of which she has been deprived by the like election.

"And it is ordered, that all the estate and interest to which the defendant William Jenkins would have been entitled in the said farm called Tyr-y-Wain under the said will, and which has been renounced by him, be apportioned between the plaintiffs and the defendant Elizabeth Jenkins, in proportion to the values found upon the said inquiry."

ROMILLY, M.R. }
July 22, 31. } DALLY v. WONHAM.

Vendor and Purchaser—Sale to Agent.

A. being under the impression that he was the absolute owner of an estate which he had not seen for twenty years, sold it to his agent for an annuity of 40l. for the joint lives of himself and his wife and the life of the survivor of them. The estate was at the time settled on his wife for her separate use for life, A. being entitled only to the reversion in fee expectant on his wife's decease. The interest of the wife was wholly overlooked, both by herself and her husband. The husband pressed the sale forward, and being a solicitor himself prepared the deeds, and was most anxious for the completion of the purchase. He died within a year after it was completed, having devised all his property to his wife. The consideration was grossly inadequate, the net yearly rental of the property being nearly 40l. Upon a bill by the wife to obtain a re-conveyance of the estate, —Held, that the sale could not be supported; the agent residing on the spot and knowing the value of the estate, which the vendor did not; and that although (assuming the annuity to be an adequate consideration for the reversion) the purchaser might keep the reversion on paying the consideration stipulated to be paid for the estate in possession, he was not entitled to retain his purchase either with an abatement from the consideration or at a value to be fixed by the Court; and that the plaintiff was entitled to a re-conveyance of the estate and also to the costs of the suit.

This bill was filed by Frances Dally, widow, to set aside the purchase of a piece of land and premises situate in the parish

of South Bersted, in the county of Sussex. The premises consisted of nine timber-built cottages, with slated roofs, and a pew in Bognor Chapel; they were formerly the estate of Elizabeth Dally, and she by her will, dated the 29th of April 1843, devised and bequeathed all her real and personal estate of what nature or kind soever of which she might die possessed, unto Alfred Florance, whom she appointed executor in trust, to receive the rents, dividends and interest, and pay and apply the same unto and to the use of her daughter-in-law Frances, the wife of her son Frank Fether Dally, for her sole and separate use, separate and apart from and not subject to or in any manner liable to the debts and control of her said husband, for and during her life, and after her decease in trust to apply the rents, dividends and interest thereof to F. F. Dally for his life, and after his decease in trust for the absolute use and benefit of her granddaughter Frances Jane, daughter of F. F. Dally and Frances his wife, upon her attaining the age of twenty-one years or day of marriage which should first happen.

The testatrix died on the 4th of March 1846.

Frances Jane Dally, her granddaughter, died on the 12th of April 1850, under twenty-one and without being married; she left her father her heir-at-law and also heir-at-law of the testatrix, and he became entitled in remainder to the fee simple of the estate expectant upon the decease of his wife Frances Dally.

F. F. Dally for some years practised as a solicitor at Maidstone, but from ill health and reduced circumstances he went to reside with his wife at Guernsey, and he had not seen the premises in question for twenty years and upwards. By his will dated the 5th of November 1852, after directing payment of his debts, he gave and devised all his real and personal estate whatsoever and wheresoever to his wife Frances Dally, her heirs, executors, administrators and assigns absolutely, and he appointed her sole executrix.

William Kimber Wonham, the defendant, was a builder residing at Bognor; he acted as the agent of Mr. Dally, received the rents, repaired the buildings and managed the property generally.

Several offers had been made to purchase the premises, but they had gone off; and in January 1861 Mr. Dally suggested that Mr. Wonham should become the purchaser; this led to a correspondence, in which Mr. Dally expressed great anxiety that he should purchase the property. It was accordingly arranged between them that Mr. Wonham should become the purchaser, in consideration of an annuity of 40*l.* per annum, payable during the lives of F. F. Dally and his wife.

On the 26th of July 1861 Mr. Dally conveyed the premises in question to Mr. Wonham in fee, in consideration of a sum of 600*l.*, which was never paid. The only consideration was a bond of Mr. Wonham, in the penal sum of 600*l.*, conditioned to be void on his paying an annuity of 40*l.*, by quarterly payments to Mr. Dally during the joint lives of himself and his wife, and the life of the survivor of them. At that time they were of the respective ages of sixty-three and forty-nine; he having attained the age of sixty-three on the 29th of March 1861, and she having attained the age of forty-nine on the 24th of March 1861.

On the 10th of April 1862 Frank F. Dally died, and on the 29th of October 1862 this bill was filed to set aside the transaction, on grounds which are fully stated in the judgment.

Mr. Selwyn, Mr. Roberts and Mr. Jessel, for the plaintiff.

Mr. Southgate and Mr. Babington, for the defendant.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS.—The interest of Mrs. Dally in this property seems to have been unknown, or to have been disregarded, by every one, including herself.

The annual rental of the property, on the average of eleven years prior to the sale, was 53*l.* 13*s.* 6*d.* The net rental, after deducting commission to the defendant at 5*l.* per cent. was 37*l.* 6*s.* 10*d.* The average, however, of the last four years a little exceeded 40*l.* a year. In 1860 the real rental was 38*l.* 3*s.* 6*d.* The terms of the sale were, that the defendant should pay 40*l.* per annum by quarterly payments to Mr. Dally for his life, and to the plaintiff for her life, if she should survive. It was to be secured only by the bond of Mr. Wonham, not by

any charge upon the property. The plaintiff was no party to the deed, nor did she in any way concur in the sale. She certainly was cognizant of it, but she appears to have been ignorant of her title to the property. The defendant was also ignorant of her title, and Mr. Dally seems to have forgotten it, as throughout he treated with the defendant as if he were the absolute owner of the property. In 1861 the net produce of the property was 50*l.* 10*s.*; in the year 1862 it amounted to 66*l.* 16*s.*; and 33*l.* 8*s.* has been received for the first half of the present year. This however, the defendant says, has been produced by the outlay he has made for the improvement of the premises. There are various estimates made by the surveyors of the property on both sides; but the test of value that seems the best is, the price which could have been obtained for it in the market had it not been for the claim of the plaintiff. The defendant, it appears from the evidence, could have sold the property for 950*l.*, including a pew in the church valued at 25*l.* by one side and 50*l.* by the other, and a contract to that effect was entered into, which, in consequence of this suit, was broken off.

The price given for the purchase was grossly inadequate. In fact, the defendant obtained the property on payment of an annuity, when the annual rents of the estate were, and are now, more than sufficient to discharge it. It was also an annuity which, practically, was to last only during the life of the plaintiff; for her husband was known to have been in a very precarious state of health, and he frequently refers to it in the latter part of his correspondence; and he, in fact, died within a year after the contract was completed. It is, however, clearly proved that the husband was very anxious to complete the transaction, and that though he at first required a sum to be paid by way of premium in addition to the annuity, he abandoned this, and was very desirous to complete the transaction without it.

It is clear that he pressed the defendant to complete; he prepared the deed, sent it at once to the defendant's solicitor to engross and to have it executed, and that he executed it himself, without compulsion or pressure.

This is a strong fact in favour of the defendant; but notwithstanding that this

fact is proved, still, having regard to the circumstances that the agent was residing on the spot, and had done so for twenty years previously, and that he perfectly well knew the value of the property, which the vendor did not, and had not seen it for twenty years, I should have been of opinion that the transaction was not to be maintained unless the agent had told him the real value of the property, or the sum which it might have been sold for, as if he had said, "though I will not give this price, still we may sell this property for 900*l.*" That would have been an argument of some value to him.

If the vendor had insisted on the defendant taking the property for the payment of the annuity, it might have been supported partly on the ground of bounty towards the defendant, and some expressions in Mr. Dally's letters were relied upon to support that; but, in truth, it is clear that Mr. Dally did not so mean it; he did not know the value of the property, and he did not know what it would fetch if offered for sale. But the defendant, from his position, must be taken to have been acquainted with the real value of the property. I think, therefore, that this sale could not have been upheld if the husband had possessed the absolute ownership of the property. But that is not so, and this is the question which, to my mind, makes the circumstances so peculiar. The entire life estate was vested in the wife for her separate use; this the husband could not sell, and did not sell, although it is obvious that all parties believed he had the fee simple, and could sell it if he thought fit.

When these circumstances were pointed out to the defendant by his legal advisers, after the bill was filed, this proposal was made, viz., that the plaintiff should enjoy the property for her life, and that the defendant should take the reversion.

This, as might be expected, was rejected by the plaintiff, who made a counter-proposal, as little likely to be accepted, that the plaintiff should take the rents for her life, and that the defendant should, in addition to the rent, pay 40*l.* per annum for the reversion. It is manifest that the plaintiff is entitled to be put into possession of the property for her life. The question then is, how is the reversion to be dealt

with on the one hand, and what is to be done with the deed, and the agreement on the other. If the whole transaction is to be set aside the plaintiff is entitled to the fee simple, as she is the sole devisee under her husband's will; if the reversion was his to dispose of, it passed at his death to her absolutely, and in that her life estate would merge.

I have, therefore, thought it useful to consider how the matter would stand if the husband were now alive and the wife had enforced her right and had taken possession of the property; and if she were now in receipt of the rents for her separate use, and insisted upon her right to continue so during her life, what, in that case, would be the rights and obligations between the husband and wife on the one hand and the defendant on the other. It is clear that the husband, if he resorted to this Court to enforce the arrangement, could not compel the defendant to pay him the annuity of 40*l.* a year, which was given solely in consideration of the defendant's being put into immediate possession of the estate. I am equally clear that the defendant could not insist on his right to keep the husband's reversion in the fee simple of the land without paying anything for it. It is plain that it was not intended to be a gift; and that some consideration must be paid for it if the matter rested in contract. It is clear that the husband could not maintain a bill against the defendant when he could not give the fee simple of the estate intended to be bought with immediate possession. It is equally clear that the defendant, if he pleased, might take the reversion, which was all the husband could convey, on paying the consideration he had offered for the whole estate in possession; but I doubt whether the defendant could have maintained a suit for the purchase of the reversion on the footing of making such a deduction from the purchase-money, that is, from the annuity of 40*l.* per annum, as the Court might think properly proportionate to the husband's interest in the property; it would, in fact, I think, be making a new and totally different contract between these parties. The husband might naturally and reasonably say, I thought I had the fee simple, and that was what I intended to sell and nothing else. If I were compelled

to sell the reversion for the possession of an annuity of 40*l.* a year, can I properly be compelled to complete, with an abatement of the consideration, a contract which, had I known of my wife's estate, I should never have entered into? But if the Court could not give this during his life, it must be equally unable to enforce it, after the death of the husband, on his representatives. Even where sales of reversions have been completed this Court has frequently set them aside on slight proofs of inadequate value, and it could not consider a contract for the sale of an estate in consideration of an annuity as a sale of a reversion and then compel specific performance of it on terms which, if it had been actually carried into effect between the parties, the Court would have set aside on proof of the inadequate value. If, in order to avoid this task, the Court were to attempt to fix the value of the reversion by statements or by evidence, it would, I apprehend, be still more at variance with the rules of this court, the end of which would be to compel one man and the representative of another man to enter into a contract for the purchase of that which the latter never intended to sell.

I have, therefore, come to the conclusion that the conveyance and bond entered into and executed by and between Mr. Dally and the defendant, and the contract on which they were founded, were wholly inoperative and incapable of taking effect, or of being enforced by this Court, and therefore these two instruments must be delivered up and cancelled, and the defendant must be compelled to reconvey the estate, and the plaintiff put into possession of the rents and profits.

There must be an account taken of the rents and profits of the estate received by the defendant since the 26th of July 1861, and in taking such account the defendant must be allowed all sums of money properly expended by him in repairs and lasting improvements; he must also be allowed all sums of money paid by him in respect of the annuity. The plaintiff, however, is entitled to the costs of the suit.

KINDERSLEY, V.C. }

June 8;

July 14. }

TUCKNISS v.

ALEXANDER.

District Chapels—Right to Fees—Ancient Parochial Chapelry — Church Building Acts—Marriages by Licence.

An ancient chapelry, situate within a large parish, had from time immemorial had a separate church and churchyard, and separate churchwardens and church-rates, and the incumbent had performed marriages, christenings, churchings and burials, and retained the fees to his own use. The right of presentation to the chapelry (which was a perpetual curacy) was in the rector of the parish. The chapelry was described as a "parish" in the Ecclesiastical Survey, but in recent local acts of parliament the church of the chapelry was referred to as a "church or ancient chapel of ease":—Held, that the chapelry was not a distinct parish, and that under the power conferred by the 59 Geo. 3. c. 134. s. 16, authorizing the assignment of a district to a chapel of ease or parochial chapel, the Ecclesiastical Commissioners were authorized to divide the chapelry into districts and to assign a particular district to the ancient chapel.

The incumbent of a district parish validly constituted under the Church Building Acts (58 Geo. 3. c. 45. and 59 Geo. 3. c. 134), has an exclusive right to celebrate marriages by banns, between persons both of whom are resident within the district parish.

Whether after the creation, under the 6 & 7 Vict. c. 37. (Peel's Act), of new parishes out of parts of any existing parish, the incumbent of the old parish still retains by virtue of the saving clause (s. 18.) the right to publish banns and celebrate marriages between persons both of whom are resident in the new parishes—quære.

Where a licence is granted, in due form, for marriage at a particular church, the incumbent is under no obligation to inquire whether there has been a sufficient residence to justify the granting of the licence. His proper course is to assume the regularity of licence and to perform the marriage ceremony.

This was a SPECIAL CASE, under the 13 & 14 Vict. c. 35, to determine the right

to the fees as between the minister of the original chapelry of Oldham, in Lancashire, and the ministers of the various districts into which it had been divided.

The special case stated that the parish of Prestwich, or Prestwich-cum-Oldham, in the county of Lancaster, formerly in the diocese of Chester, but now in the diocese of Manchester, was an ancient parish; and within the same there were and had been from time immemorial, a parish church and churchyard; and within the said parish there had been from time immemorial a parochial chapelry, commonly called Oldham Chapelry, and within the said chapelry there were and had been from time immemorial a church or chapel, called Oldham Church, and a church or chapel yard thereto annexed; and that the said chapelry was called a parish in the ecclesiastical survey; and the said church or chapel and church or chapel yard were, and had been from time immemorial, used as and held to be the parish church and churchyard of such chapelry or parish. The said church or chapel of the said Oldham chapelry had been from time immemorial a perpetual curacy, and the right of presentation thereto was, and had been from time immemorial, vested in the rector of the parish of Prestwich, and at the said church or chapel of Oldham banns of marriage had been published, and marriages, christenings, churchings and burials were and had been immemorably solemnized and immemorably performed, and the fees paid in respect thereof had been immemorably received and retained, exclusively for his own use, by the incumbent for the time being of the said Oldham church or chapel. That the incumbent and inhabitants had from time immemorial nominated and appointed churchwardens, who had from time immemorial exercised jurisdiction as such in matters civil and ecclesiastical independently and exclusively of the parish of Prestwich in like manner in all respects as if the said chapelry had been a parish from time immemorial; and the said Oldham Church had been from time immemorial repaired by means of rates levied on the inhabitants of the said ancient chapelry, and those only who had not from time immemorial been rated for the repair of the parish church of Prestwich. That the

said chapelry had from time immemorial enjoyed and exercised independent parochial rights.

The special case then stated that four different chapels existed within the chapelry of Oldham: namely, a chapel-of-ease at Shaw, in Crompton, and in the years 1757, 1768 and 1769, three other duly consecrated chapels-of-ease, namely, St. Margaret's in Hollinwood, St. Peter's in Oldham, and St. Paul's in Royton, and the ancient church of Oldham, and that four chapels were augmented from Queen Anne's Bounty or by public grants, and under two local acts (4 Geo. 4. c. lxiv. and 9 Geo. 4. c. xcix.) for rebuilding the ancient church at Oldham. The ancient church had been partially pulled down and rebuilt. That in the year 1829 a church called St. James's, in Greenacre's Moor, within the said chapelry, was erected, under the 58 Geo. 3. c. 45; and by an order, dated the 4th of March 1835, and made by his Majesty King William the Fourth in Council, on the representation of the Commissioners for Building New Churches, with the consent of the bishop of the diocese in which the parish of Prestwich was situate, in pursuance of the 59 Geo. 3. c. 134, distinct chapelries were assigned to each of the aforesaid six chapels in the aforesaid ancient parochial chapelry of Oldham; namely, a parochial chapel district was assigned to the said ancient parochial chapel (St. Mary), another to the chapel of St. Peter's, another to the chapel of St. James's, another to the chapel of St. Margaret's, and another to the chapel of St. Paul's, and another to the said chapel-of-ease at Shaw; and it was ordered that marriages, baptisms, churchings and burials should be performed in each of the above-mentioned chapels, and that the fees for the same should, from and after the next avoidance of the parish of Prestwich-cum-Oldham, belong to and be received by the ministers of the said six chapels respectively; and the said order was duly advertised in the *London Gazette* on the 5th of May 1835. The plaintiff, the Rev. Richard Austin Tuckniss, was duly presented and instituted to the chapel of St. James, and was now the incumbent. On the 7th of October 1844, by another order made by her present Majesty in Council, on the representation of the Ecclesiastical Commis-

sioners for England, and with the consent of the bishop of the diocese in which the said parish of Prestwich was then situate, under his hand and seal, and under the 6 & 7 Vict. c. 37, five new separate districts, called respectively St. Matthew's, Chadderton, St. John's, Chadderton, Coldhurst, Glodwick and Wernoth, were constituted within the said ancient chapelry of Oldham as it originally existed, and out of the district chapelries assigned as aforesaid to the church or chapel of the said parochial chapelry of Oldham, and to the chapels of St. Margaret's in Hollinwood and St. Peter's in Oldham. This Order was advertised on the 22nd of October 1844. In each of the said five last-mentioned districts a church had been built and duly approved by the Ecclesiastical Commissioners, and consecrated as the church of such district, and each of the said five districts had thereby become a new parish, and the chancellor of the diocese in which the said new parishes were situate had fixed the fees which it should be lawful for the respective incumbents for the time being of the said new parishes to receive for the publication of banns and the solemnization of marriages, churchings, baptisms and burials in the said new parishes. The plaintiff, the Rev. James Bumstead, had been duly constituted and was now the perpetual curate of the new parish at Glodwick. Since the making the aforesaid Orders, there had been an avoidance of the spiritual persons, who were respectively, when the said Orders were made, the incumbent of the said parish of Prestwich and of the ancient parochial chapel of Oldham. The defendant, the Rev. David Mitchell Alexander, had recently been presented and instituted to and was now the incumbent of the said parochial chapelry of Oldham; and the question had arisen between the defendant as such incumbent and the plaintiffs, with reference to the right of the defendant to publish banns and to solemnize marriages in Oldham church between persons residing within the limits of the said district chapelries and new parishes respectively, and with reference to the defendant's right to retain for his own use such fees as he might receive in respect of the publication of such banns and the solemnization of such marriages. No com-

pensation had been made to the present incumbent of the ancient chapelry of Oldham for the loss of the fees sustained by him by reason of the creation of the aforesaid district chapelries and new parishes, but the Rev. Thomas Lowe, the late incumbent, received, under an Order in Council, dated the 27th of April 1857, a grant of 5*l.* per annum during his incumbency, in respect of the new parishes of St. John and Glodwick; and under another Order, dated the 6th of February 1859, a grant of 8*l.* per annum in respect of the new parish of St. Matthew, Chadderton.

Upon these facts the special case was agreed upon, the questions being as follows:

First, whether the defendant was entitled to publish banns or solemnize marriages at Oldham between two persons who were both resident within the limits of the district chapelries or new parishes which had been formed out of the ancient chapelry of Oldham; secondly, whether the defendant was entitled to retain for his own use, the fees which he received in respect of the publication of such banns and the solemnization of such marriages at the said Oldham church; and thirdly, whether, if a licence had been obtained from the bishop of the diocese in which the said ancient chapelry was situated for a marriage at the said Oldham Church of such persons as aforesaid, the defendant was entitled to solemnize at the said church the marriage between such parties, and to retain for his own use the fees which he might receive in respect of such marriage.

By the 58 Geo. 3. c. 45, Commissioners were appointed and provision was made for the division of parishes into two or more distinct parishes, which were to become rectories, vicarages, &c., like the original parish, with an apportionment of the tithes, glebe, moduses, &c.; or if thought preferable, into ecclesiastical districts, to become "separate district parishes," for all ecclesiastical purposes; and the churches appropriated to these district parishes were to be perpetual curacies. The Commissioners had also power to build additional chapels, (in case no division was made,) to be served by curates appointed by the incumbents and licensed by the bishop.

By the 27th section, it is enacted "That all

acts of parliament, laws and customs relating to publishing banns of marriage, marriages, christenings, churchings, and burials, and the registry thereof, and to all ecclesiastical fees, oblations or offerings, shall apply to such separate and distinct parishes and district parishes so made as aforesaid, when they shall so become complete, separate and distinct parishes, or district parishes under the provisions of that act, after the death, resignation or other avoidance of the existing incumbents respectively in each such parish or extra-parochial place, and to the churches and chapels thereof, and to the ecclesiastical persons having cure of souls or serving the same, in like manner in every respect as if the same respectively had been ancient separate and distinct parishes and parish churches by law to all intents and purposes." The 28th section was as follows: "That no banns of matrimony shall be published or marriages celebrated or solemnized or baptisms or churchings had by any person whatever within any church or chapel of any such separate and distinct parish so made, by any such division as aforesaid, or in any private house therein, or within any such district church or chapel, or in any private house within such district, nor shall any burials be performed within any cemetery appertaining or belonging to any such church or chapel, by any person whatever, except by the incumbent of the church of the parish or extra-parochial place from which such parish shall have been separated, or some curate of such incumbent duly licensed in that behalf until after the death, resignation, or other avoidance of the spiritual person who shall be the incumbent of the church of the parish or the extra-parochial place at the time of the consecration of any such church or chapel of any such separated parish or district parish." The 30th section enacted that the division of a parish into district parishes only, and not into complete and separate parishes, was not to affect land, glebe, tithes, moduses, &c. By the 59 Geo. 3. c. 134. s. 16. it was enacted that it should be lawful for the Commissioners, in the same manner, and with the like consents, as was required in the case of division into ecclesiastical districts, to assign a district to any chapel of ease or parochial chapel, with a curate to be nominated and licensed, subject to all the

laws in force respecting stipendiary curates: provided that it should be lawful for the Commissioners, with the consent of the bishop, to determine what proportion of the fees for marriages, baptisms, churchings, and burials should be assigned to such curate, and whether banns, marriages, churchings, baptisms and burials should be solemnized or performed in any such chapel or not, and that no such chapelry should become a benefice by any augmentation of the maintenance of the curate by bounty under any act of parliament. By the 17th section, it was enacted that all acts of parliament, laws and customs relating to publishing banns of marriage, marriages, christenings, churchings and burials, and the registering thereof, and to all ecclesiastical fees, oblations or offerings should apply to all district and consolidated or district chapelries and divisions of any parishes whereof the boundaries should be enrolled in the Court of Chancery under the 58 Geo. 3. c. 45. or of that act, and in the churches and chapels whereof banns of marriage should be allowed to be published, and marriages, christenings, churchings and burials, or any of them should be allowed to be solemnized, and to the churches and chapels thereof, and to the ecclesiastical persons having cure of souls therein, or serving the same, in like manner as if the same had been ancient, separate and distinct parishes and parish churches by law. By the 3 Geo. 4. c. 72. s. 17. it was enacted that in every case in which marriages were allowed, under the former acts, to be solemnized in any chapel or a district chapelry, and in which the parties or either of them contracting such marriage, should reside in the district of the chapelry, or any other district of any chapelry, the banns of marriage should be published in the chapel or chapels of each of the districts in which such parties respectively resided, and no publication in any other church or chapel should be legal, valid or effectual for the purposes of such marriage; anything in the said act or any other act of parliament contained to the contrary notwithstanding. The 5 Geo. 4. c. lxiv. was an act "For taking down and rebuilding the body of the church or ancient parochial chapel of ease of Oldham," &c., and that was amended by the 9 Geo. 4. c. xcix.

On the 28th of July 1843, the 6 & 7 Vict. c. 37. was passed to make better provision for the spiritual cure of populous parishes; and by the 9th section of that act the Commissioners were empowered to constitute districts and endow them to some extent, each of which by the 15th, 16th and 17th sections was to become a new parish, with a perpetual curate and churchwardens: but by the 18th section it was enacted as follows: "Provided always, and be it enacted, that until parliament shall otherwise determine, nothing herein contained shall be construed to affect or alter any rights, privileges, or liabilities whatsoever, ecclesiastical or civil, of any parish, chapelry, or district, except as herein expressly provided."

In July 1845, the 8 & 9 Vict. c. 70. passed, to amend further the Church Building Acts, and the 17th section of that act provided that the church of a district chapelry, should be a perpetual curacy, and the minister a perpetual curate with exclusive cure of souls, free from the control or interference of the rector, vicar or minister of the parish from which such district chapelry should have been taken, and entitled to the fees, except Easter dues.

Mr. Glasse and *Mr. Lindley* appeared for the plaintiffs, and referred to the above acts of parliament, contending that it was clear, first, that the church or chapel of Oldham was only a chapel of ease and not a parish church, and Oldham was only an ancient chapelry, to which a district had been rightly assigned, under the acts. The Order in Council was perfectly valid, and the incumbent of the ancient chapelry had only a right to the fees for performing religious offices within his own district, and had no rights extending over the other districts, which were equally independent and distinct. Glodwick was carved out of a new parish, and stood therefore *à fortiori* in the same position. As to marriages by licence, the fees followed the place where the ceremony was performed.

Dr. Stephens and *Mr. Traill* appeared for the defendant.—What had been done by the Order in Council of 1835 was clearly invalid. Under the 58 Geo. 3. c. 45. and 59 Geo. 3. c. 134. there was no power in the King in Council to divide a parish so as to convert the whole into district parishes; dis-

tricts could only be carved out of it. Here the whole was divided, and one district assigned to the parish church. Oldham was called a parish in the *Ecclesiastical Survey* in the time of Henry the Eighth, and had always exercised parochial rights; and the legislature never could have intended that, with scarce any compensation, the incumbent of a parish should be reduced to the condition of a mere curate. Moreover, the Order in Council was silent as to the publication of banns, solemnization of marriages, &c.; and therefore the incumbent of Oldham church still retained those rights, and was entitled to the fees as a consequence. Upon these grounds, the minister of St. James's was not entitled to what he claimed. With respect to Glodwick, that was under another Order in Council, and carved again out of a district; and even supposing the district had taken away the rights of the mother-church, when another district was taken from it, the rights of the mother-church were restored. As to licences, of course the general law applied; and a licence being granted by the bishop or other official person, the fact of the contracting parties being resident in any of the districts did not take away the rights of the minister of Oldham; of this there could be no doubt.

Mr. Glasse was heard in reply.

Authorities cited:

Gibson's Codex, edit. 1713, p. 235.

Degges' Parson's Counsellor, 227.

1 *Burn's Eccl. Law*, 300.

The Attorney General v. Brereton, 2 Ves. sen. 425.

Craven v. Sanderson, 7 Ad. & E. 880.

2 *Stephen's Laws of the Clergy*, 1161.

Hornby v. Toxteth Park Burial Board,

31 Beav. 52; s.c. 31 Law J. Rep. (N.S.) Chanc. 643.

Vaughan v. the South Metropolitan Cemetery Company, 1 Jo. & H. 256; s.c. 30 Law J. Rep. (N.S.) Chanc. 265.

Gough v. Jones, 9 Jur. N.S. 82.

Kenneth's Parochial Antiquities, 594, cited in 1 *Stephen's Laws of the Clergy*, note 255, edit. 1840.

Fuller v. Lane, 2 Addams on Pews, 425.

58 Geo. 3. c. 45, ss. 16, 21, 22, 27, 28.

59 Geo. 3. c. 134, ss. 16, 17.

3 Geo. 4. c. 72, ss. 12, 17.

4 Geo. 4. c. 76, ss. 22, 26.

5 Geo. 4. c. *lxiv* (local act).

7 & 8 Geo. 4. c. 72.

9 Geo. 4. c. *xcix* (local act).

1 & 2 Will. 4. c. 38.

2 & 3 Will. 4. c. 61.

1 & 2 Vict. c. 107.

2 & 3 Vict. c. 49.

6 & 7 Vict. c. 37, ss. 11, 12, 15.

7 & 8 Vict. c. 56, s. 1.

8 & 9 Vict. c. 70.

9 & 10 Vict. c. 68.

11 & 12 Vict. c. 71.

14 & 15 Vict. c. 97.

KINDERSLEY, V.C. reserved his judgment.

KINDERSLEY, V.C. (July 14).—This is a special case for the opinion of this Court upon certain questions that have arisen between the incumbents of certain ecclesiastical districts in Oldham; and the question is—or rather the chief question—whether Mr. Alexander, as incumbent of the parochial chapelry of Oldham, is entitled to publish banns and to celebrate marriages between two persons, both of them resident in the district of St. James, and the same question with regard to two persons resident within the district of Glodwick.—[His Honour stated the facts.]—In the statement there is this passage: "The said church or chapel, and church and chapel yard (that is, of Oldham) are and have been from time immemorial used as and held to be the parish church and churchyard of such chapelry or parish."

Now, I confess that passage did not strike me whilst the case was under argument; and when I came to consider it, I hesitated whether I should not require it either to be expunged or modified to make it what it ought to be. The interpretation which I mean to put upon it, and the only one which (speaking most respectfully) prevents its being nonsense, is that this church or chapelry of Oldham, and the church or chapel yard belonging to that church or chapel, of Oldham, are and have been from time immemorial used in the same manner as if Oldham had been a parish, and this had been the parish church of Oldham; because otherwise, if it means that the parochial chapelry of Oldham, within the

parish of Prestwich, is a parish, or is to be so regarded, it is stating as a fact that which is an impossibility. Therefore, I should interpret this passage to mean that from time immemorial this church or chapel of Oldham, and the parochial chapelry of Oldham, has been used as and in the same manner as the parish church of any parish has been used. "And it has been held to be"; that is a very ambiguous phrase; it does not mean "decided or enacted to be," but popularly supposed to be; otherwise it has no meaning at all. Now, the first question is, whether the defendant is entitled to publish banns of marriage and solemnize marriages in Oldham church between two persons who are both resident within the limits of the district chapelries or new parishes, or any of them, which have as aforesaid been formed out of the ancient chapelry of Oldham. The question before me applies to all these district chapelries or new parishes, although I have only got before me the incumbents of two of them; and it is impossible to avoid, in deciding as to one district coming within a certain category, that which will, in fact, be an expression of opinion as to the others.

Mr. Lindley. — We selected them on purpose.

KINDERSLEY, V.C. — In the formal answer given, I shall limit it to these two districts. The second question is, as to the right to retain the fees in respect of such marriages; and the third question relates to marriages by licence. Now, these questions turn chiefly upon some of a considerable number of acts of parliament, ill drawn and obscure and extremely difficult to apprehend, called the Church Building Acts, which are very numerous. The first was passed, I think, in 1818, forty-five years ago, and at least twenty-five acts have been passed upon this one subject, at the rate of more than one in every two years, presenting a labyrinth of confusion, in endeavouring to explore which it is extremely difficult to find any clue to the intention. But as these acts do bear upon those questions, I must endeavour to give them such an interpretation as I think the language warrants. I have gone through them all, but the great majority appear to

me not to have any direct bearing on the present question. Now, first, with respect to the district chapelry of St. James, one of the districts created by the Order in Council of 1835, leaving Glodwick for separate consideration. This Order expresses itself and purports to be made under the 59 Geo. 3. c. 134; and to understand (as far as it can be understood) this act of parliament, I must refer to the 58 Geo. 3. c. 45. Now, as I understand the last act was the first of the Church Building Acts, and authorized Commissioners appointed for the purpose to perform two different operations: one of dividing a parish into two or more districts, for all ecclesiastical, but not civil, purposes complete parishes, dividing the glebe, the tithes and the other emoluments, so that each, for ecclesiastical purposes, would be exactly as if it had been an ancient parish. This was authorized by the 16th section of the 58 Geo. 3. c. 45, and the 21st section enacted that if the Commissioners did not think it expedient to divide a parish into two or more complete, separate and distinct parishes for all ecclesiastical purposes, they might divide it into two or more ecclesiastical districts. As to both parishes and districts, the Commissioners were to cause the boundaries to be enrolled in Chancery and registered in the registry of the diocese, in order to have for all time a record of the exact boundaries of these new parishes or ecclesiastical districts; and as soon as that enrolment and registration should have been had, then by the 24th section, these new creations (not speaking of the second class) were to become district parishes, a sort of hybrid existence between a parish and a district chapelry. By the 25th section, each of these was to be a perpetual curacy and benefice presentative, and the incumbent was to be like the parson of a parish, a body corporate. — [His Honour read the 27th, 28th and 30th sections set out above.]

I have mentioned the particulars of that act of parliament to a certain extent, not because the chapels in question were created under it, but because it is necessary to bear in mind its provisions, to see what is the effect of the next act, the 59 Geo. 3. c. 134. This appears to me to authorize the Commissioners to recommend to the Crown to perform a third operation, and

the only sections which I think it necessary to advert to are the 16th and 17th. This act is to amend the last act (the 58th), which is "For building and promoting the building of additional churches in populous parishes." And a great deal of this act (the 59th) introduces provisions not in the 58th, or alters others; but by the 16th section (under which the Order in Council of 1835, which created the district of St. James, was made) the Commissioners were empowered to perform a third operation.—[His Honour read the section.]—Now, as I understand that section, the Commissioners are authorized to assign a district to any existing chapel of ease or parochial chapel existing within a particular parish, and also to any chapel that might thereafter be built, and that district is to be served by a curate, who is (unless there be some special power of nomination elsewhere) to be nominated by the incumbent of the parish from which this district is severed; and he is to be in the position of a stipendiary curate, (except as to the assigning of salary) under the superintendence and control of the incumbent of the parish; and the district is not to be a benefice. I may observe that, by a subsequent act these districts are made benefices, but this is not material to the present question. And the Commissioners may determine (that is, I presume it is so meant, though not so expressed, may recommend to the Crown, that is, to the Queen in Council, who may order) that banns may be published and marriages and other ecclesiastical offices solemnized within the chapel to which the district should have been thus assigned. The Commissioners have professed to perform this third operation with regard to that portion of the parish of Prestwich which constituted the ancient parochial chapelry of Oldham, and divided it into six portions, and assigned one of those portions to a certain chapel within that particular portion or district. I must, however, refer to the 17th section, which is, in point of fact, *mutatis mutandis*, exactly the same as the 27th section of the 58 Geo. 3. c. 45. I must also refer to the 3 Geo. 4. c. 72. s. 17.—[His Honour read the section.]—Now, I believe I have referred to all those which have any real direct bearing on this question: and the question is, what did these

acts of parliament intend with reference to districts constituted under the 16th section of the 59 Geo. 3. c. 134. with respect to the publishing of banns of marriage and the celebration of marriages? It would have been, one would have thought, not a very difficult thing to have expressed it in plain terms; but that has not been the course pursued, and one has to find it out from deductions from the different sections which have any relation to the subject.

Now, it appears to me that the 17th section of the 59 Geo. 3. c. 134. has a very strong bearing in favour of the exclusive right of the incumbent of one of these districts to celebrate marriage between two persons resident within that district. I say the exclusive right; excluding, therefore, the right of the incumbent of the ancient chapel of Oldham. Being, as I have said, *mutatis mutandis*, exactly the same as the 22nd section of the 58 Geo. 3. c. 45, which was applied to the creation of the new parishes, or new district parishes, it enacts that "all acts of parliament, laws and customs relating to publishing banns of marriage, marriages, christenings, churchings and burials, and the registering thereof; and to all ecclesiastical fees, oblations or offerings shall apply to all districts, and consolidated or district chapelries and divisions of any parishes or extra-parochial places, whereof the boundaries shall be enrolled in the High Court of Chancery under the provisions of the said recited act and this act; and in the churches and chapels whereof banns of marriage shall be allowed to be published; and marriages, christenings, churchings and burials, or any of them, shall be allowed to be solemnized, and to" (that is, "shall apply to") "the churches and chapels thereof, and to the ecclesiastical persons having cure of souls therein, or serving the same, in like manner in every respect as if the same respectively had been ancient, separate and distinct parishes and parish churches by law to all intents and purposes." I really do not know how to get over the effect of this statement, that every law and custom and every act of parliament which applies to marriage, relating to the publication of banns and the performance of marriages and fees and so forth, which apply to any ancient parish or parish church, shall apply to these new districts, and to

the churches or chapels to which those districts shall be annexed; and whatsoever laws and customs apply to the incumbent of a parish shall apply to the incumbents of these districts. Well, clearly, as between any two ancient parishes, I apprehend the law is clear that the minister of parish A. has no right—it is against law that he should have—to celebrate marriage between two persons, neither of whom is resident in his own parish—between two persons resident in parish B. I take that to be clear law; and without going into any of the more recondite authorities upon the subject I may just refer to the case before Lord Eldon of *Nicholson v. Squire* (1), which was a question with regard to a ward of Court, and his Lordship had occasion to summon the clergyman of the parish who performed the marriage ceremony, it being a clandestine marriage; and he made some observations on that occasion. “With regard to a clergyman,” he says, “a notion seems to prevail that everything is correct if a paper describing the parties between whom banns are to be published is handed up to the clergyman in the usual manner during the service, and he publishes them without more. We know that, under the Marriage Act, no evidence can be given as to a residence of the parties, in order to invalidate the marriage. It is true that a marriage by banns is good, though neither of the parties was resident in the parish; but if a clergyman, not using due diligence, marries persons neither of whom is resident in the parish, he is liable at least to ecclesiastical censure; perhaps to other consequences.” Therefore, that alone shews that, at all events, it is against law that a minister of a certain parish should celebrate a marriage between two persons, neither of whom is resident in his parish. That is the law with respect to an ancient parish; in other words, the minister of each ancient parish has the exclusive right of celebrating marriages between two persons both of whom are resident within that parish. Then this 17th section says, that all laws which relate to ancient parishes, to ancient parish churches, to the incumbents of ancient parishes with regard to marriages, publication of banns, and so on, shall apply just as

much to these districts, and the chapels to which they are annexed, and to the incumbents of those churches. It appears to me, therefore, that the incumbent of St. James’s parish must have the exclusive right to celebrate marriages between persons, both of whom are resident within his own district. In other words, that the minister of the ancient chapelry of Oldham has no more right than the minister of any parish in Northumberland or Cumberland to celebrate a marriage between two persons resident within the district chapelry of St. James.

But that is, of course, upon the assumption that this district of St. James has been duly created. Now it has been contended that is not so; that, in fact, this Order in Council of 1835, which created this district of St. James and the other districts at the same time, is invalid. Perhaps, before I go to that I ought to add, though it is hardly necessary, that the view which I take of the effect of the 17th section of the 59 Geo. 3. c. 134. is strengthened by what we find in the 17th section of the 3 Geo. 4. c. 72, which enacts, “that in every case in which marriages are allowed under any of the provisions of the said recited acts, or either of them (including the 59 Geo. 3. c. 134), to be solemnized in any chapel of a district chapelry.” It is very badly worded; it is an ill-constructed sentence; but the meaning is, that in every case in which marriages shall be allowed to be solemnized in a chapel of a district chapelry, in which both parties contracting the marriage reside; or, if it be the case that one of the parties resides in that chapelry and the other resides in another chapelry or parish, then the banns of marriage shall be published in the chapel or chapelry of each of the districts in which the parties reside. So that if they both reside in one district, the banns are to be published in that district. And then it goes on thus: “And no publication of such banns in any other church or chapel shall be legal, valid or effectual for the purposes of such marriage, anything in the said recited acts or either of them, or any other act or acts of parliament contained to the contrary notwithstanding.” It appears to me that that entirely corroborates the view I derive from the 59 Geo. 3. c. 134. itself. I think here there is a clear intention, though clumsily

(1) 16 Ves. 259.

and obscurely expressed, that wherever two persons intend to contract marriage reside within any one of these chapelries, that the church or chapel of that chapelry is the place where the banns are to be published and the marriage is to be solemnized; and that the banns are not to be published, and the marriage not to be solemnized in any other church or chapel.

Now, with regard to the invalidity of the Order in Council, it is argued that although the legislature has given to the King in Council, on the recommendation of the Commissioners, the power to sever or divide off one or more districts from the parish, and to assign those districts to particular chapels, that it has not empowered the King in Council to divide the whole of this parish into districts, and to assign one of such districts to the parish church, as if it were a chapel. That is the major proposition; and the minor proposition is this, that Oldham was a parish, and the old chapel or church of Oldham was the parish church of the parish of Oldham, and then the conclusion follows, that the King in Council had no power to divide the whole of Oldham into districts, and to assign one to the old church or chapel of Oldham, and, consequently, the Order in Council of the 4th of March 1835, which purports to do so, is invalid.

Now, still regarding it as a syllogism, the plaintiff answers, I deny your minor proposition, that Oldham is a parish; that the church or chapel of Oldham is a parish church; and therefore, assuming the major proposition to be well founded, your conclusion is necessarily false. In fact it is clear, unless the assumption upon which the argument is based is well founded, it cannot prevail; and therefore the question resolves itself into that question of fact. Now, I must take the facts from the statement of the case upon which I am to express my opinion, and I must read again the second paragraph: "Within the said parish (that is, the ancient parish of Prestwich, otherwise Prestwich-cum-Oldham), there is, and has been from time immemorial,"—what? another parish? it would be a strange assertion if it were so—"a parochial chapelry, commonly called Oldham Chapelry, and within the said chapelry, there are, and have been from time immemorial, a church or chapel called Oldham Church, and a church or chapel yard

thereto annexed." Now, can it be contended for one moment that that which is, and from time immemorial has been a parochial chapelry within a parish, can itself be a parish church, and the chapel of that chapelry be the parish church of the chapelry? It is utterly impossible; and in the concluding portion of this section, part of which I have read, occur those words as to which I said that I must put the interpretation upon them which alone seemed to me to be consistent with possibility, namely, that Oldham church or chapel, call it which you will, has been always used in the same manner as a parish church has been accustomed to be used, for the purpose of having churchwardens, marriages and every other purpose you can suggest, and has exercised parochial rights. It has been rated separately from the rest of the parish for building churches and any purpose you please. But the fact remains unshaken that it is still, and has been from time immemorial, according to the facts both parties agree upon, a parochial chapel. But, further, one of the local acts which is embodied in this case, and is to be considered as if it were set out at large, the 5 Geo. 4. c. lxiv, is entitled "An act for taking down and rebuilding the body of the church, or ancient parochial chapel of *ease* of Oldham, within the parish of Prestwich-cum-Oldham, in the county palatine of Lancaster, for providing additional burial ground, and for equalizing the church-rates, and other purposes. And then, what does it recite? "Whereas the present church or ancient chapel of *ease* of Oldham, in the county of Lancaster, and the tower thereof, are, by lapse of time, become very ruinous and decayed, and the said church is not sufficiently large for the accommodation of the inhabitants of the chapelry of Oldham aforesaid," (treating it as a chapelry and not as a parish), "the population having of late years greatly increased, and the cemetery or burial-ground adjoining the said church requiring to be enlarged, and it is therefore expedient that the body of the said church and tower should be taken down, &c.; and it then enacts, that the rector, curates and churchwardens for the time being of Prestwich, and other persons, shall be trustees for carrying this out. And the other local act, the 9 Geo. 4, which I have referred to, was to

amend that act ; so that, as far as we find the legislature dealing with Oldham, it is upon the footing of its being, not a parish, but a chapelry, and the church or chapel the parochial chapel of ease of Oldham ; and, as I have said, it is utterly impossible that the parochial chapel, within the parish (whatever rights and privileges may belong to it) should be itself a parish. The case states, and of course I take that to be the fact, that in the Ecclesiastical Survey Oldham is called a parish. Now, of course, the Commissioners of Henry the Eighth, under the act then passed for ascertaining the possessions of all the ecclesiastical personages throughout the kingdom, with a view to the first-fruits and tenths, whatever those Commissioners did, if they called a parochial chapel a parish, or a parish a parochial chapel, all you can say is that it was erroneously and incorrectly so called in the Ecclesiastical Survey. Their calling it so, does not make it so. There is nothing in the act of parliament which authorizes the Commissioners to do anything of the kind ; and the whole of the object of the Commissioners, under the 26 Hen. 8. was for the benefit of the Crown or whoever might be entitled to obtain the account of all the possessions belonging to the church, to ascertain the possessions, to whomsoever they belonged, in order to their being, in effect, in plain terms, taxed ; that they might pay what they ought to pay according to the rights and obligations to which they were subject. And when we find that they speak of Oldham as being a parish, it was chiefly the occurrence of that which it would be very strange if something of the kind with regard to some of the places or other with which they dealt had not occurred, that they have made a mistake in calling one place or one district a parish instead of a chapelry, that is all.

Therefore what the Crown has done, at the recommendation of the Commissioners, is this : Finding in the parish of Prestwich a certain ancient parochial chapelry a portion of the parish of Prestwich, and certain other chapels which had been built, it divides the whole, not the whole of the parish, but of the chapelry of Oldham, into so many districts, and assigns one of those districts to the ancient parochial chapel itself. It may be very justly said,

and I quite feel the force of the suggestion, when the minister of the ancient parochial chapel of Oldham has been from all time the incumbent of a benefice, the perpetual curate, with certain exclusive rights and privileges belonging to him in his character of perpetual curate of this nominal parochial chapelry ; to convert him into a stipendiary curate of his district under the superintendence and control of the minister of the parish ; how can you do that ? It is most unjust and improper ; you are taking away vested rights, and I quite feel the force of that argument, but what does the act of parliament say ?

The 16th section says that it shall be lawful for the commissioners to assign a particular district to any chapel of ease or parochial chapel already existing or built, or thereafter to be built or acquired under the act. Therefore this ancient parochial chapel of Oldham comes distinctly within the terms of this section of the act of parliament, and the King in Council did exactly what this section in terms authorized to be done. It may be a very great hardship ; it may be that it would be a monstrous injustice to the incumbent of Oldham to be thus dealt with ; but the question is, is the Order in Council invalid by reason that it has ordered and done something which the act of parliament did not authorize it to do ? But there is another consideration. Let me assume that for the reasons I have last mentioned the Order in Council of 1835 ought not to have any operation so far as it purports to assign a district to the ancient parochial church or chapel of Oldham. Why is that to make invalid that which the Order in Council has rightly done with respect to the other districts ? I cannot understand, I confess, why I should come to the conclusion, that because this Order in Council is partially inoperative, or ought to be considered partially so, that must necessarily contaminate and poison and render invalid the whole of that which has been done. It appears to me that whatever be the right view with respect to the Order in Council, so far as relates to the ancient parochial chapel of Oldham, there is no reason why I should not hold it to be perfectly valid in other respects in what has been done for a quarter of a century, and all parties have been dealing with it, and the public have all proceeded on the footing of

the validity of this Order in Council—people have been married at the chapel, and incumbents have been appointed.

Another argument has been used with reference to this Order in Council—it is truly said, that although the report of the Commissioners upon which this Order in Council is founded, recommends that marriages shall be performed in St. James's Chapel, or in each of the other chapels created by this Order in Council, it does not itself order that marriages shall be performed in these district chapels in express terms, and therefore that the incumbents of these districts have no right in their respective chapels to perform marriages at all. But although the order is very clumsily drawn, its recitals being inconsistent with the intention, it appears to me that, on the true construction of it, its effect is to do so, especially when we find that for a quarter of a century that construction has been acted on. I am of opinion, therefore, that with regard to St. James's the incumbent of Oldham, whether it be the ancient chapelry, or what remains of it, or whether it be a new district created by that Order in Council of 1835, has not the right to publish banns or perform marriages on the publication of banns between two persons, both of whom are resident—"dwelling" is the language of the Marriage Act—within the district of St. James's; and, of course, the right to the fees must follow that decision.

Now I come to the other district of Glodwick, which was created under a totally different act of parliament, and by a different Order in Council. This district or new parish was constituted by a fourth operation, which, by the 6 & 7 Vict. c. 37, commonly called Peel's Act, the Commissioners are authorized to perform upon or with respect to a parish. By the 9th section of that act they are authorized to constitute parts of populous parishes, chapelries, and districts, separate districts for spiritual purposes, and, with the consent of the bishop of the diocese, under his hand and seal, "to set out by metes and bounds, and constitute a separate district accordingly, such district not then containing within its limits any consecrated church or chapel in use for the purposes of divine worship, and to fix and declare the name of such district."

So this was to create a district, not as before, by annexing it or attaching it to a certain chapel existing, but to create a district where there was no chapel, no place for worship, and to give it a name; and then a certain provision was made that no scheme was to be laid before the King in Council, without giving an opportunity to the incumbent and patron to make any objections, nor till after one month from the time it should be transmitted to the incumbent; and then it provides for the endowment of such district, which endowment is to be increased when it shall have become a new parish under the subsequent provisions of the act; and by the 11th section it provides for the nomination and licensing of a minister as to the superintendence of that district. His Honour then read the 15th section, which enacts that when any church or chapel shall have been built, purchased or acquired in such district, and shall have been approved and consecrated, such district shall thereupon "be, and be deemed, a new parish for ecclesiastical purposes;" and it should be lawful to publish banns and solemnize marriages and other offices, and receive such fees for so doing as should be fixed by the chancellor of the diocese, "and the several laws, statutes and customs in force relating to the publication of banns of matrimony, and to the performance of marriages, baptisms, churchings and burials, and the registering thereof respectively; and to the suing for and recovering of fees, oblations or offerings in respect thereof, shall apply to the church of such new parish, and to the perpetual curate thereof for the time being." Now, that last clause is not the same as clauses somewhat to the same effect are in the acts of the 58 Geo. 3. c. 45. and 59 Geo. 3. c. 134. It does not say that all acts of parliament, laws and customs, with regard to publication of banns, marriages, and so on, which apply to ancient parishes, shall apply to these new district parishes as if they were separate, ancient and distinct parishes in law to all intents and purposes; but it says that the several laws, statutes and customs in force relating to publication of banns and the performance of marriages, shall apply to the church of the new parish, and so on.

We have now got this: that under this

act a district may be created where there is no place of worship. When a place of worship is built, or purchased, or acquired, and consecrated as the church of that district, that district becomes a new parish. Now, by the 14th section, this was provided with reference to this condition, which I may call its chrysalis state, when it was a district without a place of worship, and before it became a new parish. "Provided always, and be it enacted, that until a church or chapel shall have been built or acquired within such district, and shall have been approved and consecrated as hereinafter provided, nothing herein contained shall prejudice or affect the right of any incumbent of any other church or chapel, who, before the constituting of such district, possessed the entire cure of souls within the same, or any part thereof, to publish any banns, solemnize any marriages, or perform any burials in his own church or chapel, which he could have published, solemnized or performed therein, or to receive any fees, dues, or emoluments (except the fees hereinbefore authorized to be received by the minister of such district), which, as such incumbent, he could have received if such district had not been constituted, nor any right to attend divine service in any other church or chapel, which any inhabitant of such district possessed before such district was constituted." So that until one of these districts becomes a new parish under the 15th section, while it remains merely a district without a consecrated place of worship, nothing in the act contained shall prevent the incumbent of any church or parish from doing what he might have done before with respect to marriages. One would have expected that the act would have gone on to say, "But when a church is consecrated, and when under the 15th section it becomes 'a new parish,' then we mean," so and so. But it leaves that to be conjectured; and what is more, we find this: that, in the 16th section, the minister of the new parish, when it becomes such, is to be a perpetual curate; and by the 17th section churchwardens are to be chosen as if it were a perpetual curacy, if not a parish. Then we come to the 18th section, and we find this—[His Honour here read the section]. Now, it is contended, and very fairly, that it is not expressly pro-

vided, that after these districts become new parishes, the incumbent of the mother-parish (if I may use that expression) shall not continue to perform marriages; all that is expressed is, that until the parish is constituted he shall be entitled to do it—it does not say that afterwards he shall not do it; and this is a specimen of the sort of legislation which these Church-Building Acts exhibit almost in every section. One is left to conjecture what the legislature did mean. One would say, at first sight, if it says that the minister of the said church shall continue to enjoy his old privileges until the new district became a new parish, that the legislature intended that when it did become a new parish, he was to be limited in respect of the enjoyment of his old privileges by reason that the district is to be a new parish; and a new parish, *ex vi termini*, carries with it the exclusive right of publishing banns and performing marriages as between persons who are so resident. The act says, "Nothing herein contained shall abridge any right or any privilege, except what is expressly provided by this act." I confess, turning this over and over again, I feel very great difficulty in coming to a conclusion on the subject as relates to Glodwick; but I find a ground upon which it appears to me clear that, with respect to Glodwick, the minister of Glodwick has the exclusive right, entirely irrespective of those grounds which have been argued. It appears by the Order in Council of 1844, under which Glodwick was created, that the district of Glodwick is carved out exclusively from the district chapelry of St. Peter's, which was one of the district chapelries created by the Order in Council of 1835, contemporaneously with the creation of St. James's district, which I have already dealt with. Of course, having determined that the incumbent of St. James's had the exclusive right to publish banns, and so on, and of performing marriages between two persons within his district, the same thing must apply to St. Peter's, which was created under the same act of parliament, and by the same Order in Council. When St. Peter's was created, according to the decision I came to with respect to St. James's, the minister of Oldham ceased to have the right of performing marriages as between two persons resident

in St. Peter's; but then even, if out of St. Peter's, so constituted with that exclusive privilege, another district is carved, it does not restore to the minister of the mother church, assuming it to be a mother church, that which had been taken away from it by the creation of the district of St. Peter's; it does not restore it; but the effect is, that, at all events, whatever question may arise as between the minister of Glodwick and the minister of St. Peter's, as to the question put to me, which is as between the minister of Glodwick and the minister of Oldham, that for that reason the minister of Oldham has no right to celebrate marriages, or publish the banns of marriage, between two persons resident within the new parish of Glodwick.

Now, then, we come to the other question about marriages by licence, which seems to have been tacitly assumed to be the same as the question about marriage by banns. Upon examination, it stands on a totally different footing. The question as to the performing of marriages by licence is not, in express terms (unless I have overlooked something), dealt with by any of the acts of parliament under which these districts are constituted—it is left to the general law. Then, looking at the general law, and referring to the Marriage Act, 4 Geo. 4. c. 76, we find that the responsibility, as to a marriage by licence between two persons, as to whether one of them resides in the district or parish of the church or chapel within which the marriage is supposed to be celebrated, is not put on the minister of the parish, but on the bishop, in granting the licence; and it appears to me, that if a licence is produced to a clergyman from his ordinary, from his diocesan, directing him, or in terms authorizing him, to marry two persons in his church or chapel, his canonical obedience requires him, as well as the rights of the parties require him, to perform that marriage according to that licence. The 10th section of the Marriage Act is in these terms: "It is hereby further enacted, that no licence of marriage shall, from and after the said 1st of November, be granted by any archbishop, bishop, or other ordinary or person having authority to grant such licences, to solemnize any marriage in any other church or chapel than in the parish church, or in

some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such licence." So that if a person goes and dwells in a district or parish fifteen days, and at the end of the fifteen days makes an affidavit, and thus procures a licence, the bishop's authority grants the licence, and the responsibility is upon him to take care that what is represented to him, as to the abode of one of the parties, is correctly represented. It is only fifteen days, and it may be, and very likely would be, that the minister of a metropolitan parish or the minister of a district within any of the large towns or cities of this kingdom, might really have no means of ascertaining where the parties live, except after some time, and some inquiry and research, which might delay the marriage, not only for hours, but for days; and it is not his function to ascertain it. His function is to act according to the licence of his diocesan, and the responsibility will be on the diocesan. I do not mean to say for a moment, that if a clergyman knew the facts, and chose to take upon himself the responsibility of saying, "I will not marry you notwithstanding this licence, it might not turn out when he came to represent the matter to the bishop that the bishop was misled. But what a peril does a clergyman take upon himself, supposing it turns out that one of the parties was resident for fifteen days within this district; and what a risk does he run by saying, "I cannot say whether it is so or not, but I will not marry the parties." Therefore, it appears to me that the question does not arise to be solved, if the licence is duly framed and presented to him, and that he has no right to question the authority or propriety of that licence; he is bound to marry the parties according to it; and therefore in answer to that question about marriage by licence, the Court is of opinion that the minister has no option but to perform the marriage according to the bishop's licence. I may observe this: I felt, not only during the argument but subsequently, some hesitation with regard to the jurisdiction of this Court on a question of this sort. It is very peculiar and

very novel; but finding that in a case, before Vice Chancellor Wood, of *Fitzgerald v. Champneys* (1), in which very much the same question was raised on a bill, it was not suggested either to the Vice Chancellor or by him that there was any want of jurisdiction, I cannot take upon myself to say that I will refuse to exercise that jurisdiction which he has considered this Court possessed over the question.

ROMILLY, M.R. }
June 22, 23. } INGILBY v. SHAFTO.

Pleading—Bill of Discovery—Answer—Insufficiency—Exceptions.

Upon a bill of discovery in aid of a defence to an action at law, the plaintiff in equity is entitled to a discovery only of such facts, deeds, papers, &c. as may help him to make out his defence at law. He cannot compel the plaintiff at law to disclose how he means to establish his case there.

This suit came on upon exceptions to the answer of the defendant for insufficiency.

The bill was filed by Henry John Ingilby against Robert Duncombe Shafto, for discovery in aid of his defence to an action at law.

It stated that Sir John Ingilby, by his will, dated 1770, devised certain copyhold lands held of the manor of the Forest of Knarborough, in the county of York, to John Wright for life, with remainder to his first and other sons in tail male, with remainder to Henry Wright, brother of John Wright, for life, with remainder to his first and other sons in tail male, with divers remainders over.

Sir John Ingilby died in 1772, when John Wright (who then became Sir John Ingilby) was admitted tenant to the copyhold lands, and remained in quiet possession till his death.

On the 12th of September 1804 the copyhold lands were surrendered by Sir John Ingilby and his son William Ingilby to the use of Sir John Ingilby for life, with remainder to such uses as William Ingilby

should by deed or will appoint; and in default of appointment, to the use of William Ingilby for life, with remainder to Sir John Ingilby in fee. On the 26th of September 1804 Sir John Ingilby and William Ingilby were admitted pursuant to the surrender; and Sir John Ingilby continued in undisturbed possession of the copyhold lands up to his death.

Sir John Ingilby died on the 13th of May 1815, whereupon William (then Sir William) Ingilby entered into possession of the copyhold lands comprised in the surrender, and during his life purchased other lands held of the same manor in fee, and continued in quiet possession of all such lands until his death.

Sir William (then Sir William Amcotts Ingilby) by his will, dated the 17th of July 1851, devised all the aforesaid copyhold lands to the plaintiff for his life. He died on the 14th of May 1854, and the plaintiff entered into possession of all the said copyhold lands. On the 28th of November 1855 he was admitted, and had since remained in undisputed possession.

On the 20th of February 1863 the defendant issued ten writs of ejectment, in respect of various portions of the copyhold lands. The bill described the particulars of such portions of the lands, and stated that the writs affected in the whole 847 acres only, but that the defendant's claim included property of much greater extent and value.

The bill then stated as follows:—"The defendant has refused to disclose the character in which he sues, or to furnish the grounds or particulars of his claim, or the facts, circumstances or grounds on or by reason of which he pretends that the plaintiff is not such tenant for life in possession as aforesaid; and the proceedings in ejectment do not in any way disclose the character in which the defendant sues, or the nature of the case which is intended to be set up, or on what facts, circumstances or grounds the plaintiff's title is disputed; but the defendant some time since applied to the steward of the manor to admit him as tenant to the copyhold lands, which the steward refused to do; and on the occasion of the application the defendant produced to the steward a pretended pedigree and also a draft of a proposed admittance, from which it appears

(1) 2 Jo. & H. 31; s. c. 30 Law J. Rep. (N.S.) Chanc. 777.

that the defendant then claimed in some way which is not clearly disclosed, and which the plaintiff cannot understand, to be entitled to admittance as the customary heir-at-law of the Sir John Ingilby who died in 1772."

The bill then stated at length a pedigree, which "shewed the pretended heirship of Robert Duncombe Shafto, the defendant, to Sir John Ingilby who died in 1772." It also stated that such pedigree was incorrect in many respects, and specified the errors, and then continued: "Several of the persons through whom the defendant purports to trace his descent made dispositions by surrender, will or otherwise of their copyhold estates, and dispositions of all their real estate sufficient to pass copyholds, or some other dispositions which would have passed any interest in the copyhold estates which might have been vested in such persons respectively." The bill then contained the following general charge as to the possession of documents: "The defendant has in his possession or power, and within his knowledge respectively, a large quantity of documentary and other particulars and materials, which, if produced, would shew that the copyhold estates have not descended on the defendant, or any other person, being the customary heir of the Sir John Ingilby who died in 1772, and would also supply the means of correcting the pretended pedigree, and shew that the defendant is not such customary heir, and would otherwise establish the plaintiff's title; and if the defendant would make discovery of the matters within his knowledge as aforesaid, and of the documentary materials and particulars in his possession or power as aforesaid, the same would furnish a complete defence to the several actions of ejectment by establishing the plaintiff's title to the lands, and negating that of the defendant.

The bill lastly alleged that "the plaintiff cannot safely proceed in his defence to the actions of ejectment respectively without obtaining a discovery from the defendant of the character in which he sues, and of the nature of the claim which he sets up, and of the several particulars aforesaid, and of all other particulars relating to the title, or alleged title, to the lands;" and it prayed "that the defendant may make a full dis-

covery of all particulars relating to the matters aforesaid; and that in the mean time he may be restrained from proceeding with the actions of ejectment, or any of them, or taking any other steps or proceedings for the purpose of asserting his claim to any of the lands as aforesaid."

The plaintiff interrogated the defendant as to the truth of the several allegations contained in the bill; as to the legal effect of the surrender of 1804; as to the pretended statement in the pedigree; and as to the documents and other particulars in his possession or power "relating to the matters in the bill." And the interrogatories called upon the defendant to set forth a complete list of particulars, and they were in other respects so framed as to require from the defendant not only an admission that the documents in his possession would affirmatively establish the plaintiff's title to the copyhold lands in question, but also a disclosure by the defendant of the character in which he sued at law, and of the nature and grounds of the case which he intended to establish in the actions of ejectment.

The defendant, by his answer, stated that he was advised the plaintiff was not entitled to the greater part of the discovery sought by his bill, and that the defendant had, therefore, omitted and declined to answer several of the interrogatories. He claimed, however, to be himself entitled to the lands comprised in the writ of ejectment in the bill mentioned; he alleged that the plaintiff had no title thereto, and he denied his title to the same.

The defendant then stated that he had in a schedule to the answer set forth a list of documents in his possession or power "relating to the matters in the bill mentioned." He said, "He did not admit that all such particulars established or tended to establish the plaintiff's title affirmatively; but, in order to avoid any question on that ground, he was willing to produce all the documents specified in the first part of the schedule (except as there mentioned)." His answer then concluded thus: "Save as in the schedule appears, I deny that I have or ever had in my possession or power, or in that of my solicitors or solicitor, agents or agent, a large or any quantity of documentary or other particulars

or materials, or divers or any deeds, titles, abstracts, copies of instruments, or other papers, letters, books, documents or other particulars, which, if produced, would establish the plaintiff's title, or tend to establish the plaintiff's title affirmatively to any of the copyhold lands or hereditaments in the bill mentioned, or to any of the lands for which the writs of ejectment have been brought, or which would, by establishing or tending to establish the plaintiff's title affirmatively to any of such lands or hereditaments, furnish a complete or any defence to the actions of ejectment respectively."

The answer contained several other statements, but they did not in any way shew what the plaintiff sought to obtain, viz., the nature of the claim set up by the defendant in the actions of ejectment.

The plaintiff took fourteen exceptions to the answer, on the ground that it was "evasive, imperfect and insufficient," and prayed that the defendant might be compelled to put in a full and sufficient answer to the bill.

Mr. Selwyn and Mr. G. W. Hemming,
for the plaintiff.

Mr. Jessel, for the defendant.

The cases cited were—

Metcalf v. Hervey, 1 Ves. sen. 248.

The Attorney General v. the Corporation of London, 2 Mac. & G. 247; s. c. 2 Hall & Tw. 1; 19 Law J. Rep. (n.s.) 314; affirming 12 Beav. 8; s. c. 18 Law J. Rep. (n.s.) Chanc. 314, 339.

Lowndes v. Davies, 6 Sim. 468.

Bellwood v. Wetherell, 1 You. & C. 211, 218; s. c. 4 Law J. Rep. (n.s.) Exch. Eq. 23.

Flitcroft v. Fletcher, 11 Exch. Rep. 543; s. c. 25 Law J. Rep. (n.s.) Exch. 94.

THE MASTER OF THE ROLLS.—This case is wholly independent of the Common Law Procedure Acts. If the plaintiff was entitled to the discovery he seeks by his bill before the acts passed, he is still entitled to it. If a party files a bill in equity simply for discovery in aid of an action at law or of a defence at law, he is entitled to call upon the defendant to say whether he "has not in his possession certain docu-

ments or the knowledge of certain facts which would enable the plaintiff here to establish his case at law, or else to establish his defence at law." He would be entitled to the whole of that; but I apprehend he would not be entitled to call upon the defendant here, and say to him, "How do you intend to frame your case? How do you intend to argue it upon the facts which are known to all parties?" I do not find in this bill any statement that the defendant is in the possession of any documents, or in the possession of the knowledge of any facts, which would establish the defence of the plaintiff in equity in answer to the ejectments. It is true there is the general charge as to the possession by the defendant of documents; but that amounts to nothing, for the plaintiff is not entitled to say to the defendant, "How do you intend to put your case?" I suggested during the argument the analogous case of an overdue bill of exchange, where all the equitable defences are open to a defendant at law. I apprehend the plaintiff at law would not in such a case be entitled to come into this Court, and say to the defendant: "You have pleaded that there was a want of consideration; you have pleaded that the consideration was a bad one, that it was obtained by fraud, and other things of that sort; upon which of those do you intend to rely? If you say it was obtained by fraud, then I ask you, from whom was it obtained by fraud? Was it obtained by fraud from John Smith, or in what way was it obtained by fraud? Was it done in such a place or in such a manner? And I want to know in what way you intend to make out your case." I apprehend that the plaintiff at law would not, in such a case, be entitled to come here in that way; and moreover, I think a precedent for such an application to this Court is not to be found, either in the reported decisions or in the practice or procedure of the Court, in cases of discovery. What are the circumstances? A gentleman has been in the possession of some land for a great length of time. A person brings an action of ejectment against him, and the gentleman then states that there is a great number of documents which tend to establish his case. He adds to his statement this question to the defendant: "Do you intend to contest the documents? and, if you do,

in what form do you intend to contest them? You have formally alleged that you claim the property under a particular right: is not that particular right under which you now intend to claim it unfounded? and is not that allegation which you make false?" But how will such questions as those assist the plaintiff? and, above all, how do they come within the rule of this Court, which gives discovery in aid of a defence to an action at law? I am certainly at a loss to see how they do; or what there is in this case itself to bring it within the rule. There is a great distinction between a bill which seeks discovery only and a bill which seeks relief. Discovery is, indeed, sought in both cases; but where the relief is prayed by the bill, the plaintiff is entitled to say to the defendant, "On what ground do you take your stand? I wish to know the whole of your case, because I will disprove the whole of it." But when the bill is for discovery only—if, for instance, it is in aid of an action at law—then all that the plaintiff can say to the defendant is: "If you have certain documents in your possession, the knowledge of which will assist me, and I state generally what they are, I am entitled to know whether you have that knowledge of those documents or not." But that is not like the case where, proceeding originally in equity, the plaintiff here calls upon a person to admit documents in a suit in this Court.

That renders an observation proper with respect to the general production of documents. In a bill for relief, the plaintiff only states matters in the bill which relate to the relief, and then asks the defendant whether he has not documents in his possession which relate to the matters in the bill; and he is bound to answer that question. But when the plaintiff files a bill of discovery in aid of a proceeding in another Court, all that he can ask the defendant is, whether he has certain documents in his possession which relate to the action he is about to bring. The plaintiff cannot interrogate him generally as to documents relating to the matters in the bill, because the plaintiff might state all sorts of irrelevant things in the bill, immaterial to the action.

I must say that, in all my experience, I do not remember any such bill as the present having ever been filed. The bill purports to be in aid of an

action at law to assist the plaintiff here in his defence to an action of ejectment. If the plaintiff at law had filed such a bill, could it have been upheld? But, upon a similar principle, can it be supported by a person who resists an action of ejectment? Upon the whole, I think that the authorities cited in support of this bill have reference to another subject-matter, and not to a bill filed in aid of discovery in an action at law. As respects the provisions of the Common Law Procedure Acts, the case of *Flitcroft v. Fletcher* (if law) seems to establish that a defendant at law is entitled to put to a plaintiff at law a qualified species of interrogatory, in the nature of a proceeding calling upon him to set forth in what manner and on what grounds he intends to support his claim. If that be so, it is very undesirable that this Court should give relief in the way now asked. I will, however, look into the authorities and mention the case again.

The MASTER OF THE ROLLS (June 23).—The province of discovery in equity is not to compel a defendant here, who is a plaintiff at law, to set out in what manner he means to make out his case at law, in what manner he means there to deal with a certain set of materials, and whether he intends to dispute one thing or whether he intends to dispute another. What the plaintiff here is entitled to is this: he is entitled to the discovery of anything in the possession of the other party, either of facts, deeds, papers, or documents, which will help in making out his own case. It is confined to that; and he cannot go beyond that. No doubt, in Chancery a plaintiff may do this—he may say to a defendant, "What defence do you make, and on what ground do you rest your defence to my claim?" But that is a separate and distinct matter from the present. The result is, that having gone through the interrogatories fully, and the exceptions and the passages which were referred to, I think the defendant has given the plaintiff all the discovery to which he is entitled. I expressed my opinion yesterday respecting the books and papers, the matters in the bill which the defendant had not answered, and as to the question whether he had "any documents in his possession relating to the matters in the bill mentioned?" The defendant states in answer, that he has "no

papers at all, other than those set forth, which make out the plaintiff's case." That is sufficient. I think, with respect to the rest of the bill, and the interrogatories, that the plaintiff is not entitled to any further or other discovery. I will either make him pay the costs, or I will make them costs in the cause; it will amount to the same. I have referred to *Wigram on Discovery*, 286 *et seq.*, and what is there said is not in the least overruled or questioned by *The Attorney General v. the Corporation of London*; which, on the contrary, establishes the principle which must govern this Court.

ROMILLY, M.R.
Feb. 28;
March 14.

In re MARYPORT AND
CARLISLE RAILWAY ACT,
1855, SOUTH DURHAM
AND LANCASHIRE UNION
RAILWAY ACT, 1857,
EDEN VALLEY RAILWAY
ACTS, 1858 AND 1862,
STOCKTON AND DARLING-
TON RAILWAY (AMALGA-
MATION) ACT, 1862, AND
LORD LONSDALE'S SET-
TLED ESTATES.

*Railway Company—Purchase-money of
Lands taken—Re-investment—Costs.*

According to the rule of the Court, as now settled, the costs of a joint re-investment of purchase-moneys for lands taken by different companies must be borne by the companies equally, without reference to the amounts of the purchase-moneys; but the Court will apportion the *ad valorem* duty on the conveyance, according to the amounts contributed by each company to the consideration-money.

Where three companies took lands, and two of them subsequently became amalgamated with another company, the costs of a joint re-investment were ordered to be borne, as to two-thirds, by the company which represented the two amalgamated companies.

The Maryport and Carlisle Railway Company took under the Lands Clauses Consolidation Act, a portion of the Lonsdale settled estates for the purposes of their undertaking, and they paid 864*l.* 3*s.* 6*d.* as the purchase-money into Court.

The South Durham and Lancashire Union Railway Company took other portions of the same estates, and the purchase-money was paid into Court, and invested in 845*l.* 13*s.* 6*d.* 3*l.* per cent. consols.

The Eden Valley Railway Company took other portions of the same estates, and the purchase-money was paid into Court, and invested in 4,229*l.* 18*s.* 11*d.* 3*l.* per cent. consols.

Subsequently, the South Durham Railway Company and the Eden Valley Railway Company were dissolved, and all their rights and liabilities were transferred to the Stockton and Darlington Railway Company.

This petition was now presented by the tenant for life of the settled estates, asking for a re-investment of the two smaller sums, and of so much of the larger sum as might be needed, in the purchase of an estate valued at 5,127*l.* 10*s.*, and also that the two companies might pay such costs as under the circumstances they were liable to under the provision of the act of parliament.

Mr. Wickens, for the petitioner.

Mr. De Gez, for the Stockton and Darlington Railway Company, submitted that although the purchase-moneys were unequal in amount, the costs must, by the rule of the Court, be borne by the two companies in equal proportions.

Ex parte the Bishop of London, 2 De Gez, F. & J. 14; s.c. 29 Law J. Rep. (N.S.) Chanc. 575.

Mr. C. Hall, for the Maryport and Carlisle Railway Company, contended that the amount of the purchase-money paid by each company ought to guide the Court in the apportionment of the costs of re-investment between them.

THE MASTER OF THE ROLLS (Feb. 28).—I must be governed by the case cited: the costs therefore of and incident to the petition must be paid by the two companies equally, with the exception of the *ad valorem* duty on the purchase-money. That must be borne rateably according to the amounts which each company contributed to the purchase-money.

In drawing up the order upon the petition for re-investment, a question arose whether the costs other than the *ad valorem* duty

on the conveyance, ought to be paid by the Maryport and Carlisle Railway Company and the Stockton and Darlington Railway Company in moieties, or whether the latter company ought not, as representing both the South Durham and Lancashire Union Company and the Eden Valley Company to bear two-thirds of the costs.

Mr. De Gex, for the Stockton and Darlington Railway Company, contended that the amalgamation ought not to make any difference in the division of the costs of re-investing the purchase-money. The present position of the companies was alone to be considered. There was but one petition to re-invest, and one set of inquiries as to the title.

Mr. C. Hall, for the Maryport and Carlisle Railway Company.

THE MASTER OF THE ROLLS (March 14).— Each company on taking the land became liable to pay the costs of re-investing its purchase-money. It was now argued that, if ten companies took different portions of an estate and paid their respective portions of the purchase-money into Court, each company upon its being proposed to invest the whole in the purchase of one estate, must pay one-tenth of the costs of the reinvestment, but that if nine of the companies subsequently amalgamated, the tenth remaining company became liable to pay one-half of such costs. This was scarcely reasonable. The Stockton and Darlington Railway Company therefore could not by their own act throw any costs upon the Maryport and Carlisle Railway Company which they were not otherwise liable to pay. With the exception of the *ad valorem* duty, therefore the costs of re-investment must be borne in thirds.

KINDERSLEY, V.C. } *Re REVELEY's*
May 30. } SETTLED ESTATES.

Leases and Settled Estates Act—Mining Lease—Use of Contiguous Lands.

The Court, in making an order for a lease of mines under the Settled Estates Act, will, in a proper case, authorize a lease, not only of the mines themselves, but also of so much land as may appear necessary for the

convenient and effective working of the minerals.

In this case, on the 1st of August 1862, an order had been made (in chambers) under the Leases and Settled Estates Act, (19 & 20 Vict. c. 120), which ordered that a lease should be granted of large quarries of slate, &c. in Merionethshire, in South Wales. The order as drawn up only authorized a lease of the land containing the quarries, and it appeared that for the purpose of working them, a certain portion of the contiguous land was necessary, and the lessees were not satisfied with the form of the order. Under these circumstances,

Mr. Bird asked that the order should be varied, by adding to the description of the subject-matter to be leased the words "with or without any lands or hereditaments convenient to be held therewith." The lessors, Lord Palmerston and others, did not oppose what was asked, if the Court thought fit to approve of the alteration. In the case of *Morris v. the Rhydydded Colliery Company* (1), it was held by the Exchequer Chamber, that under a power in a settlement to lease collieries and coal-mines, with all usual liberties and privileges, authority might be granted to the lessee to build cottages for workmen on contiguous lands. In the present instance there was less difficulty, as the land was waste, and the surface nearly valueless. Under the circumstances, it was submitted that the Court had authority to do what was asked.

KINDERSLEY, V.C.—It appears to me that the case cited from the Exchequer Chamber renders the insertion of any additional words unnecessary. It was there held, that the granting of contiguous lands was an incident to the power to grant the lease. I think, however, as the parties wish it, that some words may be inserted, although I think that those suggested are too wide, particularly the word "convenient." I think the words should be "so much land as the trustees shall consider necessary for the convenient and effective working of the minerals."

(1) 3 Hurl. & N. 885; s. c. 28 Law J. Rep. (N.S.) Exch. 119.

ROMILLY, M.R. }
 July 3. } INGLE v. PARTRIDGE.

Practice—Trust Funds—Payment into Court.

Trustees, who had a sum of money standing in their names at their bankers', signed an order directing the bankers to honour the cheques of any two of them, or of Messrs. G. & Co., their solicitors. W, who was one of the trustees, and one of the firm of G. & Co., drew out the money and applied it to his own use. Upon a bill against the trustees,—Held, on an admission of these facts by the co-trustees, that they must pay the money into Court.

In February 1859, the defendants, Messrs. Partridge, Fry & Williams, were appointed new trustees of a marriage settlement, and in March 1859 they opened a trust account with bankers, to whom they gave written instructions to honour the drafts of "any two of us, or of Messrs. Goodwin & Co., No. 3, Lancaster Place, Strand, our solicitors, on our behalf."

Part of the trust funds, consisting of ready money and of the produce of some

mortgages called in, were paid into the bank to the trust account, to the extent of 3,020*l.* 6*s.* 7*d.* It was drawn out by Williams, who was one of the firm of Goodwin & Co., and applied by him to his own use.

Another sum of 336*l.* consols, which was standing in the names of the said trustees, was sold out by them, and the produce, amounting to 299*l.*, was paid over to Williams alone.

Upon the admission of these facts by Messrs. Partridge & Fry, a motion was made that they should pay the amount into Court.

Mr. Hobhouse and *Mr. Beavan*, in support of the motion.

Mr. Baggallay and *Mr. Cracknall*, for the defendants, submitted that the Court only ordered that money to be paid into Court when it was in the hands of the trustees, or under their control.

The MASTER OF THE ROLLS ordered the two defendants, Messrs. Partridge and Fry, to pay the amount into Court, but he gave them until Hilary Term, 1864, to comply with the order.

The following cases will be reported in the Volume for 1864:—

LORDS JUSTICES' COURT.

ATTORNEY GENERAL v. THE PORTREEVE, ALDERMEN AND BURGESSES OF AVON (*otherwise ABERAVON*).

BACCHUS v. GILBEE.

BIDDULPH v. THE VESTRY OF ST. GEORGE'S, HANOVER SQUARE.

BOUSFIELD v. LAWFORD.

DARNLEY, EARL OF, v. THE LONDON, CHATHAM AND DOVER RAIL. CO.

FERGUSON v. THE LONDON, BRIGHTON AND SOUTH COAST RAIL. CO.

GIBBONS v. SNAPE.

STATE FIRE INSURANCE CO., *Re*.

THARP'S ESTATE, *In re*.

WELLS v. MAXWELL.

ROLLS COURT.

BAGOT v. BAGOT.

BROWN v. KENNEDY.

CHAPMAN v. BRADLEY.

FORD, *In re*.

FORSTER v. DAVIES.

SCHOLEFIELD v. LOCKWOOD.

SELLARS v. GRIFFIN.

SUFFIELD v. BROWN.

WELD v. THE SOUTH-WESTERN RAIL. CO.

VICE CHANCELLOR KINDERSLEY'S COURT.

BRITISH PROVIDENT CO. (*re Lane*.)

COLYER v. COLYER.

COX v. STEPHENS.

DICKER v. CLARKE.

LAMB v. ORTEN.

VICE CHANCELLOR STUART'S COURT.

MELLERS v. BROWN.

PELLEY v. BASCOMBE.

VICE CHANCELLOR WOOD'S COURT.

STATE FIRE INSURANCE CO., *Re*.

NEVE v. PENNELL.

REPORTS
OF
Cases in Bankruptcy,
BEFORE THE COURT OF APPEAL.

BY
SAMUEL VALLIS BONE, Esq.
BARRISTER-AT-LAW.

MICHAELMAS TERM 1862 TO MICHAELMAS TERM 1863.

CASES ON APPEAL IN BANKRUPTCY

COMMENCING WITH

MICHAELMAS TERM, 26 VICTORIÆ.

LORDS JUSTICES. }
Nov. 21, 22; } *Ex parte DOBSON, in re*
Feb. 10. } WILSON.

Misdemeanor — Sections 159. and 221. of the Bankruptcy Act, 1861—Prosecution—Jurisdiction.

A bankrupt had been guilty of acts which amounted to a misdemeanor within the 221st section of the stat. 24 & 25 Vict. c. 134; and one of the Commissioners under section 159. of the same act granted him an order of discharge with a suspension of twelve months. On appeal, the Lords Justices considered that the Commissioner had jurisdiction to direct a prosecution before a Court of Criminal Justice, and that it was not incumbent on him, with or without a jury, to try the case himself; and they discharged the order, and directed a prosecution by the assignees at the next assizes.

Subsequently friends of the bankrupt subscribed money in order to provide a dividend, if the order made by the Court should be discharged. Their Lordships discharged their order, and permitted the money to be accepted by the assignees.

This was a motion by way of an appeal from an order of Mr. Commissioner Abrahall, of the Newcastle-on-Tyne District Court of Bankruptcy, made on the 18th of July last,

NEW SERIES, 32.—BANKR.

whereby, on the application of the bankrupt for an order of discharge, the learned Commissioner granted the order, but with suspension for twelve months. The motion was that the above order might be “altered, varied, discharged, recalled or cancelled,” and that an indictment for a misdemeanor might be directed by their Lordships against the bankrupt.

The appellants were the creditors’ assignees, who preferred the appeal at the instance of Mr. Gibson, one of the largest creditors of the bankrupt. The bankrupt had carried on business for a number of years in Newcastle, in partnership with Mr. Gibson. In 1843 Mr. Gibson proceeded to America; he returned in 1845, and whilst engaged in superintending the works at St. George’s Hall, Liverpool, he was applied to by the bankrupt to enter into partnership with him. They entered into partnership, and continued to carry on business together until the 29th of January 1859, though there was no partnership deed or agreement. They had a great many very remunerative contracts, and at last entered into a very heavy contract for the erection of the County Lunatic Asylum at Morpeth. This was the only contract of which Mr. Wilson himself took the principal management; prior to that Mr. Gibson had conducted the contracts; but Mr. Wilson insisted on having the management of this. This led to differ-

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ences between himself and Mr. Gibson, who was unable to get satisfactory accounts, and a quarrel ensued, and resulted in a dissolution of partnership. In order to settle the disputes, an arbitration deed was entered into; and Mr. Johnson Hogg, a builder and contractor in Newcastle, was appointed by Mr. Wilson, and Mr. Brown, an architect, was named by Mr. Gibson; and these two gentlemen appointed Mr. C. Burnup, a well-known builder in Newcastle, and conversant with accounts, to become umpire; and that there might be no dispute as to the distribution of the assets, Mr. Henderson, timber-merchant, Newcastle, was appointed treasurer. The arbitrators, after a careful investigation extending over two years, made an award, upon which Mr. Gibson had proved against the bankrupt's estate. All three concurred in that award, and came to the conclusion that there was 2,990*l.* due by Mr. Wilson to his late partner Mr. Gibson. This award was made and published on the 10th of July 1861, and no step was taken by the bankrupt to set it aside. The bankrupt stated that he had scarcely any money or property at the dissolution of the partnership, but when the award of the arbitrators was made the bankrupt had property in Adelaide Place worth 2,100*l.*; it was mortgaged to the Rev. Mr. Lowe for 1,500*l.* He had also property at Claremont Place, consisting of very valuable building-ground. The bankrupt at that time was commencing to build on this ground, and it was subject to a mortgage to Mr. Spence for 1,000*l.* This property was worth 2,000*l.* or 2,500*l.*, and was valued at that sum. He had property in Barker Street worth 1,030*l.*, but this he purchased subject to a mortgage of 1,000*l.* The bankrupt alleged that his brother William Wilson, a builder at North Sunderland, paid off 500*l.* of this money, but without there being any handing over of the deed of conveyance at the time when he alleged that his brother paid this 500*l.*; the assignees found that this mortgage was reduced by 500*l.* Then there was a house at Framlington Place worth 1,450*l.* This was free from all incumbrance. Then he had household furniture assumed to be worth 150*l.*; but it was contended by the appellants that there was every reason to believe it was worth much more. There-

fore, he had about 2,370*l.* in property, independently of all other monies that he made in his business, and of property of a personal kind. The bankrupt did not seek to set aside the award, nor did he call his creditors together; he adopted a mode of procedure whereby he raised money, not, as was alleged, for the purpose of paying Mr. Gibson or the other creditors, but of discharging the mortgage debts to Mr. Lowe and Mr. Spence, and of handing over the property to his brother and to certain friends from whom he alleged he had received money; and by numerous deeds of mortgage and conveyance he put it completely out of the reach of Mr. Gibson and the other creditors. On the 24th of August he sold part of the Adelaide Place property for 650*l.* to Mr. Kirsop, and mortgaged the residue of that property to a building society for 1,000*l.*; and on the same day he paid off Mr. Lowe's mortgage for 1,500*l.* About the same time he paid off Mr. Spence, who was the mortgagee of the Claremont Place property, and then conveyed it, not by way of mortgage, but absolutely, to his brother William Wilson, in consideration, he said, of a sum which his brother had advanced to him in June 1860. On the 30th of August he conveyed the property in Barker Street to his brother absolutely, he pretending, when examined respecting it, that it was of no value; that though he had given 30*l.* for the equity of redemption, yet it was a bad bargain; that the mortgagee was pressing for his money, that he could not pay it, and that he applied to this brother—to whom he alleged he was already indebted in the sum of 2,000*l.* for money advanced—and told him he might take that property if he liked, and he did so. In August he mortgaged this property to a building society, to secure 850*l.* On the 10th of September he conveyed the equity of redemption on the Adelaide Place property, then mortgaged to a building society for 1,000*l.*, and worth 1,450*l.*, to Mr. W. J. Barker, for securing 450*l.*, which the bankrupt alleged he borrowed of Mr. Barker in the May preceding; so that the Adelaide Place property was then either disposed of altogether, or incumbered to its full value. On the same day that he mortgaged the equity of redemption of the Adelaide Place property, he mortgaged, by bill of sale, his

furniture to Messrs. Barker & Thompson—Mr. George Barker, of that firm, being a brother of W. Barker—to secure 350*l.*, about 250*l.* of that having been money lent by Messrs. Barker & Thompson on I O U's, and the other being for hardware supplied by them to the bankrupt. On the 22nd of October he mortgaged the house at Framlington Place to Mr. James Wilson, shipowner, and Messrs. Barnes & Wilson, for 1,000*l.*; and on the same day he conveyed the equity of redemption of that property to his brother to secure 450*l.*, which he alleged the brother lent him in 1858. The whole of these transactions took place within three months of the bankruptcy, and between the 24th of August and the 22nd of October, he having come into court on the 15th of November, on his own petition, to seek for protection against the claims of his creditors.

On the 29th of November he was adjudicated bankrupt, and on the 31st of December he filed a statement of his affairs, the brief result of which was to shew liabilities amounting in the aggregate to 4,400*l.*, and assets amounting to 100*l.* Upon his application for his order of discharge, he was opposed by Mr. Gibson; and the grounds upon which that opposition rested were stated in the document subjoined, which was signed by Mr. John Scaife, the solicitor for the creditors' assignee, and also for Mr. Gibson, and filed in the Court of Bankruptcy, and was as follows:

First, that the bankrupt did not, upon his examination, fully and truly discover, to the best of his knowledge and belief, all his property, and how, and to whom and for what consideration, he disposed thereof, and did not deliver up to the Court such part thereof as was in his possession, custody or power. Secondly, that he did not, upon such examination, deliver up to the Court all books, papers and writings in his possession, custody or power relating to his property or affairs, and especially a certain quarry-book, referred to in the examination of William Sanderson, J. Mann, Robert Ramsay and Thomas Oxer; and also certain wages-books, and sheets of paper, containing either rough entries of wages paid or extracts from the said wages-books, also referred to in the examination of the said J. Mann and Thomas Oxer. Thirdly,

that he did, after the filing of the petition for adjudication, with intent to conceal the true state of his affairs, and to defeat the object of the law of bankruptcy, conceal, prevent and withhold the production of certain books, and especially the books and papers before referred to, as well as certain pocket memorandum-books containing original and other entries relating to his affairs. Fourthly, that he did, after the filing of the petition for adjudication, or within three months next before the adjudication, with the intent last aforesaid, part with, conceal, destroy, alter, mutilate and falsify, or cause to be concealed, destroyed, altered, mutilated and falsified, books, papers and writings relating to his property, trade, dealings and affairs, and particularly the book, papers and writings before referred to, and also a certain cash-book, day-book and ledger referred to in the examinations of the bankrupt, by Thomas Oxer, John Crossley and Jane Harkness. Fifthly, that he did, after or within the time last aforesaid, make, or was privy to the making of, false and fraudulent entries, or statements, and omissions from certain books relating to his property, trade, dealings and affairs, and especially by there falsely stating that he had paid a sum of 1,450*l.* to one James Wilson, on the purchase of a house in Framlington Place, and that he had received certain large sums of money from the said James Wilson, and from his brother William Wilson, one W. J. Barker, and Messrs. Barker & Thompson; and that he had paid certain large sums for wages and expenses which never were paid or incurred by him, and by omitting from such books the profits he made and the rents he received from his property. Sixthly, that he did, within the like time—knowing that he was unable to meet his engagements—fraudulently, and with intent to diminish the sum to be divided amongst the general body of his creditors, make away with, mortgage, incumber and charge the whole or the greater part of his property—viz., by having on the 30th of August last conveyed his property in Barker Street, Shieldfield, to his brother; by having, on the 5th of September last, sold part and mortgaged the remainder of his property in Adelaide Place, New Bridge Street; by having, on the 10th of September last, mortgaged the equity of redemption in the last-named

property to his brother, and on the same day given a bill of sale of his furniture to Messrs. Barker & Thompson; by having, on the 22nd of October last, mortgaged his house in Framlington Place, and on the same day the equity of redemption thereof, to his brother; and by having parted with a certain deposit receipt to his brother, to secure an alleged loan made by him in October 1847. Seventhly, that being a trader, he has, under his bankruptcy, attempted to account for a very large amount of his property by fictitious losses and expenses. Eighthly, that, being a trader, he has, with intent to conceal the true state of his affairs, wilfully omitted to keep proper books of account.

Much evidence was gone into to support these charges, and that evidence will be found in substance in the judgment below, delivered by the learned Commissioner on the 18th of July (1).

(1) His Honour said that the bankrupt, who was a builder and contractor, had petitioned that Court in the month of November of last year, assigning as the cause of his inability to meet his engagements, losses in contracts and the adjudication of the award against him, which has been already mentioned. It seemed that the bankrupt began business as a mason with his father, was with Mr. Granger for a few years, then commenced business on his own account in 1837 with a capital of 100*l.*, and by the year 1847 had accumulated a capital of 3,000*l.* He had admitted Gibson into partnership, which was afterwards dissolved, and since that time he had been a contractor on his own account. By his statement of accounts, filed on the 25th of January, it appeared that his liabilities amounted to 7,284*l.*, and his assets, including property in the hands of secured creditors, to 3,637*l.*, leaving a deficiency of 3,647*l.*; so that, with the exception of that due to James Gibson, his debts were not large. His expenditure had been moderate, being at the rate of 260*l.* a year. Messrs. Gillespie & Spence, the public accountants appointed to assist him in the preparation of his accounts, certified on the 25th of January that they could not express their approval of the system adopted by him in recording his transactions, but that they believed his accounts to be the best he could supply. The value of his mortgaged property was set down at 3,509*l.* and the debts secured by it at 3,416*l.*, and his account, accounting for the deficiency, commenced from the 1st of February 1859, with a then deficit of 540*l.*, and was continued until the date of the bankruptcy. His trading appeared to have been most unprofitable, the losses being stated at no less than 30 per cent., and the expenses at 14 per cent. The bankrupt was examined on the 15th of January, and after a long examination on the 5th of February he was allowed to pass. On that same day the bankrupt's

From the decision of the learned Commissioner, Mr. Dobson, the creditors' assignee, appealed.

Mr. Baggallay and *Mr. W. F. Robinson*, for the appellant, on the question of jurisdiction, submitted that the Court had clear power to direct an indictment under more than one paragraph of clause 221, and especially the 7th. But if not, there was a right of appeal from the opinion of the Commissioner as to the bankrupt having wilfully omitted to keep "proper" books of account under paragraph 3 of clause 159. Upon the merits they rested the grounds of indictment, mainly, on four charges: first, that of the bankrupt having kept his books improperly; secondly, in his having withheld the book of account above mentioned, called a "quarry-book"; thirdly, in having falsely stated that 1,450*l.* was paid to James Wilson, his brother; and, fourthly, in having given the fraudulent security of

brother William Wilson, a builder and herring-merchant, of North Sunderland, was examined at great length and with much ability respecting alleged advances of money to his brother, and the securities obtained for them. The first advance was said to have been made on the 3rd of December 1853—a sum of 500*l.*, alleged to have been advanced to the partnership of Wilson & Gibson. The other advances were stated to have been made to Wilson alone. On the 14th of October, 180*l.* was lent in cash, for which a deposit-note of Mrs. Sarah Wilson, the wife of the bankrupt, on the Northumberland and Durham District Bank, was handed over as a security, and that was also to be a general security for the advances. On the 1st of June 1858 there was another alleged loan of 450*l.*; and on the 1st of June 1860 an advance of no less than 2,000*l.* For all those sums William Wilson had produced receipts, except for the sum of 450*l.*, the loan on the 1st of June 1858, which he asserted he had at home, but had neglected to bring with him. The receipt for 2,000*l.* was more specially drawn than those for the other sums, containing in the body a promise to deposit the title deeds of the Claremont Place property in the bankrupt's possession; that receipt was dated at the very time of the advance. On the 21st of February Mrs. Sarah Wilson, the bankrupt's wife, was examined very minutely touching what she knew about the circumstances of the advance of 2,000*l.* to her husband by his brother. He (his Honour) had read those examinations attentively, and although he admitted that on a comparison there might be much that appeared improbable, nay, startling and contradictory, and that some statements as to dates and other particulars seemed scarcely reconcilable; yet, considering the situation in life of the several parties, their obvious ignorance and confusion under so rigid a scrutiny, much allowance, he thought, might be made for them; and though he could not say that he had

the 22nd of October, the effect of which was to deprive the creditors of the full value of his property.

Mr. Roxburgh, for the bankrupt, contended, upon the construction of clause 159, paragraph 1, that, in the events there mentioned, if the bankrupt consents, the Commissioner must, *nolens volens*, proceed to

try him, either with or without a jury; and that the proviso at the end of the clause did not extend to this class of compulsory cases. It might well be that a bankrupt would prefer being tried before the Commissioner. In this case the bankrupt had not (paragraph 3) carried on trade by means of fictitious capital, nor contracted debts without rea-

not some hesitation in believing them, he felt himself bound to believe the substantial correctness of their allegations. At any rate, no evidence had been brought before him to disprove the fundamental facts of the story. On the 21st of February, also, was examined William J. Barker, a tin-smith in Blackett Street, and a secured creditor for 450*l.* He was examined respecting the terms and time of that advance. That witness seemed to be a most respectable man. The substance of his evidence was that he had known the bankrupt some twelve or fourteen years; that the bankrupt had behaved honourably to him relative to his father's death, which gave him confidence in him; that he advanced him 417*l.* in May last year, with the understanding that he was to have a mortgage on the house in which the bankrupt resided, in New Bridge Street, and, on completing the security on the 10th of September, a further sum of 33*l.* was advanced, to make up the whole sum of 450*l.*; that he (Barker) urged the bankrupt to perfect his security; bankrupt did not urge him, and never spoke of difficulties to him, much less of intended or probable bankruptcy.—James Thompson was then examined: he was a partner with George Barker, and they were ironmongers in the Cloth Market. He was closely examined respecting his dealings with the bankrupt. Barker and Thompson held a bill of sale over the furniture in the bankrupt's residence for a debt of 350*l.*, part for goods supplied, and part for money lent; the latter in several sums, amounting altogether to 240*l.*, for which six IOUs were produced. They got security about September or October, after a previous application for cash. That was managed by Mr. Barker, who, it seemed, attended to the money advanced, and arranged all the cash matters, and kept the books, while Thompson superintended the shop and works. Mr. Barker instructed a professional gentleman to press for payment. On the resumption of W. J. Barker's examination, he stated that, in fact, although he had borrowed money from his brother George Barker, it was always on his own account, and never for the bankrupt's purposes. G. Barker was subsequently examined, at great length, on the 25th of February. The most important parts of his evidence were that advances had been made to the bankrupt from August 1860 down to the 5th of July 1861; that he had frequently applied for the account, and had been told that it would be settled when some contract was paid in which Wilson was then engaged; that he and his partner asked the bankrupt for any security he could give. He gave them some explanations respecting the 33*l.* advanced in September to make up the 450*l.*; and those explanations, coupled with subsequent explanations, appeared not unsatisfactory, and that

the furniture for which the bill of sale was given was not worth the amount secured by it. No doubt, the time at which these securities were given naturally suggested suspicion; but as to the *bond fide* nature of the advances he thought there could be no doubt. With the account given by the bankrupt of the brickyard in Shieldfield, he could not say he was dissatisfied. His statements, too, regarding the Ouseburn Quarry were probably correct, and from the subsequent evidence he drew no inferences unfavourable to the bankrupt. His representations, too, of the various dealings with the Barker Street, Claremont Place, Adelaide Place and some other properties might, he supposed, be believed. That the several conveyances and mortgage transactions were regular, the names of the professional gentlemen concerned were a sufficient guarantee. But there was an extraordinary transaction relating to No. 17, Framlington Place, with which a Mr. James Wilson was mixed up, which he (the Commissioner) confessed he was utterly unable to fathom or comprehend. The assertions of the bankrupt and of James Wilson relating to that affair were not only irreconcilable, but absolutely contradictory. The sum of the bankrupt's story was this: That Henderson, the treasurer appointed by the arbitrators, bought the house in question at the sale of the joint property belonging to the partnership; that it was ultimately conveyed to James Wilson, a shipowner, by Gibson and himself; that it was an unfurnished house sold for 560*l.* or 650*l.*, the bankrupt was not certain which; that James Wilson paid for it; that the sum received from James Wilson was entered in his (the bankrupt's) cash-book; that he received to finish the house two sums of 250*l.* odd, and something more for management. If these sums were not in the cash-book, they would be, he said, in the other books, by which he meant some journals that had been referred to in the examination. That in June 1859 he had received 17*l.* 10*s.*; in May 1860, 250*l.*; and in September 1860, 250*l.*; that the sale took place in 1858 or 1859, that he received no money back from James Wilson, but that he paid him on the 22nd of October 1,400*l.* His words were: "That is the date when the deed was done. I paid him in cash at Chater's office, and he executed the conveyance. It was my own money which I got for houses along New Bridge Street, and the Barnes House, 630*l.* I paid cash. James Wilson had to pay the trustees 650*l.* before Gibson and I signed the deed. I cannot say I saw it paid if Gibson cannot recollect. It was bought of me for 560*l.*, and then Wilson took it. I cannot say if it was 560*l.* or 650*l.*; you will see in the journal. Finding the money did not come in, I could do nothing with it. That is my account of the trans-

sonable expectation of payment, nor willfully omitted to keep proper books of account (he was charged with having kept too many), nor been guilty of rash and hazardous speculation, &c. The bankrupt, therefore, however unjustifiable part of his conduct may have been, was not guilty of a misdemeanor within the act. All that

the Court had power to do was to vary the order and send the case back to the Commissioner, and it was now too late for the Commissioner to direct an indictment. Upon the merits, it was contended that the charges were unsustainable. The quarry-book had been handed up to arbitrators under the partnership, and had not been

action throughout. I thought it worth 1,450*l*." Such was the bankrupt's statement on the 5th of February. On the 21st of that month James Wilson was examined. His evidence was to the effect that he bought the house at the latter end of 1859 from Henderson. Henderson had bought it from Thomas Wilson, the bankrupt, but Gibson would not sign it away. James Wilson said: "I know but little about it; I did not attend the auction. Wilson the bankrupt asked me to buy it, because Gibson refused to sign. Glynn was instructed by Wilson to prepare the conveyance, and it was completed in Glynn's office. I paid 550*l*., or it might be 560*l*., for it. It was unfinished. I paid the purchase-money for the property in Mr. Hall's office, in the presence of Mr. Hall. As I am on oath, it was Wilson's money. I had the money long enough before we could get Gibson to agree to sign it away. I received the money from the bankrupt, and I forget whether at his house or mine, in 100*l*. notes. On payment I got the deeds. I took the deeds to Wilson shortly after the completion of the transaction. Wilson was not, I believe, present at the completion. I delivered the deeds at his own house, and have never seen them since. Wilson could do nothing to the house so long as my name was on the conveyance. I wished then to sign it away; I wanted to be done with the job. Wilson completed the house, I suppose, himself. I never paid any money to Mr. Wilson for completing the house; never received or paid a farthing. I never executed a conveyance of that house, at least certainly at the end of 1861. I don't know the exact month. It would be in October, at Chaytor's office. I did not instruct Chaytor; I went to his office and signed the deed—Wilson asked me. Chaytor, Wilson and I were present. I signed the deed. I merely put my name at the back and signed it away to Wilson. Wilson did not pay me 1,450*l*. for that house. I suppose that was its value. I never received or paid any money, and therefore I am clear of it. I said at Chaytor's office, I did not know whether I was doing right or wrong. I wanted to have it off my mind, and to have nothing more to do with it. The bankrupt did not ask me for a mortgage on the house. He wanted money, and asked me if I would lend him my name. I said I would do nothing of the sort. I said I would sign the house away. It was some time in October." Such was James Wilson's contradiction. If he (his Honour) was asked whom to believe, he said at once James Wilson, who could have no motive whatever to speak anything but the truth. He disbelieved Thomas Wilson, to whose evidence presently he should have reason to revert, and he should therefore hold him responsible for the consequences of

his disbelief. On page 6 of the report made on the 17th of May by Messrs. Gillespie & Spence, the accountants, they stated: "In conclusion, we feel bound to refer to the transaction with James Wilson—whose evidence is on the proceedings—wherein he states that no cash ever passed between him and the bankrupt in respect to the alleged sale of a house at Framlington Place. In those accounts, which we have examined, the bankrupt states he paid to James Wilson, on the 22nd of October 1861, 1,450*l*., in support of which he refers to the receipt of the latter in the deed of conveyance. On the other side, he charges himself with having received, in May and September 1861, from James Wilson, for work done to the same property, 500*l*., leaving to the bankrupt's credit in his cash account 950*l*. There has been one year's rent received from the tenant of the house, the receipts for which are signed 'Thomas Wilson, pro James Wilson,' not entered in the bankrupt's books, amounting to 70*l*., making together a difference in cash in that alleged transaction of 1,020*l*. If, however, James Wilson's statements are true, the conclusion is irresistible that the bankrupt has not properly accounted for that sum of 1,020*l*., and that the present accounts are consequently mis-stated by that amount." On the 21st of March, Thomas Oxer, an accountant, and formerly a clerk to the bankrupt, and, he believed, to Gibson as well, was examined at great length, and with his accustomed accuracy, by Mr. Scaife, touching the bankrupt's books and accounts, and the way in which they were kept and entered up. It would appear from that examination that the entries were regularly made in those books from a period so early as April or May 1859, soon after the dissolution of the partnership between Gibson and Wilson, and that they were kept from pocket-books, pay-sheets and loose memoranda, from time to time, which were then destroyed, as of no further use. To that examination was appended a remarkable memorandum. "Memorandum: Upon this examination being read over to the witness, on this 27th of March 1862, he stated that he now desired to make further disclosures, and to explain and add to certain of the answers above given, and, therefore, with the consent of the solicitor to the assignees, a shorthand-writer was nominated to take down such variations, explanations and additions as the witness, in the course of reading over the above examination, stated that he desired to make; and that being done, the witness signed and acknowledged each sheet of the present examination." Such was Mr. Gibson's very lucid memorandum. Upon those variations, explanations and additions made on the 27th of March, which were most important, he (his Honour) should make no further comment than this—that some of them

returned. The charge as to the 1,450*l.* rested on the evidence of James Wilson only, and was directly contradicted by the bankrupt.

Mr. Baggallay was heard in reply.

LORD JUSTICE KNIGHT BRUCE (Nov. 22) said that in this case the allegation of the

expressly, and others impliedly, contradicted many statements in Oxer's examination of the 21st of March; in fact, clearly declared that the accounts and entries alleged to have been made in the books kept from the spring of 1859 were in fact entered up in the books with which he was furnished within three months of the bankruptcy, in November last, and which books were admitted to have been made up shortly before the bankruptcy. Whether or not Oxer's examination was inspired by the bankrupt he could not say, because the evidence of such inspiration was presumptive only; nor should he (his Honour) inflict upon himself the distasteful task of analyzing Wilson's evidence of the 24th of March; but he must observe that he thought it impossible for any person to read the examinations on that day of Thomas Wilson, of John Crowsley, who, as Christie the bookseller's foreman, clearly proved that the books in question were manufactured in July 1861, and indicated the alterations in the labels and figures on them, and that of Jane Harkness, who, as Christie's shopwoman, so distinctly identified the bankrupt as the person to whom she had sold those books in October—he said it was impossible for any unprejudiced person to read those examinations without coming to the conclusion that Thomas Wilson had been guilty of at least a palpable and deliberate falsehood. It was then humanely suggested by Mr. Watson—than whom no bankrupt could have a better adviser—that time should be given to enable the two accountants, to whose report he had already referred, again to examine the books, and ascertain to what extent they might be vouched by original documents or entries. They had completed that investigation so far as circumstances would permit, and they had submitted an able and candid report. By that report it appeared that upwards of 3,200*l.* was quite unvouched. It might be suggested as some sort of palliative to the bankrupt's conduct, that he might have imagined there was little hope of his getting free of that Court without the production of books regularly kept during his trading, and that he, therefore, in an evil hour, was induced to attempt the practice of that imposition on the Court. Truth, like honesty, was the best policy. Had he frankly confessed the real state of his matters, instead of having recourse to artifice, that Court was, under such circumstances, disposed to be not otherwise than indulgent. On the other hand, the detection of the fabrication opened a floodgate of suspicion, and threw a doubt on his statements generally. He (his Honour) had listened attentively to the able addresses that had been made to him by Mr. Scaife in opposition to the discharge, and by Mr. Lockey Harle in support of the bankrupt. He had considered with care the

assignees was that they were in a position to substantiate charges against the bankrupt for acts amounting to a misdemeanor or misdemeanors under the Bankruptcy Act of 1861. After hearing the evidence adduced, his Lordship was of opinion that it was sufficient to justify the Commissioner in charging the bankrupt

charges preferred by Mr. Scaife. Could he bring himself to the conviction that the bankrupt had made the entry in his accounts of the money alleged to have been paid to, and received from, James Wilson; and the omission of 70*l.* for one year's rent, as appeared in the accountant's second report; could he bring himself to the conviction that he had made those entries fraudulently, and with the distinct intent imputed by the 221st section of the Bankruptcy Act, 1861, no alternative would have been left to him but to direct a prosecution in a criminal court for misdemeanor. But he was, after much and most anxious consideration, willing to believe, especially as, when pressed in his examination, the bankrupt had referred for explanation to Mr. Chaytor's office, and the journal to which he had alluded more than once; he was, he said, willing to believe that that matter might be capable of being in some degree, if not satisfactorily, cleared up. The only solution that had suggested itself to him was, that the bankrupt being desirous of obtaining the Framlington Place house, and finding himself balked in his wishes by Gibson, set up James Wilson as a kind of man in buckram, and then, having improved the premises by expending his labour and material upon them, considered these, that is to say, his labour and material, ultimately as the price paid for his purchase. That construction of the bankrupt's conduct, at any rate that doubt, enabled him (his Honour) to relieve him from the penal operation of the misdemeanor clause, and he was willing to give him the benefit of it; but at the same time he was compelled to judge of his misconduct before and after adjudication, under the 159th section of the act of 1861. And bearing in mind the gross irregularities, to say the least of it, that prevailed in his transactions, and the falsehood to which he had referred, he felt himself called upon to visit those offences with a considerable suspension of his discharge. He might add, that he thought it was the bankrupt's bounden duty to make some provision with Gibson on the debt under the award. Though Wilson disputed its justice, they had heard nothing of the grounds, and he had taken no steps to set it aside. It was published on the 10th of July, last year, and he was allowed till the 10th of September (two months) to arrange its settlement. He took care, however, to prefer many other creditors, in what his Honour must say seemed to him to be a systematic manner, to the entire neglect of Gibson's claims. He had read and considered the document which had been handed up to him, purporting to be signed by a large body of the creditors, and he was disposed to give it the weight which it deserved. That document was, no doubt, a favourable testimonial

with such acts. That being so, the next question was whether the Commissioner was bound to try the bankrupt himself for these alleged offences or any of them. It had been said that he was, and that although the bankrupt did not consent to any particular course, he did not refuse any particular course, and that his consent was not even asked. His Lordship thought that the provisions of the act would remove all difficulty, when the whole of the section was taken into consideration. He was of opinion, looking at the whole of the section, that there was no necessity for the Commissioner to ask for the consent of the bankrupt, or to ask him to say whether he would consent to any particular course or not, and that it was not incumbent upon the Commissioner, whether with or without a jury, to try the bankrupt himself; but that if he was satisfied that there was a case not of proved guilt, but a case for a criminal trial, it was within his authority to direct that the bankrupt should be indicted and prosecuted in one of the ordinary Courts of criminal procedure. His Lordship was of opinion that that was the course which ought at that time to have been adopted in this instance. He was further of opinion that that was the proper course now, having regard to the paper which was signed by Mr. Scaife, which was produced before the Commissioner, and which certainly contained at least one allegation, if not more, of cases of misdemeanor, supported by probable evidence. His Lordship was of opinion, therefore, that a prosecution ought to have been directed, and placing themselves in the position of the learned Commissioner, their Lordships would direct a prosecution accordingly. The order of this Court would be to discharge the Commissioner's order without prejudice to any future application by the bankrupt for an

of the bankrupt's previous character and general reputation. Such a testimonial ought to have influence in a case of doubt; it might in such a case remove doubt, but it could not displace facts. He did not think that the ends of justice in that case would be answered by a suspension of the bankrupt's discharge for a less period than one year, and he suspended it for that period accordingly. He regretted the necessity of so doing; he regretted more that the bankrupt, a man of activity and enterprise, should, by his conduct, have placed himself out of the pale of useful exertions in his

order of discharge, or to any other question; to direct a prosecution against the bankrupt at the next assizes, for it was not the Court's intention that the trial should take place at the Quarter Sessions, or before a Recorder. The indictment, however, would not go beyond the offences alleged against the bankrupt in the document signed by Mr. Scaife; the assignees would be the prosecutors in the matter, and the costs would be reserved, with liberty to apply.

LORD JUSTICE TURNER was of the same opinion. There were only two questions which it was necessary for the Court to decide: the first was, whether there were grounds for charging the bankrupt with acts which amounted to a misdemeanor within the statute; and the second, whether the Commissioner had jurisdiction to order a trial before a Court of criminal justice. Upon the first of these his Lordship was of opinion that grounds existed for charging the bankrupt with acts amounting to a misdemeanor; and upon the second, his Lordship was quite unable to agree with the argument of the learned counsel for the bankrupt that, under the first article of the 159th section, the Commissioner had not the power to order a trial before a Court of criminal jurisdiction. He entirely concurred in the order which the Lord Justice had stated.

The Registrar was ordered to issue a certificate under section 223. that their Lordships had ordered a criminal prosecution.

Feb. 10.—*Mr. Baggallay* informed the Court this day that some friends of the bankrupt had subscribed 1,000*l.*, in order that a dividend might be paid to the creditors, if the Court would sanction a discharge of the order made as above.

business. But he must blame himself, and himself alone, for those consequences. Employment in building churches, bridges, asylums and extensive county works, was certainly a most creditable antecedent; but he could not absolve a man from the observance of truth and justice in his dealings, and from keeping in view the high level of the commercial integrity of this country. Under all the circumstances, he hoped the sentence he had felt it his duty—his painful duty—to pass would be considered, as he (his Honour) was sure it was intended to be, a very lenient one.

Their LORDSHIPS considered that as the offer was to place 1,000*l.* in the hands of the assignees for the benefit of the creditors, who would otherwise receive nothing, and as the compromise would be only that of a misdemeanor, the Court might without impropriety accede to the arrangement and discharge the order. Their Lordships would make the order asked the more readily as they understood that the estate would pay nothing, and that the expense of a prosecution would be very great (2).

WESTBURY, L.C. { *Ex parte* RUCK AND
Dec. 2. { WICKHAM, *in re* WICK-
ENDEN AND MANSSELL.

*Trust Deed for Benefit of Creditors—
Trustees—Disputes—Jurisdiction.*

Trustees were appointed of a deed of arrangement between debtors and their creditors, and disputes arose among such trustees. Two of them petitioned that the remaining trustee might be removed and the trust fund vested in them. The Court of Bankruptcy made an order directing the fund in hand to be paid over to the accountant in bankruptcy; and appointed an official assignee to act as if appointed under a bankruptcy. On appeal, the Lord Chancellor decided that the Court below had no power to make such order.

Mr. Cornelius Ruck and Mr. Philip Wickham, in this case, appealed against a decision of Mr. Commissioner Goulburn. The appellants were two of the trustees appointed under a deed of arrangement executed by the debtors, and it prayed the removal of Mr. W. Lawrence, the co-trustee. The facts were as follows.

Messrs. George Wickenden and George Palfreyman Mansell carried on the business of grocers at Southborough, in Kent. On the 1st of June 1861, an agreement was made between the partners for a dissolution of the partnership existing between them on condition that Wickenden should take the whole of the trade fixtures, &c., together with the stock-in-trade, &c., at a

(2) See, on same subject, *Ex parte Strickland*, *post*, p. 12.

NEW SERIES, 32.—BANKR.

valuation; and Wickenden to pay Mansell 200*l.* as part of his share of the business, 50*l.* for money laid out in the premises, and 50*l.* for goodwill. Upon the completion of the valuation it was discovered that the liabilities of the firm exceeded the assets thereof. By reason of this fact the dissolution was not further proceeded with, except that Mansell continued the trade on his own separate account for a few weeks, during which period he contracted debts on his separate account by borrowing money from Mr. William Lawrence to the amount of 200*l.* By deed, dated the 29th of November 1861, made between Wickenden of the first part, Mansell of the second part, William Lawrence and the petitioners, being trustees, &c., of the third part, and the several creditors of Wickenden and Mansell of the fourth part, Wickenden and Mansell granted and assigned unto the said trustees, all the messuages, &c.; and secondly, all the stock-in-trade, &c., of the said Wickenden and Mansell, or either of them, wheresoever, &c., upon the trusts and with the powers therein mentioned, and upon further trust to pay the costs and expenses of the preparation of the deed, and subject thereto to pay the residue in satisfaction of the debts owing to the several creditors of the said Wickenden and Mansell, or either of them. The deed was duly executed by the said debtors and trustees respectively, and was advertised in the *London Gazette*. It further appeared that Lawrence had received as trustee the sum of 1,005*l.* 1*s.* 6*d.*, and that it was his duty to have paid the same to the account of himself and the petitioners, pursuant to a resolution of the creditors; but instead of doing so, he retained it in his own hands, though repeatedly requested to pay over the same. At length, on the 11th of February 1862, he paid to his private bankers, Messrs. Randall & Co., of Maidstone, the sum of 913*l.* 8*s.* 6*d.* to the joint account of himself and the petitioners. On the 13th of January last a majority in value of the creditors of the debtors passed a resolution that the monies received by Mr. Lawrence be forthwith placed in a joint account in the London and County Bank, in the names of the three trustees. Application was made to Mr. Lawrence to comply

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with this resolution, but he omitted to do so. A petition was then presented by the other trustees alleging that Mr. Lawrence had, in several ways, refused to act with his co-trustees in carrying out the trusts of the deed, and that he had not accounted for a portion of the debtor's estate received by him; that a majority in number and value of the creditors had assented to the prayer of the petition; that in other respects the interest of the said Mr. Lawrence was in conflict with that of the petitioners and of the general body of the creditors. The petition thereupon prayed that the said Mr. Lawrence might be removed from being a trustee, and that the petitioners might be appointed trustees; that the trust estate be vested in the petitioners; that Mr. Lawrence should transfer the amount received by him; and that he should be ordered to pay to the petitioners interest at the rate of 20*l.* per cent. per annum upon the several sums admitted to have been received by him on account of the estate.

The petition was heard before Mr. Commissioner Goulburn, and after argument his Honour said he was satisfied that he had jurisdiction to make an order upon the petition, and directed the fund in hand to be paid over to the accountant in bankruptcy, to be placed by him to the account of the trust estate of Wickenden and Mansell as if they had been adjudicated bankrupts, and appointed an official assignee to act as if he had been appointed under a bankruptcy. He reserved the question of the costs of the petition, but he would order 100*l.* to be set aside for payment thereof, if need be. He considered that Mr. Lawrence had acted wrongly in appropriating to his own use monies which came to his hands as trustee, but his Honour hardly thought he would be justified in visiting him with the costs of the present proceedings. He said nothing about interest upon the sums received by Mr. Lawrence.

From this order, as before stated, the co-trustees appealed.

Mr. Bacon and *Mr. E. B. Lovell* stated that the petition prayed for an improved method of carrying into effect the terms of the trust deed, whereas the order, as made, was an entire suppression of the

deed itself. The relief to be afforded under the prayer for general relief must be *ejusdem generis* with the relief specifically prayed.

[The LORD CHANCELLOR.—Where is the power conferring on the Court jurisdiction to make this order to be found?]

Mr. Daniel and *Mr. De Gex*, in support of the order, contended that the spirit and intention of the New Bankruptcy Act were to give to the Court jurisdiction to do anything which was requisite for the benefit of the creditors. In support of this view the 134th, 136th and 197th sections of the act, especially the 136th section, were relied upon.

The LORD CHANCELLOR.—I have been informed that examinations have taken place at meetings of creditors, at which no officer of the Court has been present, and that the costs of such meetings have been allowed out of the estate. For myself, I would certainly not allow such costs. It is quite clear that upon the application of two out of three trustees, praying the assistance of the Court of Bankruptcy to administer an estate in accordance with the provisions of a trust deed registered under the act, that Court can have no power to make the order which has been made in this case. If all the parties consent to the order proposed, well: otherwise, I have no jurisdiction:—"All parties consenting, let an order be made, declaring that the creditors of the joint and separate estate should be allowed to come in *pari passu*, and directing an account to be taken on that footing; the costs of the petitioners and respondents to be paid out of the fund; the remainder of the petition to stand over, with liberty to apply to the Lord Chancellor only."

The order by consent was so made (1).

(1) See, on same subject, *Ex parte Morgan*, *post*, 15; *Ex parte Wensley*, *post*, 23; *Ex parte Rawlings*, *post*, 27; and *Ex parte Godden*, in *re Shettle*, *post*, 37.

WESTBURY, L.C. } *Ex parte* COLE, in re
Dec. 3. } ATTWATER (1).

Bankruptcy Law Consolidation Act, 1849,
s. 120—*Adjudication, Proceedings under—*
Summons—Costs of Assignees.

A party bought land, &c. of a trader, and afterwards the trader was adjudicated bankrupt. A person holding the purchase-deed for the purchaser, was summoned, after the adjudication, under section 120. of the 12 & 13 Vict. c. 106, before a county court Judge, to produce the deed. The Judge ordered it to be impounded, and the property to be delivered up to the assignees to be sold for the benefit of the creditors.

On appeal, the Lord Chancellor discharged the order, and the assignees were directed to pay the costs.

This was an appeal against an order of Mr. Espinasse, the Judge of the County Court No. 48, for Bromley, &c., before whom this case was taken in Bankruptcy. It appeared that Mr. James Thomas Attwater purchased of Mr. J. W. Attwater some land and other property, which was duly conveyed. Mr. J. W. Attwater afterwards was adjudicated bankrupt, and then Mr. Cole, who held the deed for the purchaser, was summoned, under section 120. of the Bankrupt Law Consolidation Act, 1849, to attend before the County Court, and after giving evidence the learned Judge made the following order :

“Upon the application of the solicitor for the assignees, and upon hearing the evidence of James Thomas Attwater and others, and the statement of the said solicitor, that the bankrupt did, by indenture dated the 25th day of June 1862 (which the said James Thomas Attwater produced and submitted to the Court) convey four houses and other property, situate in the parish of Minster, in the Isle of Sheppey, in the county of Kent, to the said James Thomas Attwater, when he (the said bankrupt) was known to be insolvent, and without valuable consideration, it is ordered that the said houses and other property comprised in the said indenture be given up to the assignees and taken possession of by them, and be sold or disposed of for the

benefit of the creditors under the bankruptcy. And it is further ordered that the said indenture, dated the 25th of June 1862, be retained by the registrar, and be disposed of as the Court shall direct.”

It did not appear by the proceedings whether Mr. J. T. Attwater was a creditor under the bankruptcy or not, and it was admitted that there was no formal submission to the jurisdiction of the Judge, and that no evidence was gone into on behalf of the appellants, Messrs. Cole and J. T. Attwater.

Mr. Daniel and Mr. Clement Swanston supported the appeal.

Mr. Fooks appeared in support of the order.

THE LORD CHANCELLOR.—It is very much to be regretted that the order was ever made. It is quite beyond the power of the learned Judge to make any such order. This gentleman, who held the purchase-deed on behalf of the purchaser, was summoned before the Court under the ordinary clause of the statute of 1849. He obeyed the summons, and attended for the purpose for which he was so summoned. The Court, having him before it, immediately assumed a jurisdiction to try the question, and detained him in court in a different capacity, namely, as a defendant in a suit in which the assignees were plaintiffs, gave judgment against him, and stripped him of his property, he having been brought there merely to give evidence. The order must be discharged, and the assignees must pay the costs of this application. The deed will be delivered up.

Mr. Fooks.—Will your Lordship order the costs of the assignees to be paid out of the estate?

THE LORD CHANCELLOR.—Certainly not. The assignees must pay the costs themselves. I shall never see prudent or proper conduct on the part of assignees until they are made to feel the necessity of acting with strict propriety, and with a sincere intention to do their duty. I must assume that the order was made by the Court on the motion of the assignees; and I must do that, for the sake of public example, which I otherwise regret to have been compelled to do.

(1) See *post*, *Ex parte Watts*, re Attwater, p. 35.

WESTBURY, L.C. { *Ex parte* WILLIAM AND
Dec. 3. { GEORGE STRICKLAND,
in re STILL.*

Misdemeanor—Prosecution under Section 221. of the Bankruptcy Act, 1861—Suspicion.

Reasonable evidence of the guilt of parties is necessary before a prosecution by indictment, under the 221st section of the act, 24 & 25 Vict. c. 134, can be directed. It cannot be so on a case of mere suspicion.

This was an appeal from two orders pronounced by Mr. Commissioner Goulburn, one directing the bankrupts to be prosecuted under the 2nd and 5th paragraphs of the 221st section of the Bankruptcy Act, 1861, for having wilfully and fraudulently concealed and abstracted part of their property; the other directing that the final examination should be postponed *sine die*. The bankrupts, father and son, on the 21st of August 1860, entered into partnership as ironmongers and ironfounders, at Winchester. They borrowed 800*l.* of a bank, and gave as a security the guarantee of Mr. Benthams. As a counter security for this guarantee, the bankrupts made an assignment to Benthams, by bill of sale, of all their property, including the plant and stock-in-trade. The bill of sale was dated the 17th of January 1862. In a schedule the property was valued at 3,000*l.* Benthams, immediately after the date of the bill of sale, and before the bank was paid, proceeded to enforce the security. He put a lad named Thomas Still, a nephew of the elder bankrupt, into possession, and on the 5th of May last he sold the whole of the property to Joseph Still, a brother of the elder bankrupt, for 900*l.*, out of which the bankers were paid their 800*l.*

The adjudication was dated the 17th of May, and was made on the bankrupts' own petition. By the first accounts furnished by the bankrupts, they estimated the value of their stock on the 1st of January 1862 at 3,046*l.*, and could only account for subsequent sales to the extent of 1,110*l.* 15*s.* 4*d.* The difference, amounting to about 1,936*l.*, being very much larger than the amount realized by the sale to Joseph Still, the learned Commissioner was of opinion that

* See same point, *Ex parte Dobson*, ante, p. 1.

there was *prima facie* evidence of fraud, and made the order against which the bankrupts now appealed. It was stated, by the bankrupts, that the evidence upon which the Commissioner's judgment was given was taken at private meetings at which the bankrupts were not present, and the Court proceeded upon the *ex parte* statements of counsel founded on such evidence. Mr. Hart was the accountant to the estate. He pointed out the discrepancy in the bankrupts' accounts, and reported as follows: "This can only be accounted for by one of two ways: either the value of the stock was greatly over-estimated in January 1862, or the bankrupts must have connived at the abstraction of a very large amount of their property." And he recommended further inquiries.

Mr. Karlake and Mr. R. Griffiths, for the bankrupts, argued that the utmost that could be said against the account was, that it was an over-estimate on their parts. If an opportunity were allowed, it could be distinctly and most unequivocally proved that every farthing's worth of the property passed from Benthams to Joseph Still, who was ready to return the whole upon being repaid the 900*l.* and his expenses.

Mr. Bacon and Mr. Little, for the assignees, supported the order, and argued that on the examination of the bankrupts, without anything more, there was a sufficient *prima facie* case of fraud shewn, and therefore it was the duty of the learned Commissioner to direct an indictment to be preferred under the 221st section of the act.

Mr. Karlake was heard in reply.

THE LORD CHANCELLOR.—This is a case the determination of which is attended with a great deal of anxiety. It is a case which presents undoubtedly elements from which a conclusion of fraudulent conduct against the bankrupts might *prima facie* be reasonably entertained. But the position in which it stands appears to be this: as if pending a civil suit to set aside a deed of fraudulent sale to Joseph Still, the Court, whilst the matter was still *sub judice*, and before determining the question of civil right, were to direct a criminal prosecution anterior to the conclusion of the civil inquiry. Now, the responsibility attending orders of this kind is very great. There is

here no property; nothing has been given up to the assignees. If this prosecution be directed, it is directed at the public expense. I am very well aware of the trade which is made out of these prosecutions. I am very well aware of the abuses which have already taken place with regard to the enormous charges which have been brought against the bankruptcy fund as the result of prosecutions directed, I have no doubt, with very good intentions, but upon evidence which has failed altogether to sustain the indictments. Whilst, therefore, it is my duty to take care that the intention and spirit of the bankrupt laws for the suppression of fraudulent practices are carried out, it is incumbent on this Court not to direct prosecutions of this kind upon mere suspicion. Here is a case presenting features which warrant the strongest suspicion of fraud, and yet which ought to have been the subject of further investigation. These two bankrupts entered into partnership, and, I understand, began trade, before the 2nd of January 1862. They opened an account with a bank, and the bank required them to give them security upon what should be found due on their account. They obtained the guarantee of a gentleman named Bentham; and, as an indemnity to him, they made a general sweeping transfer to him of all their property, that property representing a sum of more than 3,000*l.* They go on trading for a few months only, and in April 1862 Bentham takes possession of the whole property. He being possessed of the whole property, the bankrupts have recourse to an elder brother for some purpose, the nature of which has not yet been accurately shewn, but apparently he comes forward as a friend of the bankrupts, and for their benefit. The fact, therefore, appears to be this: a sale of the whole of the property is made by Bentham, the guarantor of the bank, to Joseph Still. A very young man is constituted the agent of the purchaser, Joseph Still, and is put in possession of the property. That is no sooner done, and the transfer apparently complete, than the bankrupts petition against themselves, and describe themselves as having no property to hand over to the assignees. Undoubtedly this is a case which requires the strictest and severest investigation. The

deficiency unaccounted for is this—(which his Lordship described). If the matter had remained there, I should not have disturbed or restrained the execution of this order for a single moment. But then comes this: a person named Hart, an accountant, is employed, and his investigations, which appear to have been accurate, except in one particular, bear very materially upon the question of the accuracy of the statement in the deed. Hart's statement amounts to this, that the whole account appended to the deed was altogether erroneous, and that there was no such property as that represented. Then how can I direct a prosecution upon the faith of a statement that the bankrupts possessed property to this amount on the 1st of January? Then I find this particular also. He debits the bankrupts with 1,026*l.*, which he says represents profits, *i. e.*, he considers that the difference between the cost price and the amount at which the goods were sold ought to be considered as so much additional stock. But that is a conjecture, and I cannot look upon that as a foundation for a criminal prosecution. Then, this large sum of 3,046*l.* will be reduced down to such an amount as that, supposing the property handed over from Bentham to Joseph Still to be even within 1,000*l.* or 1,100*l.*, the whole of the bankrupts' property will be accounted for. This reduces the question to this: whether the sale was a *bonâ fide* transaction, or whether it was collusive and fraudulent? If it were collusive, the fact of the bankrupts having notice of that fraudulent concealment would require to be established, in order to bring them within the 221st section of the Bankrupt Act, on the ground that the whole arrangement was a fraud and contrivance with the intention of defeating and delaying the creditors. Therefore, if I were now in the position of hearing a suit in equity to set aside a fraudulent sale, and to have a declaration that Bentham had a lien only, and that the bankrupts ought to have accounted for the residue, I should direct further inquiries. I shall not discharge the order, because, I think, doubts may be entertained whether this was not a mere fraudulent sale. I suspend the order for the purpose of having the deficiency of evidence in this respect made good, and of affording to the

bankrupts an opportunity of still further examination. That part of the order which postpones the final examination *sine die* will be discharged; and the assignees will be placed under the obligation, and will have the right of prosecuting inquiries in order to afford materials for arriving at a certain conclusion. The order will be suspended until further order by myself. The costs to be reserved.

WESTBURY, L.C. } *Ex parte PAGE, in re*
Dec. 5; } NEAL.*
Jan. 14. }

Practice—32nd Order in Bankruptcy—Introduction of new Evidence on Appeal.

The 32nd order in Bankruptcy must be construed with reference to evidence on the matters in issue, and does not preclude the introduction of fresh evidence for the purpose of informing the Court of Appeal of what has taken place in the Court below.

This was a petition of appeal against an order of Mr. Commissioner Sanders, whereby he refused an application for adjudication. It appeared that a trust deed had been executed by the alleged bankrupt, and duly registered under the 192nd section of the act of 1861; and a certificate of registration had been granted by the registrar. The appellant's case was that this deed was invalid, and that its execution was an act of bankruptcy; and it was alleged that the learned Commissioner had declined to enter into the question of the validity of the deed, treating the certificate of the registrar as conclusive evidence of its validity. This allegation was disputed on behalf of the alleged bankrupt, and one of the questions in issue was whether or not the learned Commissioner had consented to receive the evidence in question.

Mr. De Gex, on behalf of some of the creditors, proposed to read an affidavit, setting forth what took place before the Commissioner.

Mr. Little, for the respondents, objected that, under the 32nd General Order of November 1861, no new evidence could be received on any appeal unless the Court of Appeal should, on the hearing, so direct.

* See *Ex parte Miller*, *post*, p. 45.

THE LORD CHANCELLOR.—The rule of the Court, or rather the provisions of the statute, apply to the non-introduction of new evidence upon matters in issue; but the evidence now tendered is upon a matter not in issue. It is simply to inform the Court of what took place before the Commissioner. If the Court below acted with irregularity, what took place before the Court below would have been determined by notes taken of proceedings before it; but, unfortunately, that was not done. The counsel desire to be informed as to what did take place. What, then, did take place? What was the nature of the application? As I understand, Mr. De Gex applied to adduce evidence before the Court, and the Court refused the application. That would not come within the prohibition of the statute; it is not evidence upon a matter in issue. Does Mr. Little still oppose the introduction of this evidence?

Mr. Little.—All that I am instructed to say is, that the statements in the affidavit are in the highest degree incorrect. I submit that if the appeal had been on a question of the non-introduction of essential evidence, the notice of motion should have been directed to that point.

THE LORD CHANCELLOR.—For the future I desire to have it understood that the 32nd Order must be construed with reference to evidence on the matters in issue, and that the order will not extend to prohibit the Court from being informed of what took place before the Commissioner; distinguishing the proceedings before the Commissioner from the evidence upon the matters in issue. Here the material thing is whether Mr. De Gex's client did give the other side an opportunity of contradicting the matters which he alleged. The case must stand over; and if it is found that the statements in Mr. De Gex's affidavit are incorrect, the affidavit will be answered, and then a renewed application can be made to the Commissioner to enter into the question whether the deed was or was not an act of bankruptcy. If it was duly registered, it was not an act of bankruptcy; if not duly registered, then it may have been so. The petition will stand over generally.

Mr. De Gex (Jan. 14), on behalf of the petitioning creditor, said that he had

affidavits to shew that the Commissioner had declined to receive any evidence tendered to him with the view above stated.

Mr. Little, for Mr. Neal and in support of the order, insisted that the affidavit could not be read.

The LORD CHANCELLOR.—I cannot try upon affidavits what has been really done by the Commissioner. The only question upon the appeal is, whether an act of bankruptcy has been committed. The petitioning creditor must make another application to the Commissioner, accompanying that application with an intimation from me that it is competent for him to receive evidence affecting the validity of the composition deed, *ultra* the certificate of registration. The question of costs must be reserved.

WESTBURY, L.C. } *Ex parte* MORGAN, in re
Jan. 28, 30. } WOODHOUSE.

Trust Deed for Benefit of Creditors—Registration—Cessio Bonorum—Secured Creditors—“The Bankruptcy Act, 1861,” ss. 192. to 200.

In order that a trust deed for the benefit of creditors may be a protection against proceedings in bankruptcy, all the conditions of the 192nd section of the Bankruptcy Act, 1861, must be complied with, and it must be registered and advertised under that and the 193rd section, and a deed registered under the 194th section does not confer the same protection.

A deed not registered under the 192nd section is not binding upon creditors who are not parties to it.

The 192nd section is applicable only to deeds which contain provisions for the benefit of all the creditors; therefore a trust deed for the benefit of those creditors only who shall execute the same within twenty-eight days is not within that section, and cannot be registered except under section 194, and dissenting creditors are entitled to treat such a deed as an act of bankruptcy.

It is not, however, required by the 192nd section that a deed for the benefit of creditors should comprise the whole of a debtor's property.—Tetley v. Taylor (1), disapproved of

(1) 1 El. & B. 521; s. c. 21 Law J. Rep. (N.S.) Q.B. 346.

By the 197th section, creditors under a trust deed are in the same position as creditors under a bankruptcy; and therefore, if they hold security, they cannot prove without allowing for the value thereof.

This was an appeal by the petitioning creditors from the decision of the Commissioner of the Leeds District Court of Bankruptcy, dismissing the petition for adjudication.

The act of bankruptcy relied on consisted of the execution by Mr. Woodhouse of a deed of assignment for the benefit of his creditors. This deed, dated the 25th of October 1862, was made between W. H. Woodhouse of the first part, Richard Brook and others (trustees for themselves and the rest of the creditors of the said W. H. Woodhouse, parties thereto) of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being respectively creditors of the said W. H. Woodhouse, of the third part. After reciting that the said W. H. Woodhouse, being justly and truly indebted unto the said parties thereto of the second and third parts in the several sums set opposite to their respective names in the schedule thereunder written, which he was unable to pay in full, had therefore proposed and agreed to assign all his estate and effects unto the said trustees for the benefit of his creditors as thereafter mentioned, it was witnessed that the said W. H. Woodhouse assigned to the said trustees all and every the stock-in-trade, goods, wares, merchandises, household furniture, fixtures, plate, linen, china, books of account, debts, sum and sums of money, and all securities for money, vouchers and other documents and writings, and all other the personal estate and effects whatsoever and wheresoever of him, the said W. H. Woodhouse, in possession, reversion, remainder or expectancy, upon trust to convert into money, and to pay all costs and expenses of preparing and executing the deed, and attending the trusts thereby created; “and in the next place, to pay, retain and satisfy, rateably and proportionably, and without any preference or priority, to themselves, the said trustees and their partners, and the other persons parties hereto of the third part, who shall execute these presents within twenty-eight days

from the date hereof, the several debts or sums set opposite to their respective names in the said schedule hereto, subject to the covenant hereinafter contained for verifying the amounts thereof, and to pay the residue (if any) of the said monies unto the said W. H. Woodhouse, his executors, administrators and assigns." The deed then provided, that it should be lawful for the trustees to make to the said W. H. Woodhouse such allowances, or return to him such part of his household furniture or effects, not exceeding the value of 20*l.*, as they might deem expedient, and also to employ the said W. H. Woodhouse in winding up the affairs, and to allow him out of the trust estate such sums as to them should seem proper. There was a further proviso, that it should be lawful for the trustees, at the expense of the trust estate, to require the amount of any debt or debts of any or either of the several creditors parties thereto to be verified by solemn declaration, or in such manner as to the said trustees should seem expedient; and in the event of any such creditor or creditors refusing or failing so to verify his, her or their debt or debts, then such creditor or creditors so refusing or failing as aforesaid should lose all benefit of dividends and advantage to be derived from or otherwise claimed under the deed; and thereupon the trustees were authorized and empowered to pay such last-mentioned dividends or dividend unto the said W. H. Woodhouse. The deed then contained this clause: "Provided also, and it is hereby declared and agreed, that any resolution signed by the majority in number and value of the creditors parties hereto shall be binding on all the several parties hereto, and shall be effectual for the allowance and passing of the accounts of the said trustees, and for discharging them from the trusts hereof, and from all claims and demands in respect thereof; and that all questions relating to the said trust estate shall be decided according to English bankrupt law." And the said several creditors parties thereto of the second and third parts released the said W. H. Woodhouse from all debts, demands, &c. which they, the releasing parties, had against him up to the day of the date of the deed. The schedule to the deed was signed by thirteen creditors, whose debts amounted in the aggregate to about 600*l.*

On the 21st of November a copy or abstract of this deed, but not the deed itself, was brought to the office of the chief registrar, for registration; and the clerk to the chief registrar indorsed thereon a memorandum to the effect that the deed had been duly registered pursuant to the provisions of the Bankruptcy Act, 1861, under section 194. No copy of the deed was left with the registrar, and the entry of it in the registrar's book was not published in the *London Gazette*, as required by the 193rd section of the act.

The petition in Bankruptcy was filed on the 10th of December by certain creditors who had not executed the deed, the alleged act of bankruptcy being the execution of the deed, and an adjudication was made in the first instance *ex parte*. The Commissioner, however, afterwards annulled the adjudication, on the ground that all the requisites of the act of parliament had been complied with, and the deed therefore was not an act of bankruptcy.

From this decision the petitioning creditors appealed.

Mr. Bacon and Mr. Swanston, for the appellants.—The deed is an act of bankruptcy. In the first place, it does not provide for all the creditors, but only for those who execute within twenty-eight days and verify their debts. Nor does it provide for the distribution of all the estate, because the trustees have power to return to the debtor furniture to the amount of 20*l.*—*Tetley v. Taylor and Cooper v. Thornton* (2). Then the release to the debtor only purported to be made by those creditors who should execute within twenty-eight days; the debtor could not plead a release in answer to any creditor who did not execute within twenty-eight days. Another objection is, that the deed has not been duly registered under the 192nd section of the act, for the deed itself was not left at the registrar's office, as required by the fourth condition, nor was it advertised, as required by the 193rd section—*Ex parte Rawlings* (3), *Ex parte Godden, in re Shettle* (4). They also referred to *Wal-*

(2) 1 El. & B. 544; s.c. 22 Law J. Rep. (N.S.) Q.B. 145.

(3) *Post*, p. 27.

(4) *Post*, p. 37.

ter v. Adcock (5), and to the General Order of the 22nd of May 1862.

Mr. De Gex, for the respondent, contended that the deed was not an act of bankruptcy—*Irving v. Gray* (6), *M'Naught v. Russell* (7). The deed was duly registered under the 194th section, and was therefore valid under the 192nd section; nor was it bad because the trustees had power to restore a small portion of the furniture to the debtor.—

Snodin v. Boyce, 4 Hurl. & N. 391.

Harris v. Pettit, 31 Law J. Rep. (N.S.) Chanc. 552.

Whitmore v. Turquand, 1 Jo. & H. 444; s. c. 3 De Gex, F. & J. 107; 30 Law Rep. (N.S.) Chanc. 345.

Dunch v. Kent, 1 Vern. 260.

Spottiswoode v. Stockdale, Sir G. Coop. 102.

Broadbent v. Thornton, 4 De Gex & Sm. 65.

Nicholson v. Tutin, 2 Kay & J. 18.

Rauworth v. Parker, *Ibid.* 163; s. c. 25 Law J. Rep. (N.S.) Chanc. 117.

Mr. Bacon replied.

The LORD CHANCELLOR (Jan. 27) observed, that the deed had been brought in and registered under the 194th section; it was not advertised; no copy of it was left; it was kept in the pocket of the debtor, and the argument before his Lordship was, that it should bind creditors who never heard of it. If the conclusion were arrived at that the sections subsequent to the 192nd referred back to deeds described and fulfilling the conditions in the 192nd and 193rd sections, a reasonable interpretation would be given to the statute, and one which would prevent its being made the instrument of fraud. The case was one of considerable importance. His Lordship's present impression was, that the deed in question did not answer the description in the 192nd section. His impression undoubtedly was, that the whole of the provisions of the statute which relate to a deed of assignment of a debtor's estate binding on creditors not

actually parties to it, were provisions which applied only to deeds coming within the requirements of the 192nd section, and registered in conformity with the 193rd. The 194th section was intended merely for the purpose of the registration of other instruments which did not come strictly within the 193rd section, and in default of registration a penalty was attached, namely, that they should not be received in evidence. His Lordship would consider the subject, and give judgment in a day or two.

The LORD CHANCELLOR (Jan. 30).—It was the object of the legislature in passing the 192nd section of the Bankruptcy Act of 1861, and the seven or eight subsequent sections, to establish and to give security to a private administration of an insolvent's estate against process at common law, and also against proceedings in bankruptcy. The case of *Tetley v. Taylor*, as decided in the Exchequer Chamber, has, in effect, nullified a great part of the benefit which resulted to deeds of arrangement from the provisions contained in the Bankrupt Law Consolidation Act of 1849. As these sections have been repealed, and therefore that decision applies only to the construction of a portion of the statute law which is no longer in force, I may be permitted to say, with all respect, that I entirely dissent from that decision, and I think it was attended with unfortunate consequences. It appears to have been the intention of the framers of the 192nd section of the act of 1861 to avoid the same result in point of decision as that which was the consequence of *Tetley v. Taylor*. The case of *Tetley v. Taylor* was decided on this view of the case, that words of release being conjoined with words of distribution in the winding up of an estate, rendered every deed void which did not contain in it provisions for the distribution of the entirety of the bankrupt's estate. The effect was that deeds of composition, which very frequently proceed upon part only of the bankrupt's estate, which sometimes may proceed upon the basis of security being given by third persons for payment by instalments in satisfaction of the insolvent's debt, were taken entirely out of the operation of the act of 1849. Therefore, it will be observed, that

(5) 7 Hurl. & N. 541; s. c. 31 Law J. Rep. (N.S.) Exch. 380.

(6) 3 *Ibid.* 34; s. c. 27 Law J. Rep. (N.S.) Exch. 278.

(7) 1 *Ibid.* 611; s. c. 26 Law J. Rep. (N.S.) Exch. 192.

in framing the 192nd section, the disjunctive conjunction "or" is used before the word "distribution," for the purpose of arriving at a different conclusion with regard to the deeds which were to be valid and effectual under the 192nd section. I shall advert to that more fully presently. Now, in order to entitle a deed to the benefit of the subsequent clauses, it became necessary to introduce certain conditions. These conditions are embodied in the latter part of the 192nd section, and one of the most material of these provisions is that relating to the registration of deeds. The principle of the majority binding the minority is continued, with an alteration, from the Consolidation Act, where six-sevenths in number and value of the creditors were required, whereas by the 192nd section a majority in point of number, representing three-fourths in value of the creditors, are sufficient to bind the minority, provided the conditions are observed. One, I say, of the most material of these conditions is that relating to registration. The terms of the condition are somewhat peculiar. The deed is to be brought into the office of the chief registrar for registration. The manner in which registration is to be effected is described in the 193rd section. An abstract is to be made of the deed and entered in the book kept in the chief registrar's office for inspection, and the abstract so made is required to be published in the *London Gazette*. Now, it will be found that all the subsequent sections which give protection to a deed of this description are sections dependent entirely upon that particular form of registration being pursued. Accordingly, it will be found that the 196th section relates to registration only in the office of the chief registrar; and in like manner the 197th section mainly relates only to such deeds as are within the 192nd section, that is to say, deeds registered in the office of the chief registrar. Again, the 198th section begins thus: "After notice of the filing and registration of such deed has been given as aforesaid." But there is no antecedent provision on the subject of notice, except the provision that the deed when registered in the office of the chief registrar shall be advertised in the *London Gazette*. The benefit, therefore, of the 198th section, which is the most material, is given

exclusively to those deeds which have been advertised in the manner I have described. The 199th section in like manner relates entirely to deeds which have been duly registered in the manner prescribed by the 192nd section. The 200th section also plainly refers to a deed of similar description. It is plain, therefore, that the protection intended by the statute to be given to a deed under the 192nd section is a protection to be extended only to a deed duly registered in the manner and form prescribed by the 192nd section, and the 193rd, which is consequent thereupon. Now, the immediate subject which I am called upon to determine is, whether the deed in this instance was duly registered in this manner. It is necessary to observe, that, in addition to the registration required by the 192nd section, it appeared to the legislature desirable to require another form of registration for deeds which did not exactly comply with the requirements of the 192nd section. Accordingly, the 194th section gives the power and imposes the obligation of registering any deed of composition for the benefit of creditors, not registered under the 192nd section, in the Court of Bankruptcy. The words are material. A deed under the 192nd section is to be registered by the deed being brought into the office of the chief registrar, and the solemnities attending its registration are distinctly defined. A deed under the 194th section is directed to be registered simply in the Court of Bankruptcy. For convenience sake, by a general order, both forms of registration have been directed to be made by the same officer in the same office. But registration under one section is very different from registration under the other. The 194th section was introduced with a double view: first, because it was apprehended that many deeds of composition might still be made which would not be brought under the 192nd section, and which might have an injurious effect by reason of their being secret deeds of arrangement. The obligation, therefore, was imposed upon all persons executing such a deed of bringing it in within twenty-eight days; and a penalty is attached in case of default, that the deed shall not be receivable in evidence. Another object of the enactment was this: it was thought that many deeds of composi-

tion might not be perfected in the manner required by the 192nd section within twenty-eight days, and yet the creditors might be willing to accede to such a deed. Therefore power was given, under the 194th section, to register a deed which did not comply with the requirements of the 192nd section. These two forms of registration being very different, the consequences of the one form do not attach to the other. The consequence of an observance in every respect of the terms of the 192nd section is, that the deed is binding on the minority, who do not execute the deed. No such consequence attaches to registration under the 194th section. Now, the deed I have to deal with was brought into the office within twenty-eight days, but not in a manner which permitted of its being registered under the 192nd section; and, accordingly, the person who had charge of the deed elected to register it under the 194th section. A memorandum was indorsed upon it; which, according to the evidence, certified that it had been registered pursuant to the provisions of the Bankruptcy Act, under section 194. It is impossible, therefore, that the deed can now be set up as duly registered under the 192nd section; and if not duly registered under that section, it is not binding upon the creditors who are not parties to it. The practical result, therefore, is, that any creditor not a party may deal with that deed as an act done by the debtor; and if that act constitutes an act of bankruptcy, it is competent to a creditor who is not bound by it, not being a party to it actually or constructively, to treat the act as an act of bankruptcy. Now, the deed plainly is an act of bankruptcy, if not exempted from that consequence by the enactment of section 192; because it is a deed conveying the whole of a debtor's property to trustees for the benefit of his creditors. That is unquestionably an act of bankruptcy; and it was therefore perfectly competent to the petitioning creditor, not being a party to that deed, to avail himself of it as an act of bankruptcy, and to require an adjudication in Bankruptcy to be founded thereon. But the matter does not rest entirely here. I regret to see the variety of determinations, not consistent with each other, which have taken place upon the 192nd section. I

think it must be perfectly clear to any person who will examine that section, that it was intended to be applicable only to deeds which contain provisions for the benefit of all the creditors. I entirely agree with that determination which has decided that, if a trust deed excludes any creditor, or a deed of composition excludes any creditor, such a deed is not entitled to the benefit of the provisions contained in the 192nd section. Now, the question therefore is, whether this deed may be properly denominated a deed which in its operation may exclude creditors of the debtor; and I think that must be the result of the extraordinary form of trust here adopted. The trustees are not to hold the property in trust for all the creditors, with a proviso that the creditors shall come in within the ordinary time. But the trust is very plain; it is a trust for the benefit only of such creditors as shall execute the deed within twenty-eight days from the date. It is a form of trust, therefore, which entirely takes the case out of the reach of those decisions which have held that the proviso requiring the creditors to come in within a certain time would not, if objected to, avail the petitioning creditor who has not executed the deed, because it confines the benefit of the deed to that class of creditors who shall come in within that period of twenty-eight days. Therefore, I am of opinion that if this deed had been registered in conformity with the 192nd section, this particular form of trust is inconsistent with that character which, in my opinion, it is necessary deeds should have, in order to obtain the benefit of the 192nd section. Another point which was argued before me it is not absolutely necessary, after what I have said, that I should decide. It was argued that, because the trustees were empowered to make to the debtor a return of part of his property to the amount of 20*l.*, this was not a deed for the distribution of the entirety of the estate, and therefore not a deed within the 192nd section. That argument proceeded entirely upon a repetition of the decision of the Court of Exchequer Chamber in the case of *Telley v. Taylor*. I am not of opinion that that argument is a valid one, or that I could have accepted that ground of determination, if the deed had been assailed on that ground only; because it is abundantly clear that it

is not required by the 192nd section that a deed, in order to be entitled to its benefit, should be a deed comprising the whole of a debtor's property. It is a strange thing to observe, that the sections relating to composition deeds were completely defeated by the decision of the Court of Exchequer Chamber, because it involved this consequence, that there could be no possibility of making a valid arrangement by deed, unless the debtor was stripped of the entirety of his property. But the very object of this transaction repeatedly is to render it unnecessary to break up a business; to save a debtor from the necessity of having his whole property sold, his estate broken up, and the power of continuing his existing *status* as a trader entirely taken away. This probably was the intention of the legislature in framing this decision. What was called in *Tetley v. Taylor* a *cessio bonorum*, that is, an entire assignment of the entirety of the debtor's property, is not necessary to the validity of a deed of composition or trust under the 192nd section. The points, however, which I decide for the purposes of the present application are these: that this deed was not duly registered under the 192nd section; that it was unquestionably, and by the submission of the parties, registered under the 194th section; that validity, as against the use now attempted to be made of it, is not given to it by the 194th section; that the present petitioning creditor, therefore, is not bound by that deed, but may treat the deed as an act of bankruptcy; and, further, I am of opinion that the partial trust—that which confines the benefit of the deed in terms to a partial class of creditors—gives to the deed an exclusive character, which would have prevented its being brought under the 192nd section, if it had been duly registered in conformity therewith. In the present case, an adjudication in bankruptcy was originally made, founded upon this act of bankruptcy; but the learned Commissioner was afterwards of opinion that the case was taken out of his power. All, therefore, that I think is necessary is, that I should reverse that order, and allow the adjudication originally made in Bankruptcy to stand. The costs of the hearing of both parties to be paid out of the estate.

In conclusion, his Lordship added: I

must also observe, that reference has been made to the order of the 22nd of May and to the schedule, drawing a distinction between secured and unsecured creditors. That distinction is most necessary, by reason of the language of the 197th section; because as soon as a deed is entitled to the benefit of the 192nd section, it was the object of the legislature, by the 197th section, to give to all parties under that deed a power of resorting to the Court of Bankruptcy whenever it should be necessary so to do. The object of that enactment was to obviate the consequences which arise under trust deeds, which, but for that enactment, must, in case of any error or misfeasance, be dealt with by a suit in Chancery. Accordingly, the 197th section causes the state of things under a trust deed to be precisely the same as if there had been a bankruptcy instead of a deed of composition. Therefore, creditors under a trust deed are *in eodem statu* as creditors under a bankruptcy. But creditors under a bankruptcy cannot prove without allowing for the value of their securities, and creditors under trust deeds are subject to the same obligation.

LORDS JUSTICES.

Nov. 7;
Dec. 8.

} *Ex parte DRINKWATER,*
in re DRINKWATER.

Leave to Appeal to the House of Lords
—*Re-hearing—Deposit.*

An order having been made in July 1861, granting a bankrupt his discharge, with a condition as to his after-acquired property, the Lords Justices refused an application by the bankrupt for leave to appeal to the House of Lords, and determined to re-hear the case themselves, directing that a new deposit of 20l. should be made.

After the case had been so re-heard, an order was made, varying the former order by suspending it for a certain time, giving the bankrupt protection in the mean time, and an unconditional discharge at its termination.

This was a motion made for the bankrupt John Drinkwater, asking that the Lords Justices would settle a special case, to be

certified under the provisions of section 10. of the act, 14 & 15 Vict. c. 83. (the Lords Justices Act), for an appeal to the House of Lords against a decision of their Lordships, pronounced on the 4th of July 1861 (1). The case will be better understood by the statement succinctly of the facts gathered chiefly from the former report:—Mr. Drinkwater carried on business as a stuff-manufacturer at Manchester, and having been adjudicated bankrupt, Mr. Commissioner Jemmett gave him an unconditional order of discharge. Mr. Hewett, the trade assignee, appealed against that order; and their Lordships discharged it, and made a new order of discharge, protecting the person of the bankrupt in respect of debts proved under his bankruptcy, but so as to make, or leave, all his after-acquired property of every description liable for all debts proved or proveable under the bankruptcy, and to all actions, suits and proceedings in respect thereof as if this bankruptcy had never taken place. Upon that occasion Lord Justice Knight Bruce was of opinion that the bankrupt's conduct had brought him within the 159th section of the Bankruptcy Act, 1861, on the ground that he had contracted a debt of 1,000*l.* with a lady named Alice Sophia Bury, "without having any reasonable or proper ground of expectation of being able to pay the same," and had thus incurred the penalties of the act as to after-acquired property. Lord Justice Turner did not rely upon this debt; but, agreeing in the decision of his learned Brother, did so upon a consideration of the general conduct of the bankrupt, saying, "I cannot say that I am satisfied that the debt of 1,000*l.* which was proved under the bankruptcy was contracted by the bankrupt without reasonable and probable expectation of being able to pay the same. Whether that was so or not, the Court must consider the conduct of the bankrupt both before and after the bankruptcy. . . . I have no doubt that the application in bankruptcy was an application made without any view to the benefit of his creditors (there being no estate which he could distribute amongst his creditors), but simply with a view of getting rid of the liability

for the debt of 1,000*l.* for which he was sued. That was his purpose. This Court ought not to be instrumental in giving effect to an application of that kind."

Since that decision, the Lord Chancellor, in the case of *In re Mew and Thorne* (2), had expressed an opinion that a bankrupt's discharge could not be refused or suspended unless the bankrupt had been guilty of conduct amounting to misdemeanor under the 159th section of the act of 1861 (24 & 25 Vict. c. 134), or had committed one of the offences enumerated in the third paragraph of it, and that it was not competent for the Commissioner or the Court of Appeal to inquire into the bankrupt's general conduct.

Mr. Daniel, in support of the motion, said he appeared, at the instance of the bankrupt's father, to ask their Lordships to certify and approve of a case to appeal upon to the House of Lords. On the former occasion when their Lordships gave their decision, Lord Justice Knight Bruce thought that the bankrupt had brought himself within the 159th section of the Bankruptcy Act, 1861, on the ground that he had contracted a debt of 1,000*l.* without reasonable and probable expectation of being able to pay it; whilst Lord Justice Turner gave his decision upon the general conduct of the bankrupt, and said in the course of his decision that he could not say that he was satisfied that this debt of 1,000*l.* was contracted by the bankrupt without reasonable and probable expectation of his being able to pay it. Since that claim the Lord Chancellor had decided in the case of *Mew and Thorne*, that a bankrupt's discharge could not be refused or suspended unless the bankrupt had been guilty of conduct amounting to a misdemeanor under the 159th section of the act, or had committed one of the offences enumerated in the third paragraph of that section. As Lord Justice Turner had decided that the bankrupt had not brought himself within that section, and he conceived both their Lordships' opinions must concur, he thought their Lordships would not refuse his application.

[LORD JUSTICE KNIGHT BRUCE.—Is this application *ex parte* ?]

Mr. Bacon, for the trade assignee.—No. I see no question on which to appeal to the House of Lords. There is no question of

(1) See the case *nom.* *Ex parte Hewitt*, in re Drinkwater, 31 Law J. Rep. (N.S.) Bankr. 83.

(2) 31 Law J. Rep. (N.S.) Bankr. 87.

construction of the act in dispute. Your Lordships heard the case fully, and decided upon the fact. If this were an application for a re-hearing, well and good; but an appeal to the House of Lords must be upon a question of law.

Mr. Daniel read the whole of Lord Justice Turner's decision in the former case, to shew that he did not consider that the bankrupt had brought himself within the 159th section; and he also read a portion of Lord Justice Knight Bruce's decision.

[LORD JUSTICE TURNER.—As I collect from what you have read, Lord Justice Knight Bruce was of opinion that the debt of 1,000*l.* was contracted without reasonable and probable ground of expectation of being able to pay the same. Whether that was so or not, my opinion was that the bankrupt was to be made subject to the conditions contained in the order, and, therefore, I gave no opinion upon the question of fact.]

LORD JUSTICE KNIGHT BRUCE.—We came to the same conclusion for different reasons, it not appearing that either differed from the reason given by the other. Was that so?]

Mr. Bacon said it was.

[LORD JUSTICE KNIGHT BRUCE said, as the case could not go to the House of Lords upon a question of fact, would it not be as well to have it re-heard?]

LORD JUSTICE TURNER.—I was not aware on the last occasion that it would be in any way important that I should give any opinion upon the question, whether the debt had been contracted without reasonable and probable ground of expectation of being able to pay it; and my decision was given before the Lord Chancellor had decided the construction of the act.]

Mr. Bacon said, that when he presented the case before their Lordships on the previous occasion they (the Lords Justices) proceeded to some extent upon the ground that the whole proceeding on the part of the bankrupt was an abuse of the bankrupt law. Their Lordships decided upon the facts, and as there was no case for the House of Lords, he should not object to a re-hearing, but there was no estate to fight with.

Mr. Daniel said, that the creditors for 1,000*l.* did not appeal, but it was the trade assignee, who was a secured creditor. It

should be remembered, too, that the bankrupt's estate realized 84*l.*

Mr. Clement Swanston followed on the same side.

Mr. Jordan followed on the same side as *Mr. Bacon*, and said it had been decided in the Court of Exchequer (some of their Lordships had acted on that ruling) that repealed sections of one act might be referred to for the purpose of explaining subsisting sections of another act which expressly related to the same subject-matter. Now, if the 18th section of the Bankruptcy Act of 1849, 12 & 13 Vict. c. 106. (which had been repealed) was taken to explain the 10th section of the Lords Justices Act, it would appear that the only case in which an appeal would lie to the House of Lords, would be where "any matter of law or equity brought before the Court, by way of appeal, was of sufficient difficulty or importance to require the decision of the House of Lords." The other side had not shewn that there was any such difficult point of law or equity, and, therefore, there could be no appeal to the House of Lords. Although Lord Justice Knight Bruce had decided in *Borwall's case* (3) that a bankrupt's discharge could not be refused or suspended unless the bankrupt had brought himself within the 159th section, and the Lord Chancellor had since approved of that ruling, that case did not apply here, inasmuch as the bankrupt's discharge had neither been refused nor suspended. In *re Newton* (4) the Lords Justices had refused the bankrupt's leave to appeal to the House of Lords, on the ground that the former order made by their Lordships was "manifestly and plainly right." He (*Mr. Jordan*) contended that the order made previously in this case was "manifestly and plainly right," for the order only amounted to saying that the bankrupt should pay his just debts when he was able. *Mr. Daniel* had said that the assets of the bankrupt were 84*l.*; but the bankrupt only stated them at 20*l.* in his balance-sheet: this sum he offered to pay, and now wished to appeal to the House of Lords. The trade assignee did not hold one farthing security for his debt from the bankrupt, and he was strongly of opinion that the bankrupt had brought himself

(3) 31 Law J. Rep. (N.S.) Bankr. 73.

(4) Ibid. 81, 82.

within the 159th section of the act by extravagant living alone; for, according to his balance-sheet, his personal expenditure for the year and a half before his bankruptcy had been at the rate of 13*l.* a week.

Mr. Daniel was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—As an appeal to the House of Lords cannot be upon a matter of fact, an appeal in this case cannot go to that tribunal; and as the question involved here is, “Had the bankrupt when any of his debts were contracted reasonable or probable grounds of being able to pay the same?” I shall be ready to adopt any order that my Lord Justice Turner may make.

LORD JUSTICE TURNER.—My opinion is, that this case ought to be re-heard. It is quite true that our decision was one upon facts, but at the time when it was pronounced it was not material upon what facts the decision proceeded; because, according to my view, if the conduct of the bankrupt had been such before his bankruptcy as to subject him to blame for misconduct, it was within the power of the Court to decide on that misconduct. The Lord Chancellor has since arrived at a different conclusion, and has decided that the only misconduct that can be taken into account is that which is specified in the act, and it becomes now of the last importance, when questions of this description are decided, that it should be known upon what grounds the decision proceeded; because, if the decision had proceeded upon grounds of misconduct not specified in the act, there might be a wholly erroneous decision which could not be submitted for consideration to the House of Lords. I think the bankrupt has a right to a decision which may place the case in such a position that he may appeal to the House of Lords, if in the result we should think the question of such importance as to warrant an appeal; and that he cannot have unless there be a decision expressing facts upon which the judgment proceeds. My opinion is, that this is a proper case to be re-heard before us, in order that we may arrive at a conclusion as to whether the conduct of the bankrupt has or has not been within the special clause of the act of parliament.

Perhaps both our judgments may be construed in the same way that *Mr. Bacon* has adverted to—that the whole proceeding was an abuse of the bankrupt law; but I am not clear whether an abuse before bankruptcy, such as an alienation of all the bankrupt's property, would or would not fall within the special clause.

The case was accordingly re-heard on the 8th of December, but no fresh evidence was produced, the same counsel appearing for the respective parties. At the close of the arguments,

LORD JUSTICE KNIGHT BRUCE proposed an order varying the order this Court had originally pronounced by suspending the order of discharge for fifteen months, giving the bankrupt protection in the mean time, and giving him an absolute discharge at the end of that period.

LORD JUSTICE TURNER, in addition, said that though he was not satisfied with the bankrupt's conduct, he could not hold him to have contracted debts without any reasonable ground of expectation of being able to pay them, or to have put his creditors to needless expense by a frivolous defence. He should not, therefore, feel justified in imposing on him the sentence which this Court had visited him with in July last, and would agree with the order made by his learned Brother.

WESTBURY, L.C. } *Ex parte WENSLEY, in*
Dec. 19. } *re WENSLEY.*

Disputed Adjudication—Deed of Composition—Act of Bankruptcy—Registration—Section 194. of the Bankruptcy Act, 1861.

A trader, by deed, after reciting that he was unable to pay his debts, conveyed certain real estate to a trustee, upon trust to pay all costs, charges and expenses, “already or hereafter” to become due to his solicitor, and the professional charges of an accountant, and apply the residue in payment of the debts of such of the creditors of the bankrupt as should execute the deed, rateably. The deed was not registered under the 194th section of the act, 24 & 25 Vict. c. 134:—Held,

that the deed could be received in evidence against the bankrupt, and (supporting a decision of one of the Commissioner) that it was under the circumstances of the case an act of bankruptcy.

This was an appeal made on behalf of the bankrupt, John Wensley, against an order made by Mr. Commissioner Perry, of the Liverpool District Court of Bankruptcy, adjudicating him a bankrupt. The facts of the case appeared to be as follows.

Messrs. Edmund and John Mercer, timber-merchants, at Liverpool, presented a petition praying for an adjudication in bankruptcy against John Wensley on the 24th of October last, and an adjudication was made on the 6th of November following. Immediately thereupon the bankrupt served notices of his intention to dispute the adjudication. The matter was fully gone into on the 21st of November, when the Commissioner made the order now appealed from.

The acts of bankruptcy relied on were, that the bankrupt failed to attend a meeting of his creditors, and had executed a deed alleged by him to have been a deed of trust for the benefit of his creditors, dated the 4th of June 1862, and expressed to be made between John Wensley, builder, of the first part, Thomas Bagot, accountant, of the second part, and the several persons whose names and seals were subscribed and affixed, being creditors of John Wensley, of the third part. The deed recited thus: "Whereas the said John Wensley is indebted unto the several persons, parties hereto of the third part, in the several sums of money set opposite their respective names in the schedule hereunder written, and is not prepared to answer or pay the same"; and it witnessed, that John Wensley thereby conveyed to the use of T. Bagot and his heirs, two plots of land and buildings thereon, at Everton, subject, as to the firstly-named hereditaments, to the mortgage thereon to John Conway, and other incumbrances; and subject, as to the secondly-named hereditaments, to a lien for the residue of the purchase-money for the same, upon trust to sell, and out of the rents and profits, and also from the monies to arise by sale, "in the first place,

after discharging all costs, charges and expenses already or hereafter to become due to Mr. John Conway, solicitor, and the professional charges of the said Thomas Bagot in his capacity of accountant herein, and the costs and charges attending the said sale or sales, and the money which he and they respectively may disburse for the interest due to the said John Conway," taxes, repairs and insurance; then "to pay to the said John Conway, his executors, administrators and assigns, all principal, interest and monies now or hereafter due and owing to him"; then to apply the residue in payment of the debts of such of the creditors as should execute the deed rateably; and the surplus to John Wensley. The deed also contained, in consideration of the above grant, a general covenant on the part of the creditors not to sue, and a general release of all actions and debts. The deed contained no assignment of personalty, and was not registered under the Bankruptcy Act, 1861.

Mr. De Gez, in support of the appeal, argued that the deed ought not to have been received in evidence, as it had not been registered as was required by the 194th section of the Bankruptcy Act of 1861, which enacted, that "every deed, instrument or agreement whatsoever, by which a debtor, not being a bankrupt, conveys, or covenants to convey, his estate for the benefit of his creditors, shall within twenty-eight days from and after the execution thereof by such debtor be registered in the Court of Bankruptcy; and in default thereof shall not be received in evidence." The deed was not a conveyance of all the bankrupt's estate, and as it contained a release of all his debts, it was not incumbent on him to have it registered.

The LORD CHANCELLOR. — Supposing that a creditor sued the bankrupt and the bankrupt produced the deed as a release; or, supposing that the creditor brought an action, say of ejectment or trover, and the deed were produced, if it turned out that it had not been registered, the deed would not be receivable in evidence. But as the act of the bankrupt, and as against the bankrupt, though not registered, it may always be received in evidence to undo the deed, though not to support any right of

the bankrupt. It cannot be received as proof of any title or release under it. The deed was rightly, I think, admitted in evidence.

Mr. De Gez.—It is to be observed that the deed does not purport to convey all the bankrupt's estate, and it is also to be remarked that the other side ought to have shewn, but they wholly fail to do so, that the deed was executed in contemplation of bankruptcy. The evidence was wholly blank as to the existence of any promise or engagement on the part of the bankrupt to attend the meeting of creditors, failing to attend which had been construed into an act of bankruptcy. The learned counsel in support of the various points in his argument, cited

Gibbins v. Phillips, 7 B. & C. 529;
a. c. 6 Law J. Rep. K.B. 209.

Van Casteel v. Booker, 2 Exch. Rep.
691; a. c. 18 Law J. Rep. (N.S.)
Exch. 9.

Johnson v. Fesemeyer, 25 Beav. 88:
affirmed on appeal, 3 De Gez & Jo.
13.

Mr. Bacon appeared for the respondents, the petitioning creditors, but was not called upon.

THE LORD CHANCELLOR.—I have before me the case of a man in insolvent circumstances, admitting, under his hand and seal, that he is unable to pay his debts, who makes a conveyance of what appears undoubtedly to be the greater part of his property, the object being, in the first place, to give a general species of charge in favour of his solicitor, a charge which is made to extend, not only to debts then due, but to those which should become due. The next charge I find is in favour of the trustee, an accountant; and then there are directions to apply the residue of the produce of the sale of the property, after payment of these general charges, in favour of such creditors as should come in and execute the deed. Now, there may be an act of bankruptcy in a payment of money voluntarily made in preference of either of his creditors, by a man knowing himself to be so insolvent that he must expect bankruptcy to be a thing of necessary consequence. There may be an act of bankruptcy by a fraudulent gift of part of a man's property to a creditor

under such circumstances. There may also be an act of bankruptcy in a conveyance by a man of a proper and reasonable amount of his property, accompanied by such circumstances of insolvency as that the general body of his creditors are thereby defeated and delayed in the manner of distribution to which they would be entitled under the administration of the law. The question here is, whether the Commissioner was not right in holding the present deed to come under that category. I am told by the counsel for the bankrupt that the circumstances prove that this would not be a probable consequence of the present deed, because it is clear that the property was so large that the bankrupt might place it in the situation in which it now stands, and yet believe that the consequence would be to promote the interests of the creditors, instead of to delay them. I cannot come to that conclusion. I think this was a very improper deed to have been made; and I think the giving this charge to the solicitor must necessarily be attended with delay to the creditors. That being the necessary effect of the deed, it becomes a fraudulent conveyance within the meaning of the statute. The evidence in favour of the value of the property fails altogether to satisfy me that it ought to have the effect of confirming the deed. It shews me that the property was not of anything like the value that justified its being placed in this position. I think, therefore, the deed made as it has been, under circumstances of insolvency, merely for the purpose of getting hold of the property, and keeping the management, the conversion and the distribution of it entirely in the hands of the bankrupt's solicitor, is not such a deed as can be supported; and, as such, it is an act of bankruptcy within the statute. For these reasons I think that the Commissioner arrived at a right conclusion, and I shall not disturb his order. The deposit must be returned, and the costs of the petitioning creditor beyond that amount be paid out of the estate.

LORDS JUSTICES.

Nov. 14 ;

Dec. 6.

Ex parte WOOLHEIM, in re WOOLHEIM.

Annulling Adjudication—Costs as between Co-respondents—Jurisdiction.

A trader, resident in Scotland, was adjudged bankrupt on the petition of a creditor resident in the same country. The trader brought an action against the petitioning creditor, but the latter refused to appear to it. The Court ordered that if he did not appear to the action within ten days the adjudication should be annulled; and he having failed so to appear, the adjudication was annulled.

The Court has jurisdiction to order a respondent in bankruptcy to pay the costs of a co-respondent. The official assignee, on the above bankruptcy being annulled, was allowed his expenses of the custody and sale of the bankrupt's estate out of the assets received by him, and the petitioning creditor was ordered to pay the amount of such expenses to the bankrupt as well as his costs and the costs of the official assignee.

Mr. Solomon Woolheim, a trader, residing and carrying on business in Glasgow, was adjudicated bankrupt on the petition of a creditor who also resided in Scotland. Mr. Woolheim, after the adjudication, had commenced an action against the petitioning creditor, but that person had neglected and still refused to enter an appearance.

Mr. De Gex, in support of an application on behalf of the bankrupt to annul the adjudication, argued that, for the purposes of this case, Scotland must be considered a foreign country, and said that there was no instance of a trader who had traded solely in a foreign country having an adjudication of bankruptcy in this country sustained against him. The petitioning creditor had availed himself of the law of England in obtaining the adjudication, and yet refused to submit to the jurisdiction of our Courts by failing to appear to the action.

Mr. Ernest Reed, for the petitioning creditor, said that as his client resided in Scotland, in which country the bankrupt carried on business, if any ground existed for the bringing of the action, it ought to have been brought there.

Mr. Bagley, appearing for the official

assignee, left the case wholly in the hands of the Court.

Their LORDSHIPS ordered that the adjudication should be annulled unless the petitioning creditor appeared to the action within ten days.

Dec. 6.—Mr. De Gex informed the Court that the petitioning creditor had not appeared to the action.

No counsel appeared for that person.

Their LORDSHIPS made an order absolute for annulling the adjudication, and asked what was asked as to costs.

Mr. Bagley, for the official assignee, submitted to the judgment of the Court whether he ought not to be at liberty to retain his costs and expenses out of the assets which had reached his hands. In the performance of his duty he had taken possession of a considerable quantity of goods, and had, with the concurrence of Mr. Woolheim, sold them, and held the money in his hands.

Mr. De Gex, for Mr. Woolheim, contended that the party who, while the bankruptcy was in existence, held the office of official assignee, had, from the moment the adjudication was declared to be annulled, no power to retain any portion of the estate, but must hand it back to the lawful custody, namely, to that of the person whose bankruptcy had been annulled. Such was the case in lunacy after a commission *de Lunatico Inquirendo* had been declared void—*In re Windham* (1). In the present case Mr. Woolheim was the party injured by these proceedings, which it was shewn ought never to have been instituted, and yet a party who only sustained his office by the validity of the adjudication which had been annulled asked that Mr. Woolheim should bear the costs incurred by that party. If the official assignee had honestly any claim, it was against the petitioning creditor, through whose invalid act all the mischief had been occasioned.

Mr. Bagley submitted that the Court had no jurisdiction to order costs to be paid by one respondent to another. In Chancery, as he understood, the course was to order

(1) 31 Law J. Rep. (N.S.) Chanc. 720.

the plaintiff to pay the costs of a defendant who was entitled to receive costs, and to order the defendant, who ought to bear the costs of the suit, to repay to the plaintiff the costs so paid by him.

LORD JUSTICE TURNER.—That is the course in Chancery, but I do not think that it is so in proceedings in Bankruptcy.

Their LORDSHIPS said, that in annulling the adjudication they should order the petitioning creditor to pay the costs of the bankrupt and of the official assignee, and direct that the latter should be allowed the expenses of the custody and sale of the bankrupt's estate out of the assets received and retained by him, and that he should pay over to the bankrupt any surplus, and that the petitioning creditor should pay to the bankrupt the amount so deducted by the official assignee. The order of the Court would be without prejudice to any action which the bankrupt might commence against the petitioning creditor.

LORDS JUSTICES. }
 Nov. 22, 24; } *Ex parte RAWLINGS, in re*
 Dec. 6, 10. } *RAWLINGS.*

Trader-Debtor Summons and Admission of Debt—Composition Deed—Cessio Bonorum—Bankruptcy Act, 1861, ss. 192, 194.—Adjudication of Bankruptcy notwithstanding Registration of Deed of Arrangement.

A creditor having commenced proceedings in Bankruptcy against his debtor by trader-debtor summons, under which the debtor signed an admission of the debt, and four days after executed a composition deed, which was afterwards duly registered, it was held by one of the Commissioners, that such debtor was not protected by the certificate of registration from an adjudication of bankruptcy, upon the petition of the creditor, the act of bankruptcy being non-payment of the debt within the time limited by the act of 1849. On appeal to the Lords Justices, it was held, that the certificate of registration of a composition deed by a trader is not conclusive evidence that all the conditions of section 192. of the Bankruptcy Act, 1861, have been complied with; and on a question arising whether the necessary assents of

creditors had been actually given, these assents were ordered to be produced; and as it then appeared that they were in part conditional and not absolute, and that on the condition not being fulfilled the necessary proportion of creditors would not have assented, the deed was held to be not a valid ground for annulling an adjudication subsequent to the date of the deed; and that the bankrupt seeking to annul the adjudication may adduce further evidence; and (per Lord Justice Turner) the 192nd section extends to deeds of composition, although they neither contain, nor are accompanied by, any cessio bonorum; but the words "between a debtor and his creditors" in that section refer to all the creditors, and not some of them only. The appeal was therefore dismissed.

This was an appeal by Mr. Samuel Bagley Rawlings, a miller, at Oakham, in Rutlandshire, against an order of Mr. Commissioner Goulburn refusing to annul an adjudication that had been made against him.

The petitioners, Messrs. Lucy & Son, were creditors of the bankrupt in the sum of 250*l.* 9*s.* 3*d.*, in respect of which they proceeded against him under a trader-debtor summons, in answer to which he signed an admission in the usual form on the 7th of October.

By the 81st section of the Bankruptcy Act, 1849, a debtor having signed an admission of debt under a trader-debtor summons has seven days within which to pay, secure or compound to the satisfaction of the creditor; and if he do not, he commits an act of bankruptcy on the eighth day.

The seven days expired on the 14th of October, and the bankrupt, having failed to comply with the requisitions of the statute, committed an act of bankruptcy on the 15th. The Messrs. Lucy thereupon presented their petition for an adjudication of bankruptcy on the 15th of October against Rawlings, who was adjudicated on the 27th. On the 3rd of November the bankrupt gave notice to dispute the adjudication upon all points, and at the same time gave notice that he had on the 11th of October duly executed a deed of arrangement and composition with his creditors within the 192nd section of the Bankruptcy Act, 1861, and that such deed had been duly registered on the day of its date.

The deed referred to was dated the 11th

of October 1862, and made between the bankrupt of the first part, Martha Rawlings, his mother, and J. Brown of the second part, and the several persons whose names were contained in the schedule thereunder written, and who by themselves, their partners or agents respectively had executed the deed, being creditors of Rawlings, of the third part; and reciting the indebtedness of Rawlings to the parties of the third part, and that J. Brown was a large creditor, and that it was agreed between the several persons parties thereto that Martha Rawlings and J. Brown should pay to the several creditors of Rawlings a composition of 7s. 6d. in the pound on the amount of their respective debts, which was to be accepted by them in full satisfaction and discharge of their debts by three equal instalments of 2s. 6d. each at the expiration of three, six and nine months from the date thereof, and to be secured by the joint and several promissory notes of Rawlings, Martha Rawlings and J. Brown; and reciting that the several promissory notes had been delivered to the several creditors, and that, to enable Martha Rawlings and J. Brown to meet the notes at maturity, it had been agreed between the parties thereto that all his stock-in-trade, monies, trade effects, and all other the estate and effects of S. B. Rawlings, should be assigned unto Martha Rawlings and J. Brown in manner thereafter mentioned; it was witnessed, that Rawlings, with the full consent and approbation of his said creditors, transferred and assigned, and his said creditors ratified and confirmed unto the said Martha Rawlings and J. Brown, their executors, administrators and assigns, all his estate and effects belonging to his said business, and all other his estate and effects whatsoever, his wearing apparel alone excepted, with the usual power to them, as his attorneys, to collect and get in the same, give receipts, adjust and settle accounts, and the like usual provisions. And a covenant was inserted as follows: "And in consideration of the premises, they, the said creditors, parties hereto of the third part, do hereby, for themselves severally and respectively, and for their several and respective heirs, executors and administrators, covenant and agree with the said Martha Rawlings and John Brown, their executors and administrators, that the said

composition so agreed to and secured as aforesaid shall be, and the same is hereby taken and accepted by them the said creditors respectively, in full satisfaction and discharge of their several and respective debts and demands against the said Samuel Bagley Rawlings, the full amount of which said debts and demands are set opposite to the respective names of the said creditors executing these presents in the schedule hereunder written." The deed also contained a covenant on the part of Rawlings for further assurance; and it was executed by Rawlings, Martha Rawlings and Brown, but by no creditor.

Before the learned Commissioner, in opposition to the adjudication, it was asserted and argued as follows: The bankrupt's debts amounted to about 5,000*l.*, and a large majority of his creditors, representing debts to the amount of 4,461*l.*, had assented to the deed. The dissentient creditors represented about 600*l.* Under the trader-debtor summons no act of bankruptcy was committed until the eighth day after the 7th of October, the day on which the summons was returnable and the admission signed. The deed was executed on the 11th of October, and registered the same day, so that when the deed was registered no act of bankruptcy had been committed. In a trader-debtor summons the act of bankruptcy by non-payment did not relate back to the service of the particulars of demand. The notes securing the instalments had been handed to the creditors, and the property assigned to the sureties absolutely to indemnify them in case they should be called on to pay.

The Commissioner, however, said, on giving judgment on the 6th of November 1862: "I have no doubt whatever upon this case. This is an attempt to bring within the provisions of the act of parliament certain practices with regard to deeds which were never contemplated by the legislature. It is contended that a debtor may, notwithstanding an assignment to third parties, keep possession of everything for himself, to do with it as he pleases. I think that is exactly what the act of parliament is intended to prevent. Then it is said, that the two persons named in the deed are not *eo nomine* trustees at all, and that there is no resulting trust; but it is quite clear to my mind that they

were virtually and actually trustees for the benefit of creditors, and that, being trustees, the seventh condition of the 192nd section will apply. But it is said, that the persons to whom the property is assigned take it not as trustees, but as assignees absolutely, and that the property is given up because the promissory notes have been delivered out to the creditors; that is, the debtor giving to them bits of paper, and keeping the substantial property himself. I think I should greatly err if I were to accede to such a proposition, or put the construction contended for upon the act of parliament. I think I must refer back to the act of bankruptcy, which is the trader-debtor summons, and, those proceedings being before the execution of the deed, that the deed is bad, and that the adjudication of bankruptcy must be affirmed."

The appeal now came on for argument.

Mr. Ernest Reed (in the temporary absence of his leader, *Mr. Bacon*), for the appellant, said—The question for discussion was, whether a deed of composition was within the meaning of section 192. of the Bankruptcy Act, 1861. He contended it was. The respondent would, no doubt, rely on *Tetley v. Taylor* (1), and the more recent decision in *Walter v. Adcock* (2), to prove the contrary. It was, therefore, necessary to review the past law of Bankruptcy in order to interpret the recent enactments. Prior to 1849 the estates of debtors in Bankruptcy were administered by the Court, but in that year arrangements by deed executed by a debtor and acquiesced in by a certain majority of creditors were sanctioned by statute. Experience, however, proved, that whilst the commercial advantages of such arrangements were considerable, the protection afforded to the debtor and his property was precarious; and dissenting creditors, relying on technical difficulties, succeeded in their attacks on both. It was contended the new law of 1861, by express words, had remedied the defects of the old law of 1849, enlarged the power of creditors, and given a wider scope to arrangements by deed. This pro-

position would be apparent from a comparison of the statutes. Under the old law there was but one mode of changing from bankruptcy to arrangement, and that was provided for by section 230. of the act of 1849; but to give effect to that section nine-tenths of the creditors present at a meeting were required to assent to the composition. Under the new law, the creditors were empowered to resolve upon any arrangement. Section 110. of the act of 1861 empowered the majority in value present at a meeting to resolve that no further proceedings should be taken in bankruptcy; and if this resolution was assented to at a subsequent meeting by a majority in number representing three-fourths in value of the creditors present, the estate was forthwith removed from the Court and administered according to the will of the creditors. Again, section 185. of the same act invested three-fourths in number and value of the creditors present or represented at a meeting in Bankruptcy with authority to resolve that the estate ought to be wound up under a deed of arrangement; and if the Court found the resolution reasonable, the bankruptcy was annulled and the debtor protected. These sections proved the intention of the legislature to invest the persons most interested, viz., the creditors, with new and enlarged powers; and section 192. clearly indicated that old restrictions were swept away and a wider scope given to arrangements by deed. Under the 224th section of the old law, the deed was to be signed by six-sevenths in value and number of the creditors in order to render it valid and effectual; and the three following sections imposed further conditions on the debtor. The deed would not protect him from the attacks of non-executing creditors until after the expiration of three months from the time when the creditors received notice of the suspension and of the proposed deed, unless the Court granted a certificate declaring the deed duly executed; but even then fourteen days' notice of the intention to ask for such a certificate was to be served on every creditor, and it was incumbent on the trustees or two creditors to certify that the deed had been duly executed by the necessary majority. The result was, that either within the fourteen days, or within

(1) 1 El. & B. 521; a.c. 21 Law J. Rep. (N.S.) Q.B. 2, 346.

(2) 7 Hurl. & N. 541; a.c. 31 Law J. Rep. (N.S.) Exch. 380.

the three months, dissenting creditors defeated the object of the deed by forcing the debtor into bankruptcy; and even supposing the deed to have become valid by effluxion of time, still, hostile creditors, relying on the technicality of some slight allowance, either of furniture or wearing apparel, having been made to the debtor or his family, arrested his person and attached his property—*Tetley v. Taylor* (3). The words, however, of the statute which gave rise to this difficulty were altered. Under section 224. of the old law they stood, "touching such trader's liability and his release therefrom, *and* the distribution, inspection, conduct, management and mode of winding up of his estate." The doctrine, therefore, of *cessio bonorum* applied, and the authorities were numerous that distribution was imperative. In the new law, the conjunctive "and" had been altered to the disjunctive "or." It could not be assumed that alteration had been made unadvisedly; in fact, when the act was printed the conjunction remained, but in passing the legislature the disjunctive "or" was substituted, thereby clearly demonstrating the intention to provide against old difficulties, and it now read, "relating to the debts or liabilities of the debtor and his release therefrom, *or* the distribution," &c. This substitution of the disjunctive for the conjunctive was also necessary to meet the contingency of composition deeds, where no distribution would take place. No special period was now necessary to give validity to the deed, and the application to the Court had been abolished. The six-sevenths in number and value of the creditors had been reduced to a majority of the creditors representing three-fourths in value, and any person able to depose thereto might verify the fact that the requisite majority representing a particular value had assented to the deed. It was not now even necessary for the creditors to execute the deed; their assent in writing was sufficient. There was also a marked contrast between the head-note to the old law and that to the new law. Formerly it stood, "And with respect to arrangements by deed"; now it appeared, "As to trust deeds for the benefit of creditors, composition and inspectorship deeds,

executed by a debtor." Could any one reading these different expressions contend they referred to the same thing? The *prima facie* interpretation of every statute was the meaning any ordinary reader would attach to it, and nothing could be opposed to that meaning but the words of the statute itself. What, then, was the meaning of the 192nd section of the act of 1861? First, there were to be trust deeds which required an assignment of estate and a trustee to administer it; secondly, composition deeds, which required no assignment, the object being to leave the debtor in possession of his property; and, thirdly, inspectorship deeds, under which the debtor would retain his property. The words "every deed," which commenced the section, did not mean every trust deed, but every deed belonging to one of these particular classes, and the conditions which followed indicated that the absence of a trust deed was contemplated and provided for. Division 2nd, "If a trustee be appointed he shall execute;" division 7th, "Immediately on the execution thereof by the debtor, possession of all the property comprised therein of which the debtor can give or order possession shall be given to the trustee." And as the appointment of a trustee was not imperative, and as all trust deeds required a trustee, it was self-evident that arrangements were contemplated with property and without property, and that the application of the seven conditions must depend on the character of the deed that was executed. A contrary contention would leave without meaning the "if" in the second condition. The "every deed" referred to in section 194. must include the deeds comprised in section 192, and there a conveyance of a principal part of a debtor's effects was declared in terms. The learned counsel concluded by citing *Ex parte Godden re Shettle* (4) in Bankruptcy, in which case a deed of composition was holden by Mr. Commissioner Holroyd to be within the meaning of section 192, and, contending that the principle of *cessio bonorum* was obsolete, referred to the amalgamation of bankruptcy and insolvency, and to sections 98. and 99. of the Bankruptcy Act, 1861, which assisted pauper bankrupts out of custody and re-

(3) *Ubi supra*.(4) *Post*, page 87, next case.

lieved them from the costs of applying to the Court.

Mr. Bacon, on the same side, said, the question was, whether a deed by which the bankrupt has agreed to pay a certain sum to his creditors, either immediately or by instalments, is valid within the meaning of the 192nd section. It was contended on the general question, that the intention of the legislature was that composition deeds should be within the statute; and, as to this case, that every condition had been fulfilled. The seventh condition, requiring possession to be given to the trustees, had been complied with by handing the notes to the creditors. He entered into a full examination of the 192nd, 194th, 198th and 199th sections of the act of 1861.

Mr. G. M. Giffard and *Mr. Clement Swanston*, in support of the order of the Commissioner, said, that there had not been the requisite assent of creditors under the first paragraph of section 192, and that there had not been a giving of possession to the trustees under the seventh paragraph.

[*LORD JUSTICE KNIGHT BRUCE*.—Is the chief registrar satisfied as to the assents?]

Mr. Bacon.—Yes, he is. All that the bankrupt is bound to produce now is the affidavit stating the fact that three-fourths in value of the creditors have signed under the fifth paragraph.

[*LORD JUSTICE KNIGHT BRUCE*.—I think *Mr. Giffard* is entitled to have the assents of the creditors produced, or their absence accounted for.]

The assents were then produced, and it was found that the assent of Messrs. Eaton & Co., creditors for 1,400*l.*, was given only on the condition that all the creditors should be unanimous.—It was contended also that the affidavit was untrue, inasmuch as this assent was not given till afterwards, viz., on the 30th of October.

Mr. Giffard and *Mr. Clement Swanston*, on the general question, argued that there was no substantial difference between the old and new law. The doctrine of *cessio bonorum* was part of the bankrupt law: and was it to be assumed that the legislature intended to make this change without more express declaration? The learned counsel cited—

Tetley v. Taylor, ubi supra.

Ex parte Wilkes, in re *Wilkes*, 5 De Gex, M. & G. 418; s. c. 24 Law J. Rep. (N.S.) Bankr. 6.

Waller v. Adcock, ubi supra.

Irving v. Gray, 3 Hurl. & N. 34; s. c. 27 Law J. Rep. (N.S.) Exch. 273.

Ex parte Calvert, in re *Calvert*, 3 De Gex & J. 95; s. c. 27 Law J. Rep. (N.S.) Bankr. 42.

Moreover, the terms of the deed amounted to a trust.

[*LORD JUSTICE KNIGHT BRUCE*.—I do not think a trust has been created.]

Mr. Bacon, in reply.—In this case there is enough to support the deed, and the certificate of the registrar is conclusive. As to the deed, it is sufficient to support it that the sureties undertake to pay the composition, and no actual assignment for the benefit of creditors is required. The seventh rule of the 192nd section applies only to deeds where trustees are appointed. The case of *Tetley v. Taylor* is an authority since the act of 1861, for there composition deeds are by name included. The 192nd section must be held to comprise all trust deeds, composition deeds and deeds of inspectorship.

LORD JUSTICE KNIGHT BRUCE (Dec. 6).—Whether the deed on which the appellant relies in this case as invalidating the adjudication is an instrument so worded—an instrument such in its provisions—as to come, or be capable of being brought, within the 192nd section of the Bankruptcy Act, 1861, I decline expressing an opinion at this time. But I assume, for the present purpose, that it is so. I assume too in his favour, but without asserting it, that the seventh condition at the end of that section is not applicable in the present instance. I think, however, that he fails as to the first and the fifth conditions with respect to the assent or approval required. It seems to me neither established nor proved that, before the end of forty-eight hours mentioned in section 193, or before the entry there mentioned, or registration, the assent in writing or approval in writing necessary was obtained. Especially it is not, I think, shewn, or likely, that, as to the debt of Messrs. Eaton & Co. of 1,400*l.* or more, the condition mentioned in the letter of Messrs. Thompson and Phillips, dated the 27th of September, had, before or at either of those

periods, been complied with, and I am of opinion that neither the deed nor the registration affects the adjudication, which cannot, as I conceive, be properly, now at least, annulled; but if the appellant shall desire to adduce further evidence before us, or if he, or the persons to whom the assignment is made, shall desire to bring an action to try the validity of the adjudication, I have no objection to either course being taken, though I am not for any stay of proceedings under the adjudication.

LORD JUSTICE TURNER.—This is an application on the part of Samuel Bagley Rawlings, the bankrupt, to discharge an order of Mr. Commissioner Goulburn, confirming an adjudication of bankruptcy against him, and to annul the adjudication. The application proceeds upon this ground, that before the adjudication of bankruptcy the bankrupt had executed a deed, which it is contended was a deed of composition with his creditors, within the meaning of the 192nd section of the Bankruptcy Act, 1861, and the deed had been, as it was contended, assented to in writing by the requisite proportion of the creditors, both in number and value, and had been registered according to the provisions of the statute, upon the affidavit of the bankrupt verifying the facts of such assent, whereby, as it was insisted, the deed had become valid and binding upon all the creditors of the bankrupt, including the creditor at whose instance the adjudication was made. No question appears to have been raised before the learned Commissioner as to the deed having been assented to in writing by the requisite proportion of the creditors in number and value, but in the course of the argument before us the written assents of the creditors were called for on the part of the respondents, and were produced on the part of the bankrupt; and upon the production of them it appeared to my learned Brother, and I fully agree with him upon the point, that a creditor for 1,400*l.* or upwards, who had been reckoned by the bankrupt as one of the assenting creditors, had, at the time of the registration, given a conditional assent only, and not an absolute assent; and this debt of 1,400*l.* or upwards being deducted, there was not the requisite proportion in value of creditors assenting to the deed. It was indeed attempted to be made out on

the part of the bankrupt that, after deducting this debt of 1,400*l.*, there would still be the requisite proportion in value of assenting creditors; but this result was arrived at by deducting the amount from all the debts, and not from the amount of the debts of the assenting creditors only, a course of proceeding which is plainly wrong. Assuming, therefore, these facts to be properly before us, it would be impossible, as it seems to me, to maintain this deed; but I am by no means satisfied that we ought to take notice of these matters whilst the registration stands unimpeached; and, at all events, these matters arise upon new evidence, and the bankrupt, therefore, was well entitled to ask for liberty to adduce further evidence with respect to them. This application was made on his part, and if it be persisted in I am quite willing to accede to it; but, at the same time, I think it right to state my opinion upon the substantial points of the case, which were adjudicated upon by the learned Commissioner, and were fully argued before us. This appeal raises two questions: one, a general question extending to all cases; the other, a particular question applying to this particular case. The general question is this: whether the 192nd section of the Bankruptcy Act, 1861, applies to a mere deed of composition where the deed does not contain and is not accompanied by any *cessio bonorum*. Before the passing of this act the law was well settled that, in order to validate an arrangement between a debtor and his creditors under the Consolidation Act, there must be a complete *cessio bonorum*; and it was argued in this case, on the one hand, on the part of the bankrupt, that it was intended by this act to alter this state of the law, and on the other hand, on the part of the respondents, that there was no such intention, the provisions of the Consolidation Act and of this act upon the subject being, as it was insisted, substantially the same. The principle on which this act is framed seems to me to determine this question in favour of the appellant's view. This act is not framed upon the principle of repealing and re-enacting. Where no alteration is intended to be made, the Consolidation Act is left in force; where alteration is intended, the enactment of the Consolidation Act is re-

pealed. Seeing, then, that the enactments of the Consolidation Act upon this subject are repealed, we must, I think, conclude that an alteration in this respect was intended. The question then must be, to what extent was the 192nd section intended to affect the alteration? This must of course depend upon the terms of the section. It is in these terms: "Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management and winding up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed, that is to say: 1. That a majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to 10% and upwards shall, before or after the execution thereof by the debtor, in writing, assent to or approve of such deed or instrument. 2. If a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same. 3. The execution of such deed or instrument by the debtor shall be attested by an attorney or solicitor. 4. Within twenty-eight days from the day of the execution of such deed or instrument by the debtor, the same shall be produced and left (having been first duly stamped) at the office of the chief registrar, for the purpose of being registered. 5. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor, or some other person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number representing three-fourths in value of the creditors of the debtor whose debts amount to 10% or upwards have, in writing, assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed. 6. Such deed or instrument shall, before registration, bear such ordinary and *ad valorem* stamp duties as are hereinafter provided. 7. Immediately on the execution thereof by the debtor, posses-

sion of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees." The terms of this section, therefore, are perfectly general; they extend to every deed or instrument between a debtor and his creditors relating to the several matters which are mentioned in the section or any of such matters; and I do not see how it can be said that a deed of composition providing for the release of the debtor from his debts upon payment, either by him or by any other person on his behalf, of a composition upon those debts, although it may not contain any assignment of the debtor's estate, or any part of it, does not fall within those terms. It was said, however, that the conditions specified in the section, and other parts of the act which were referred to in the argument, proved that no deed or instrument which did not comprise or affect the property of the debtor was contemplated as being, or intended to be, within the operation of the section; but it is to be observed, that it is not limited in its operation to composition deeds, but extends generally to trust deeds for creditors which ordinarily do, and to composition and inspectorship deeds which may or may not, affect the property of the debtor. There are deeds, therefore, pointed out by the section to which all the conditions specified in it, and the other enactments referred to in it, would apply; and I do not think that it would be a sound construction of the section to hold that it was not meant to apply to any deed unless all the annexed conditions would also apply to it. The argument would, as it seems to me, go too far. It would exclude from the operation of the section not only releases founded on covenants to pay at a future day, but all deeds and instruments of arrangement with debtors having no available property; and this, too, notwithstanding the act in terms extends to insolvents of every class and description. The better conclusion, I think, is, that these conditions are to be read with reference to the subject-matter to which they are applied, *reddendo singula singulis*. On the general question, therefore, my opinion is, that this section extends to deeds of composition, although there may be no *cessio bonorum*; but I desire to be understood as expressing this

opinion with all possible deference to the contrary opinion expressed by one or more of the learned Barons of the Court of Exchequer, for whose opinion I entertain the highest respect.

Having said thus much upon the general question, I proceed to consider the particular question arising in this case. Although this section, in my opinion, extends to deeds of composition where there is no *cessio bonorum*, it does not, in my judgment, extend to deeds of composition of every description. I agree in the opinion expressed by one of the learned Barons of the Court of Exchequer, that, in order to bring a case within the section, the composition must be with all the creditors. I read the section thus: "Every deed or instrument relating to the debts and liabilities of the debtor, and relating also to his release therefrom, or to the distribution, inspection, management and winding up of his estate, or to any of such matters, shall be valid and effectual under the proviso which is mentioned in the section": in effect, that the deed must relate to the debts and liabilities, and to some one or more of the other specified matters; and I think that the words "debts" and "liabilities," as used in the section thus read, must be taken to relate to all the debts and liabilities; for not only is this, as I conceive, the ordinary meaning of the words, but it is scarcely possible to suppose that the legislature could intend that all the creditors should be bound by an arrangement which was partial, and confined in its operation to some of them only. In all these cases, therefore, I think the question to be considered must be, does the deed or instrument extend to all the creditors? Now, the deed before us in this case is as follows: "This indenture, made the 11th of October 1862, between Samuel Bagley Rawlings of the first part, Martha Rawlings and John Brown of the second part, and the several persons whose names are contained in the schedule hereunder written, and who by themselves, their partners or agents respectively, have executed these presents, being creditors of the said Samuel Bagley Rawlings, of the third part;"—confined, therefore, as to parties, to the parties who, being creditors, have executed these presents.—"Whereas the said Samuel Bagley Rawlings has for

some time past carried on business as maltster and corn, seed and cake merchant, at Oakham aforesaid, and now stands indebted to the several persons parties hereto"—that is to say, to the persons who have executed this deed—"in the several sums of money set opposite to their respective names in the schedule hereunder written, which he is unable to pay in full; and whereas the said John Brown is a large creditor of the said Samuel Bagley Rawlings, and it has been agreed by and between the several persons parties to these presents that the said Martha Rawlings and John Brown shall pay to the several creditors of the said Samuel Bagley Rawlings"—there the expression is more general—"a composition of 7s. 6d. in the pound on the amount of their respective debts"; then the mode in which that composition is to be paid, namely, by three instalments, is specified, "and to be secured by the joint and several promissory notes of the said Samuel Bagley Rawlings, Martha Rawlings and John Brown: and whereas the said promissory notes have been respectively delivered to the several creditors of the said Samuel Bagley Rawlings, persons parties hereto of the third part,"—going back again to the persons the parties to this deed.—"And whereas, in order to enable the said Martha Rawlings and John Brown to meet the said promissory notes, it has been agreed by and between the several parties hereto, that all the stock-in-trade, fixtures, trade effects, and all other the estate and effects whatsoever of the said Samuel Bagley Rawlings, shall be assigned to Martha Rawlings and John Brown in manner hereinafter expressed." Then the deed witnesses that Samuel Bagley Rawlings assigns to Martha Rawlings and John Brown all his estate; and there is a power of attorney to enable John Brown and Martha Rawlings to get in the property. "And in consideration of the premises, the said creditors parties hereto of the third part do hereby, for themselves severally and respectively, and for their several and respective heirs, &c., covenant and agree to and with the said Martha Rawlings and John Brown, and also separately with the said Samuel Bagley Rawlings, that the said composition so agreed to and secured as aforesaid shall be and the same is hereby taken and secured by them the

said creditors respectively in full satisfaction and discharge of their several respective debts and demands against the said Samuel Bagley Rawlings, the full amount of which said debts and demands are set opposite to the respective names of the said creditors executing these presents in the schedule hereunder written." Then there follows a covenant for further assurance on the part of Samuel Bagley Rawlings. This deed is not, as it seems to me, a trust deed for the benefit of creditors. There is no trust fixed upon the property assigned by it. It is, as it seems to me, a mere deed of arrangement between the bankrupt and the parties to whom the property is assigned, by which those parties come under the obligation of paying the creditors of the bankrupt to whom promissory notes were given, but no others of his creditors. No creditor of the bankrupt could, as I understand this deed, insist in his own right, or otherwise than through the bankrupt, on his debt being paid, or on a promissory note being given to him for the payment of it. I agree, therefore, with the learned Commissioner, that this is not a deed of composition within the meaning of the 192nd section; and, subject to the option on the part of the bankrupt to adduce further evidence as to the assent, if it shall be desired on his part to do so, I think that this application must be refused, and with costs to the extent of the deposit.

On a subsequent day (Dec. 10), counsel informed the Court that the bankrupt did not propose to call any further evidence (7).

WESTBURY, L.C. } *Ex parte* WATTS, in re
Dec. 12. } ATTWATER.*

Assignees, What passes to—Order and Disposition—Lien.

In December 1861 the bankrupt contracted with W. to build a barge for him, to be paid for in bricks; the barge to be completed on the 5th of June 1862. The bankrupt hired a yard for a certain number of months, for the purpose of completing the contract, which period expired before the completion of the work, and W. then

hired the yard. In June it was agreed by the bankrupt in writing that the barge should be held by W. as a security for advances made by him. In July the bankruptcy took place. The advances made by W. exceeded the amount of work done and materials supplied by the bankrupt:—Held (reversing the decision of the County Court Judge sitting in Bankruptcy), that W. had a lien upon and was entitled to hold the barge, unless the assignees chose to complete the contract.

This was an appeal from an order made by Mr. Espinasse, at the County Court, No. 48, Bromley, &c., in the matter of the bankruptcy of J. W. Attwater. In December 1861 the bankrupt was employed by the appellant, a brickmaker, to build a barge for him, the purchase-money for which was to be paid in bricks, the quantity to be supplied not to exceed in value the amount of work done. The barge was to be completed on the 5th of June. The bankrupt, at the request of the appellant, hired a yard of a Mr. Page for several months, in which to build the barge. The time having expired for the building of the barge, the bankrupt signed a memorandum, bearing date the 24th of June 1862, whereby he declared that the barge and timber in the yard should be held by the appellant as a security; and by a receipt, dated the 25th of June, he acknowledged that the appellant had paid him the sum of 266*l.* 14*s.* 9*d.*, and a further sum of 20*l.* for the hiring of the yard, which had not been paid by him. The 5th of June having elapsed, and the bankrupt having discontinued the building of the barge, another shipwright, of the name of Burgess, was engaged by the bankrupt to complete the work, but whether as the servant of the appellant or not did not appear. The yard, after the expiration of the time for which it was let to the bankrupt, was taken by the appellant. The date of the adjudication was the 17th of July 1862. The County Court Judge said that the barge was in the order and disposition of the bankrupt at the time of his bankruptcy on the 17th of July, and directed that it should be given up to the assignees. The present appeal was then brought by Watts.

Mr. Bacon and Mr. Martindale appeared for the appellant.

(7) See the case, *supra*, p. 15, of *Ex parte Morgan*, in re Woodhouse, on the same subject, before the Lord Chancellor.

* See *ante*, *Ex parte Cole*, in re Attwater, p. 11.

Mr. Fooks, for the assignees.

The following cases were cited:

Wood v. Russell, 5 B & Ald. 942.

Clarke v. Spence, 4 Ad. & E. 448; s. c. 6 Nev. & M. 399; 5 Law J. Rep. (N.S.) K.B. 161.

Holderness v. Rankin, 28 Beav. 180; s. c. 2 De Gex, F. & J. 258; 29 Law J. Rep. (N.S.) Chanc. 753.

The LORD CHANCELLOR.—I do not think there is any reasonable doubt in this case. A person of the name of Watts contracts with the bankrupt Attwater, for the building by the latter of a barge. A special part of that contract is as to the mode of the payment of the price. It was to be paid for in bricks, to be delivered by Watts to Attwater. There was no particular stipulation as to the work being measured previously to any payment being made, nor was the price to be paid by instalments. I should have been disposed to agree, therefore, that this barge would have remained the property in its unfinished state, and even in a finished state, of the builder, until it was actually delivered in pursuance of the contract. But what afterwards took place altogether varies that legal position of the matter. It appears that Watts paid more money than the value of the work done by the bankrupt anterior to the 5th of June. It also appears that the barge being originally constructed in a yard which the builder had taken a lease of, or had contracted for the possession of, for a certain number of months, that period of time expired before the barge was complete, whereupon the purchaser of the barge hired the yard himself, and thenceforward the barge was a chattel upon premises belonging to Watts, the contractor with the bankrupt. Then it appears that on the 5th of June the bankrupt did not proceed any longer with the building of the barge, which was then handed over to a person named Burgess. Burgess was a shipwright, employed by the bankrupt Attwater, but it does not appear that he was a servant of Attwater. On the 14th of June 1862 Attwater was unable to pay the money then due to Mr. Page, from whom the yard was hired. On the 24th of June, the amount of the payment made by Watts in respect of the barge was ascertained, and the sum

of 266*l.* 14*s.* 9*d.* was then admitted by Attwater to have been received by him, and a receipt was accordingly given by him to Watts for that aggregate amount. At the same time, it was agreed that Watts should pay 20*l.* to the owner of the barge, and that the 20*l.* should be considered a further sum of money paid on account. Then there is a memorandum of agreement, dated the 24th of June, signed by Attwater, which, acknowledging the receipt of the money, declares that the barge and timber on the wharf shall be held as a security by Watts until the agreement for the construction of the barge shall be fulfilled. Is it possible after that to contend that there was any property in the barge, except that property which remained in Attwater after the agreement was fulfilled, and the barge was in a condition to be launched? The barge was in an unfinished state, and was to be held by Watts as a security. Under these circumstances, the only thing that remains to inquire is, what was the amount of work done by Attwater up to the 17th of July? Here the evidence varies. The evidence for the contractor, Watts, makes the amount 18*l.* less than the sum at which the assignees put the value. But even that amount does not exceed 270*l.* 11*s.* 4*d.*; and it is shewn on the face of the contract that on the 24th of June, 286*l.* 14*s.* 9*d.* had been actually paid by Watts. The result is, that Watts is entitled to the benefit of that lien, and to hold the barge, and the place where the barge was at the time of the bankruptcy, unless the assignees choose to redeem the barge. The option I shall offer to the assignees is, to complete the contract in like manner as the bankrupt was bound to do. If they decline that offer, I must declare Watts entitled to the benefit of the lien, and reverse the order.

The assignees having declined the offer to redeem the barge,

The LORD CHANCELLOR said he could not make the assignees pay the expense of this new hearing, because he must apply to this case the ordinary rule, which prevented him making the respondents pay costs. But he would make an order that the assignees' costs of the application to the County Court Judge should not be allowed them out of the estate. It was high time that steps should be taken to check the disposition to make these applications, in consequence

of the unhappy facilities that have been afforded to them.

Mr. Fooks said, that the application had been made with the consent of the creditors and with the sanction of the Judge.

The LORD CHANCELLOR.—Then the creditors should give indemnity.

LORDS JUSTICES. }
Nov. 24; } *Ex parte* GODDEN, *in re*
Dec. 6. } SHETTLE.

Composition Deed—Registration—Protection from Arrest—Secured and Unsecured Creditors—Sections 97, 185, 192. and 198. of the Bankruptcy Act, 1861.

A deed executed between the debtor of the one part, and the several other persons whose names and seals were subscribed and set, being severally creditors of the debtor, of the other part, whereby a composition was paid in cash to the creditors upon their executing the deed, was declared by one of the Commissioners to be within the protection of the 192nd section of the statute 24 & 25 Vict. c. 134; and was also declared, upon being duly registered and the certificate of registration obtained, to be within the 198th section of the same act. After certificate of registration, the amount of composition was tendered to the only dissenting creditors and to their solicitors, and refused; and those creditors (knowing of the deed and of its registration) having arrested the debtor upon a judgment before obtained, the same Commissioner ordered his release. Upon appeal, the Lords Justices decided that the Commissioner had jurisdiction to order his release; but that the word "creditors," in the 192nd section, comprised the secured as well as the unsecured creditors; and it appearing that the necessary proportion of creditors had not assented to the arrangement, and that the deed would enure to the benefit of those creditors only who executed it, — the true interpretation of the act being that it should be for the benefit of all the creditors,—the order of release was discharged.

This was an appeal by Messrs. Godden, creditors of Thomas Shettle, of Southampton, butcher, against an order of Mr. Commissioner Holroyd, directing that he should be released from custody, on the ground

that he was entitled to protection under the Bankruptcy Act, 1861, as having executed a deed of composition with his creditors within the 192nd section. The deed was as follows:—"This indenture, made the 12th of August 1862, between Thomas Shettle, of the town of Southampton, butcher, of the one part, and the several other persons whose names and seals are hereunto subscribed and set, being severally creditors in their own right, or in co-partnership, or being agents of creditors of the said Thomas Shettle (and hereinafter called the creditors), of the other part; whereas the said Thomas Shettle being indebted unto the said several persons whose names and seals are hereunto subscribed and set, or their respective principals, in the several sums of money set opposite their respective names in the schedule hereunder written, and being unable to pay the same in full, he has lately proposed to the said creditors, and it has since been mutually agreed between the parties hereto, that the said Thomas Shettle should pay to the said creditors, and that they should accept from him, a cash composition of 4s. 6d. in the pound on the full amount, and in full discharge of their respective debts, and that upon payment thereof the said creditors should execute the release and indemnity hereinafter contained. Now this indenture witnesseth that, in pursuance of the said agreement, and in consideration of the premises and of the payment to each of the said creditors aforesaid of a composition of 4s. 6d. in the pound, upon and in discharge of their said respective debts and claims, the receipt whereof they do hereby respectively acknowledge, they, the several creditors, do, and every of them doth, by these presents, fully and absolutely acquit, release and discharge the said T. Shettle, his heirs, executors and administrators, of and from all and singular the debts, sums of money, bills, bonds, notes, accounts, reckonings, costs, charges, damages, expenses, judgments, executions, actions, suits, claims and demands whatsoever, either at law or in equity, which they the said several creditors respectively, or their or any of their partner or partners respectively now have, or shall or may, or otherwise could or might hereafter have, claim, challenge or demand, of, from or against the said T. Shettle, his heirs, executors or administrators, or his or

their lands or tenements, goods or chattels, estate or effects, or any of them, for or by reason or on account of the debts, claims and demands of them, or any of them, respectively, due or owing from the said T. Shettle, and set forth in the said schedule to these presents, and all interest and arrears of interest for or in respect of the same several debts and premises, or any of them, or for or by reason of any other matter, cause or thing whatsoever relating thereto. Provided always, that the release hereinbefore contained shall be without prejudice to and not extend or be construed to extend to prevent any of the said creditors from claiming or realizing any security now held by them, or any of them, or from suing any person or persons other than the said Thomas Shettle, liable to payment thereof, for the recovery thereof. In witness," &c. This deed was executed by twenty-two creditors out of twenty-three, the only dissenting creditors being the Messrs. Godden, the present appellants, who were judgment creditors for 118*l.* 18*s.* 10*d.*, and 174*l.* 5*s.* 7*d.*; together, 293*l.* 4*s.* 5*d.* The twenty-two creditors executing the deed represented debts amounting to 1,407*l.* 14*s.* 3*d.* Mr. Shettle executed the deed on the 20th of August, and it was registered on the following day. On the 25th the certificate of due registration was obtained in the form prescribed by the 19th General Order, with the following note indorsed:—"Note. This certificate is available to the said A. B. (the debtor) for all purposes as a protection in bankruptcy."

On the 26th of August notice of the registration of the deed was given to the Messrs. Godden, and a tender was made to them of the composition for the amounts of their debts respectively, which they refused to accept. Upon this a like tender was made to their solicitor on their behalf, and he also refused it.

On the 24th of October Thomas Shettle was arrested upon a *ca. sa.* issued at the suit of the Messrs. Godden, notwithstanding the chief registrar's certificate, of which the sheriff's officer had notice at the time of the arrest.

Shettle himself, and one Brooks, who tendered the amount of the composition to the opposing creditors, deposed by affidavit to the foregoing facts. In an affidavit, however, filed by or on behalf of the op-

posing creditors, it was stated that one Aldridge, a creditor for 300*l.*, who had executed the deed, had so executed it upon the express agreement that he should receive the composition upon the whole amount of his debt, although he then held securities from the debtor to nearly the full amount of his claim, and had, in fact, as the deponent believed, realized 120*l.* by the sale of a portion of those securities before he executed the deed. But the allegation was contradicted by Mr. Shettle, who stated that the securities in question belonged to one Watts, a bankrupt, whom he had opposed upon his application for his certificate; that the creditor upon signing the agreement to accept the composition had expressly reserved his right to retain possession of the securities in his hands deposited by Watts, and that the only knowledge which he, Thomas Shettle, had respecting the realization by the creditor of the 120*l.* from the securities in his hands was derived from the affidavits referred to.

It was admitted on both sides that no leave had been applied for before issuing proceedings against Mr. Shettle, as required by the 198th section of the Bankruptcy Act, 1861, which enacts that "after notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant without leave of the Court, and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the Court shall be available to the debtor for all purposes as a protection in bankruptcy."

Mr. Shettle therefore applied for his release, and after hearing the question fully argued, Mr. Commissioner Holroyd gave judgment on the 17th of November 1862, in the following words: "It seems to me that the objection made to the want of the requisite amount of assents has been completely answered by the affidavit of the debtor which has just been read. It appears that the securities referred to in the affidavit of Mr. Mackay were not the securities of

Shettle, but of a third party; and that being so, they form no objection to the introduction of Aldridge as a creditor. With respect to the general features, I think that upon consideration of the cases which have been referred to, of *Ex parte Castleton* (1), and *Walter v. Adcock* (2), it is my duty, in accordance with the opinions expressed by the Lords Justices in *Ex parte Castleton*, to decide that composition deeds are within the 192nd section of the act of parliament. I think that the seventh condition of that section does not apply to a case where no trustee is appointed, and that it does not apply to a simple composition deed, that is, a deed providing for the payment of a certain sum in discharge of the debt. There is this further point in the case, that in this deed there is not, as in *Walter v. Adcock*, a covenant to pay *in futuro*, but an engagement to pay the amount of the composition down at once; and it would seem that the composition has been actually paid to all the assenting creditors, and tendered to the Messrs. Godden, who are the only dissentients. I must therefore order the debtor to be released. I think, however, that the Court ought to be careful how it interferes with the common law rights of creditors. If these creditors wish to take the opinion of the Lords Justices, I will delay the issuing of the order for release for a few days."

It was from this judgment that the Messrs. Godden appealed.

Mr. G. M. Giffard and *Mr. Ernest Reed*, in support of the appeal, objected that the deed was bad, being made in favour only of those who should execute it, so that all dissenting from its terms were excluded. The word "creditors" in the 192nd section of the Bankruptcy Act, 1861, included secured and unsecured creditors both, and, taking them together, the number required by the act had not assented. The list of creditors to which *Mr. Shettle* had sworn was therefore inaccurate and incomplete. To shew the meaning of the word "creditors," the learned counsel referred to the 185th section. Again, as before argued, the deed did not comprise all the creditors, but only those who executed the deed, and the others could claim no advantage under it. The

requisite majority had not executed the deed, and from the General Order in Bankruptcy, dated the 22nd of May 1862, it was clear that it was intended that both secured and unsecured creditors should be comprised, as the amounts of their debts were thereby ordered to be placed in separate columns.

[LORD JUSTICE KNIGHT BRUCE.—We cannot recognize the order as of any authority upon the interpretation to be put upon any passage of an act of parliament.]

Composition deeds were not within the 192nd and following sections—*Walter v. Adcock* (3). Another objection to the deed was, that it contained no *cessio bonorum*. And as there was no bankruptcy, the Court had no jurisdiction to order the debtor's release.

Mr. Baggallay and *Mr. Doria*, in support of the Commissioner's order, argued that the question of jurisdiction to order the prisoner's discharge was settled in *Ex parte Castleton* (4). The 97th section of the new act shewed that secured creditors were not to be reckoned; and if that view were right, the necessary proportion in number and value of the creditors had executed the present deed. The section expressly included composition deeds, and no objection could be sustained on that ground. The creditors, the appellants, had chosen to disregard the provisions of the act by arresting the respondent without obtaining the sanction of the Court. No *cessio bonorum* was now necessary; and *Walter v. Adcock* was plainly distinguishable from the present case, inasmuch as it contained only a covenant to pay *in futuro*. The dicta in *Walter v. Adcock* were founded upon this, that if the legislature had intended to introduce composition-deeds for the first time within the purview of the bankrupt law, it would have done so in clear and unmistakeable terms, such intention had been as clearly and unmistakeably shewn as it was possible to be where express words were not used, and therefore those dicta, so far as intention was concerned, were unsupported. Another reason suggested by the learned Barons of the Exchequer was, that not only a *cessio bonorum* was required, but a *cessio bonorum omnium*, in accordance

(1) 31 Law J. Rep. (N.S.) Bank. 71.

(2) 7 Hurl. & N. 541; s. c. 31 Law J. Rep. (N.S.) Exch. 380.

(3) *Ubi supra*.

(4) *Ubi supra*.

with the case of *Tetley v. Taylor* (5). The law upon which that case was founded had no existence under the act of 1861; in proof of which it was quite clear that no *cessio bonorum* was required by the 192nd section. The learned counsel referred to the second and seventh conditions of that section as illustrating their proposition, and referred again to *Ex parte Castleton*, in which their Lordships had themselves expressed opinions that not only was it not necessary to have an assignment of all the debtor's property, but that it did not appear that any assignment at all was required. Under these circumstances, it was submitted that not only were the objections of the Chief Baron and of Mr. Baron Martin fully answered, but that the opinion of Mr. Baron Wilde and the intimation of opinion of Mr. Baron Bramwell in *Walter v. Adcock*, and the opinions of the Lords Justices in *Ex parte Castleton*, that composition deeds were comprehended within the 192nd section, was the proper and only reasonable construction upon this point. But even if a *cessio bonorum* were necessary, the payment of the composition in cash to the creditors upon their executing the deed was a *cessio* amply sufficient to satisfy the requirements of the act in that respect. The present deed was strictly in accordance with the case of *Ex parte Castleton*, and therefore within the 192nd section. This being so, these creditors were bound by the deed; and being so bound, it was their duty to have obtained the leave of the Court, under the 198th section, before they proceeded to arrest the debtor. By the interpretation clause, section 229, the words "the Court" were declared to mean the "Court of Bankruptcy," which alone, therefore, had jurisdiction after a debtor had obtained his certificate of registration. Instead of obtaining such leave, the creditors had insisted upon their common law right, and acted in defiance of the act of parliament. They could not then complain if their acts were fruitless. They had direct notice of the registration of the deed; the amount of composition was actually tendered to them and to their solicitor, and refused; which distinguished this case from *Walter v. Adcock*, where the composition was payable *in futuro*. The only other

point in the case was, whether or not these creditors could, upon an application like the present, discuss the validity of the deed at all. He submitted they could not.

Mr. G. M. Giffard was heard in reply, and referred to the 113th section of the Act of 1861, which provided that a party should not be discharged on a mere matter of form.

LORD JUSTICE KNIGHT BRUCE (Dec. 6). — In this case, which is one of an appeal from a most able and experienced Commissioner, several points have been argued. One was as to jurisdiction, with regard to which it was contended that the learned Commissioner had not the power to make the order or to entertain the application in which it was made, there not having been an actual bankruptcy. That is a point which is certainly open to a difference of opinion. My opinion, on looking at sections 192. and 198, and other parts of the Act of 1861, is, that the Commissioner has jurisdiction, that it is not necessary to apply to a Judge of one of the Courts at Westminster, and that the appellant's objection as to this point is not well founded, though I do not feel confident upon it. I will assume, however, that the respondent is so far right. The second point relates to the meaning of the word "creditors," in the second paragraph of the 192nd section. Does that word mean and extend to creditors holding securities, good or bad, sufficient or insufficient, as well as to those wholly without security? The respondent contends that it does not; the appellants say that it does. If, as the respondent contends, it does not, then the requisite assent has been obtained; but if the word "creditors" is not to be limited, and ought to be construed as extending to all creditors, secured and unsecured, then two-thirds in value of the creditors were not assenting or approving parties on the 12th day of August 1862. Consequently, if the latter view be the true one, the application to the learned Commissioner was, in my judgment, wholly groundless, unless, indeed, the objection of the respondent as to registration be well founded. But that contention, I think, wholly fails, and, in my opinion, neither registration nor the certificate assists the respondent's case for any effectual pur-

(5) 1 El. & B. 521; s.c. 21 Law J. Rep. (N.S.) Q.B. 2, 346.

pose. The word "creditors," if construed literally, according to grammar and according to idiom, must be read as the appellants contend. But does the context, founded on a general purview of the statute, demand or justify any departure from this reading? I find myself unable to answer that question in the affirmative, and I am unable to see that the respondent's case is advanced or assisted by the 97th section or by the interpretation clause. It seems to me that the word "creditors" in the first condition of clause 192. ought to receive a literal interpretation, in conformity with grammar and idiom; and the respondent's case, therefore, upon that ground also, fails. It has been said that this construction is likely to produce inconvenience. But if it be desirable to estimate degrees of inconvenience, whether greater or less, I must observe that the respondent's interpretation is likely to produce quite as much inconvenience as the appellants', though perhaps of a different kind. I do not express my opinion on any other point than this. Differing with the utmost respect from the learned Commissioner, I think the order should be discharged. If it be true that a hope has been recently expressed by one of the learned Judges of the Courts at Westminster for a legislative revision of this act, I join in that hope; nor will the revision, I trust, be narrow in its range nor long delayed.

LORD JUSTICE TURNER.—I am also of opinion that this order cannot be supported. The learned Commissioner could not, as it seems to me, have any jurisdiction to make the order, unless the deed executed by the respondent was valid and binding on all the creditors, under the provisions of the 192nd section of the Bankruptcy Act, 1861; and, in my opinion, this deed, like the deed in *Rawling's case* (6), was not so valid and binding: primarily, I think, for the same reason as in that case, the deed does not extend to all the creditors, for the deed is in this form (which his Lordship read). I do not see how any creditor not a party to the deed could insist on coming in under it, and being paid the composition provided by it; but beyond this, there is, as it seems to me, another objection which is fatal to

this deed. I think it has not the assent of the necessary proportion in value of the creditors; for, according to the best opinion which I can form upon the point, I think that, in reckoning the proportion of assenting creditors under this section, the debts due to secured as well as unsecured creditors must be taken into account; otherwise creditors imperfectly secured would be left at the mercy of the unsecured creditors. The Order of May 1862, referred to in the argument, may probably have been intended to meet this difficulty; but I do not think that the construction of the act can be altered or affected by any general order. The order of the learned Commissioner must be discharged (7).

WESTBURY, L.C. } *Ex parte* BARNEY, in re
Dec. 12. } HORTON.

Act of Bankruptcy—Absence—Annuling Adjudication—Costs.

A trader absented himself for three or four days from his place of business, and in his absence a bill of exchange was presented for payment and was dishonoured; and application was also made for payment of other bills. The trader was adjudicated bankrupt, the act of bankruptcy being this absence "with intent to delay his creditors." One of the Commissioners in the country annulled the bankruptcy, the alleged bankrupt swearing that his absence was occasioned by an attempt of his to get up evidence of perjury against one of his workmen and to obtain pecuniary assistance. Pending this dispute as to the adjudication, the trader signed a declaration of insolvency. On appeal, the decision of the Commissioner was affirmed, on the ground that there was not sufficient evidence to support the adjudication; but the Lord Chancellor, under the circumstances, refused to allow the trader his costs, as his "declaration of insolvency" whilst applying to annul an adjudication was inconsistent with an honest desire for the equal distribution of his assets.

This was the appeal of Mr. Theophilus Barney, the petitioning creditor, for an

(7) See the case, *ante*, p. 15, of *Ex parte Morgan*, in re Woodhouse, before the Lord Chancellor, on the same subject.

(6) See *ante*, p. 27.

adjudication against Mr. Joshua Horton the younger, of Worsley, in Staffordshire, iron-founder, against an order of Mr. Commissioner Sanders, dated the 3rd of December 1862, by which the adjudication against Mr. Horton had been annulled with costs. The facts are of rather a complicated character, and will be best understood from a connected narration collected from the allegations in the petition of appeal and the affidavits; and they were as follows: The petition for adjudication was filed on the 20th of October 1862, and the adjudication was made by the registrar on the 22nd of the same month; the amount of the petitioning creditor's debt was 133*l.* 16*s.* 7*d.* A notice of an intention to proceed in Bankruptcy was left at the bankrupt's house on the 13th of October by another creditor named Webb, and the particulars of the demand (71*l.* 18*s.* 1*d.*) were left there on the 14th; on the 29th of October a trader-debtor summons at the suit of Webb was issued against Mr. Horton, returnable on the 5th of November, and on the 4th Mr. Horton signed an admission of the debt. During the dispute as to the validity of the adjudication, Mr. Horton signed a declaration of insolvency; and very soon after it was filed, namely, on the 15th of November, another petition for adjudication was filed by the same solicitor who conducted the former adjudication; and immediately after the order of Mr. Commissioner Sanders was made, the second petition for adjudication was opened, and Mr. Horton was adjudicated bankrupt on the 4th of December. It is now necessary to go back a little and state the circumstances on which Mr. Commissioner Sanders founded his judgment in annulling the first adjudication, which were these: Mr. Horton, in the course of his business transactions, made a contract with one Mr. Price for the supply of iron for the construction of the Northern Outfall Sewer in the county of Essex, and in the performance of that contract he employed a man named Furnell to superintend the placing of the iron in the works. About the end of September 1862 a dispute arose between Furnell and the workmen employed in the placing of the iron in the works concerning the payment of wages; the dispute was taken before the board of Magistrates at Ilford, and their Worships made an order

on Mr. Horton to pay the amount, about 300*l.*, dated the week previous to the 13th of October. On Sunday the 12th of October Mr. Horton left his home for the purpose (as he alleged) of attending, at Chelmsford, the hearing of the appeal against the order in the wages dispute, and which was appointed to come on on Tuesday the 14th of October, and on the previous day he had to attend before the magistrates at Stratford to enter into his recognizances; on that day (Monday) a bill for 260*l.* which he had accepted became due, was presented and dishonoured, and other debts became payable, one of which was paid. The appeal did not come on till Wednesday, when the magistrates decided that they had no jurisdiction. Mr. Horton then went to London, and was engaged in collecting evidence in support of a charge of perjury against one of his workmen for some swearing in the matter of the wages dispute, and he returned home on the following Saturday. Before he went, however, he endeavoured to get money from Furnell. Before Mr. Horton left home on the 12th of October he consulted his solicitors, and on their advice (as he alleged) he directed his foreman to deliver on Monday a quantity of pig-iron, and on the Sunday Mr. Horton sold 150 tons of pig-iron for 3*l.* a ton; and this sale was made (as creditors alleged) to enable Horton to enter into the recognizances. Whether the works were suspended during Horton's absence was questionable on the evidence. After the delivery of Webb's notices, another creditor named Smith went to the works and found them shut up; and Mr. Barney gave evidence that Messrs. Corser & Walter, Mr. Horton's solicitors, sent him a circular, dated the 18th of October, saying that that gentleman had been obliged to stop payment, and that a meeting of his creditors would be held at their office on the 21st of that month. The only other important piece of evidence was, that on the 29th of September Mr. Horton executed a bill of sale to secure a debt due to one of his family.

The Commissioner considered that the absence of Mr. Horton was not for the purpose of "delaying his creditors," and annulled the adjudication, with costs.

Mr. Daniel and Mr. De Gex supported the appeal, and cited—

Ex parte Kilner, 2 Deac. 324; s.c. 3 M. & A. 722.

Holroyd v. Whitehead, 3 Camp. 530.

Mr. Bacon and Mr. Bardswell, for the bankrupt, said that the Commissioner had given the most patient and attentive hearing to all the arguments that had been presented for his consideration before he came to the conclusion at which he had arrived, and that the decision ought not to be disturbed.

The LORD CHANCELLOR.—I am very sorry to be obliged to arrive at the opinion I am about to express. I am called upon to reverse an order of a learned Commissioner who, I have no doubt, has been correctly represented to have given a most patient and attentive hearing to this matter. In order to do that, I must be sure that the Commissioner has arrived at an erroneous conclusion. I am by no means satisfied that the Commissioner has arrived at a correct conclusion; but, unfortunately, I have not the means of proving satisfactorily that that conclusion is an erroneous one. I have said that I regret this, and for the following reason: I have here a man entirely and confessedly insolvent. It is impossible not to conclude that at a time coeval with the adjudication he was insolvent. I have before me an adjudication which was most desirable for the creditors; and if the bankrupt had been honestly desirous of a distribution of his property amongst them, I do not see why he should have been a party to dispute that adjudication. It amounts to something absurd and ridiculous that a man who has confessed that, from the 10th of October, he was abundantly (if such an expression may be used), at least grossly, insolvent, should come to this Court with an application to annul the adjudication, admitting that he was in such a condition as that the only proper proceeding was an adjudication. I am compelled, however, by the state of the law, to consider whether there has been that which the act of parliament renders still requisite, namely, an act of bankruptcy. I cannot conceive that the real applicants to annul this adjudication, or that one of those applicants, is a party endeavouring to support that act of the 29th of September, proved in evidence, which immediately pre-

ceded the state of insolvency. The present petitioner, however, tells me that, upon a deliberate examination of all the circumstances, he feels himself compelled to put the act of bankruptcy upon this: that the bankrupt remained in London, without any reasonable cause, during Thursday, Friday and part of Saturday, and being, as he knew, entirely insolvent, he ought to have inferred that his absence would necessarily defeat his creditors. In order to consider a portion of time so small as these two days and part of a day, we are compelled to look a little further back and inquire when and for what purpose the bankrupt came to London. He went to London on Sunday; and if I had found upon the evidence anything to bring into reasonable doubt the ground assigned by the bankrupt for going to London, I think I should not have hesitated to concur in the prayer of the present petition. But the difficulty I feel is this: It can hardly, I think, be disputed that the bankrupt went to London *bonâ fide* for certain purposes, though the facts are not clearly ascertained, one of which was to prosecute an appeal against an order made by the magistrates for payment of wages to workmen in his employ. I do not know that the bankrupt did not go London for this purpose. He entered into the necessary recognizances; he applied to a solicitor; he employed counsel, and I have no doubt he was a *bonâ fide* litigant. I find him thus engaged on Monday, Tuesday and Wednesday, and I admit he was reasonably detained, and that he went for a reasonable purpose. Now, passing over these three days, we will come to the day when the bankrupt returned to London, and see whether the return and the delay during Thursday and Friday were consistently accounted for. It appears that the bankrupt on Sunday—the day when he went to London—found himself without the means of going to London. Then a very extraordinary circumstance took place. He went, it is said, whether or not truly, under the advice of a solicitor, to some person to whom he was recommended to apply, and was induced to dispose of a part of his property to this person on the Sunday, to the extent of 150 tons of pig-iron, for which he was paid 3*l.* a ton. It then appears he agreed with the solicitor that the solicitor should communicate to his creditors his state of insolvency, and

should summon a meeting of the creditors for that purpose. I think it is in favour of the bankrupt that they communicated to Barney their instructions so to do. I then find that upon Friday notices are sent to the creditors of the bankrupt, calling upon them to attend a meeting on the following Tuesday. If the bankrupt had stayed away over the day of that meeting, his absence might not have been consistently accounted for; but I cannot make his return on Saturday consistent with any theory that he remained away on Thursday and Friday without a reasonable purpose. In order to shew that the purpose was not a reasonable purpose, it is not sufficient to shew it was not in accordance with the dictates of prudence; it must be shewn that it was not a sincere purpose nor an honest purpose, that it was a mere sham and pretext. The story about the prosecution is a very singular and a somewhat improbable story. But I am unable to give it judicially that designation, because I have not had the circumstances connected with it fully sifted. Then, in justice to the bankrupt, I must take the story as I find it. On Monday the bankrupt takes out a summons in an action for perjury against one of his workmen, upon whose evidence, it was said, the order against which the bankrupt was appealing was obtained. The bankrupt, returning to London from his discomfited appeal, and finding that the constable had been unable to serve the workman, personally attempted to discover where the alleged offender was to be found. The bankrupt says he spent Thursday and Friday in a way which, if it were untrue, might have been disproved, and which, in mercy and in reason, may be considered to be compatible with the alleged motive of his remaining. It is said that if he had received the money from Furnell, he might have hurried back earlier; and certainly his story is not weighed down by the suggestion of any improper motive. Under all the circumstances, I am bound to give credit to the story. I am obliged to accept it as being a *prima facie* reason for his delay in London until the contrary is shewn. He does not avoid the meeting on the Tuesday. I cannot say that from the circumstances, though they are in a state in which it is unsatisfactory to form a judgment, it is apparent to my mind that the bankrupt

remained in London with an intention to delay and defeat his creditors. I am compelled, therefore, to come to the conclusion that there was not sufficient evidence to support the adjudication. In refusing to discharge the order of the Commissioner, I desire it to be entirely understood, that whether the bankrupt did or did not remain in town for that purpose is a question the negative of which I do not mean at present to determine. But I mean to say that the affirmative of that question is a thing not proved, and, not being proved, I cannot annul the adjudication: but to give costs to a man, not only insolvent, but who had prepared all the materials for a new adjudication when he had got rid of the old one, with some secret latent purpose not consistent with a fair distribution of his property, is a proceeding which I cannot for one moment sanction. That part of the order, therefore, must be varied. I neither affirm nor do I annul the adjudication; I make no order except to discharge the direction that the bankrupt is to have his costs of these proceedings.

LORDS JUSTICES. { *Ex parte* STEVENSON, *in re*
 Nov. 14, 18; { THE LIVERPOOL TRADESMAN'S LOAN COMPANY
 Dec. 9. { (LIMITED).

Winding up of Company—Jurisdiction—Limited and Unlimited Company—Calls.

A company of unlimited liability registered under the statute 7 & 8 Vict. c. 110, after carrying on business was registered as a limited company under the statute 19 & 20 Vict. c. 47, and was afterwards ordered to be wound up. The Court, affirming an order of one of the Commissioners of Bankruptcy, decided that the same must be done under the jurisdiction in Bankruptcy, both as to matters before as well as after registration, under the act of 1856.

A call can be made by the Court of Bankruptcy upon the shareholders at the time of re-registration to discharge debts of the company then due, whenever they accrued.

[For the report of the above case, see 32 Law J. Rep. (N.S.) Chanc. p. 96.]

LORDS JUSTICES. }
 Nov. 19; } *Ex parte MILLER, in re*
 Dec. 19. } *MILLER.* *

Practice—Appeal—Fresh Evidence—Jurisdiction—Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), section 233; and section 24. of "The Bankruptcy Act," 1854, (17 & 18 Vict. c. 119).

The Court of Appeal has jurisdiction to allow fresh evidence in addition to that adduced before the Commissioner; and, when produced, will entertain the question, and not send it back to the Commissioner.

The time for appeal against an adjudication does not expire until two calendar months after the advertisement of the bankruptcy, under the 233rd section of the Bankrupt Law Consolidation Act, 1849, varied by the 24th section of the 17 & 18 Vict. c. 119, notwithstanding that the former section uses the word "commenced" proceedings.

This was an application on behalf of Mr. Henry Miller, that the adjudication against him made by the Liverpool District Court of Bankruptcy, on the 9th of September 1862, might be annulled, and that the petitioning creditors might be ordered to pay the costs; and that he might be at liberty to shew cause before the District Court against the adjudication, on the two-fold ground of the want of a good petitioning creditor's debt, and that there was no act of bankruptcy.

Mr. De Gex, in support of the application, asked that he might have leave given him to produce evidence in support of his application, in addition to that which had been used before the Commissioner. The grounds of the application were, that the adjudication had in effect been made *ex parte*, as the summons had never reached the applicant, who was at that time at Naples, and knew nothing of the proceedings until he read in the newspapers the advertisement of the bankruptcy.

Mr. Clement Swanston, for the petitioning creditors, contended that the Court had no jurisdiction to make such an order; for an application for leave to adduce additional evidence was not in the nature of an appeal, and was therefore not one which this Court could entertain. Moreover, the applicant should have given notice of his intention

to ask leave to add to the evidence. He cited *In re Carter, ex parte Carter* (1).

Their LORDSHIPS were of opinion that they possessed the jurisdiction, and they ordered the motion to stand over generally, with liberty to either party to adduce new evidence as they might be advised.

Dec. 19.—The motion again came on for hearing, when the following facts were disclosed: The bankrupt, by his affidavit, swore that he was never indebted to James Henry Conway (the petitioning creditor), or his firm of Conway, Bincks & Co., in the sum of 201*l.* 18*s.* 9*d.*, or any other sum, for goods sold by them to him, or at his request, as trading at Liverpool under the firm of Miller & Company; for he denied that at the time when the debt was alleged to have been contracted he was trading at Liverpool at all, or that he had any dealings whatever with Conway, Bincks & Co. He denied the commission of any act of bankruptcy, or that he had ever removed from Liverpool, or from Wigan, where he had resided, with an intention to avoid, defeat or delay any creditor. He had occasion to go to Italy on business in April 1862; but his family resided during his absence in his house at Islington until June, when they went out to him at Naples, and there he left them when he returned to England on business in August. That he had not during the six months preceding the adjudication resided or carried on business within the jurisdiction of the Liverpool District Court. He was not aware of any proceedings in Bankruptcy having been taken against him until the 25th, when he accidentally became aware of the fact by reading the list of bankrupts in the *Daily Telegraph* newspaper, and he at once communicated with his solicitor.

Shortly after the last-mentioned day, notice was given of an application to be made before the Court at Liverpool to annul the adjudication on the ground of surprise; but when affidavits in support of that application were tendered to be filed, the registrar declined to receive them, giving as his reasons the following observations in writing:

"*Re Miller, a Bankrupt.*

"October 23rd, 1862.

"It having been decided that an appli-

(1) 1 De Gex, M. & G. 212; s. c. 21 Law J. Rep. (N.S.) Bankr. 23.

* See *Ex parte Page*, ante, p. 14.

cation to annul a bankruptcy must be on one of three points, namely, the disputing the petitioning creditor's debt, or the trading, or act of bankruptcy, this notice is nugatory as to the order to annul.

"The appeal also, it has been held, must be, not to the Commissioner after a certain lapse of time, but to the Lords Justices; and the question which would arise, if a petition were presented to them, might be, whether they would hear it on the ground of fraud, mistake or surprise, after the statutory time for an appeal has expired.

"The papers brought here, if they had been in time, could not have been used as the means for obtaining an order to enlarge the time for surrendering."

The present notice was served upon the petitioning creditors on the 8th of November, and their solicitors undertook on the 10th of that month to accept service on behalf of the assignee.

During the argument that subsequently took place, the existence of a partnership between Mr. Henry Miller and his brother John Miller, or rather its dissolution, was seriously questioned; for on that fact depended whether there was a debt due to Messrs. Conway, Bincks & Co.; and the Lords Justices decided in favour of dissolution, and therefore that the debt failed. On that part of the case it is only necessary to say that counsel argued that not only was the dissolution pretended or colourable, but that the applicant was out of time in his application. He should have gone to the learned Commissioner within twenty-one days, under section 104. of the Bankruptcy Law Consolidation Act, 1849, which provides that a person adjudicated bankrupt "shall be allowed seven days, or such extended time, not exceeding fourteen days in the whole, as the Court shall think fit, from the service of the duplicate of adjudication upon him, to shew cause to the Court against the validity of such adjudication." He had omitted to do so within that time, and therefore his only proper course would have been to proceed by petition of appeal to the Lords Justices. That the 233rd section of the same act provides that if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy, or (if he were in any other part of Europe)

within three months after such advertisement, or (if he were elsewhere) within twelve months, have commenced an action, suit or other proceeding to dispute or annul the fiat or the petition for adjudication, the *Gazette* shall be conclusive evidence that the person so adjudged a bankrupt became a bankrupt before the date of such fiat, &c., and that the 233rd section was varied by the 24th section of the 18 & 19 Vict. c. 119, which enacts, that it shall be construed and acted upon for all purposes whatsoever as if the words "two calendar months" were therein inserted in lieu of the words "twenty-one days." And lastly, that the 12th section of the Bankruptcy Law Consolidation Act provides, that if no appeal be entered within twenty-one days from the date of any decision or order of the Court, and be thereafter duly prosecuted, every such decision or order shall be final.

After this discussion the main part of the argument proceeded:

Mr. Daniel and *Mr. De Gex* appearing for the bankrupt, and arguing the matter both on the old and new evidence.

Mr. Bacon and *Mr. Clement Swanston*, for the petitioning creditors, submitted that the applicant was not in place, inasmuch as he should have gone back with the additional and new evidence to the Commissioner. He was also out of time. A bankrupt who desires to annul the adjudication must proceed under the 104th section of the act of 1849. That section allows him a period of seven days, or an extended further period, not exceeding fourteen days from the service of the duplicate of the adjudication upon himself, within which to shew cause. If he omits to do this, he must proceed by petition of appeal to the Lords Justices—*Carter v. Dimmock* (1). By the 233rd section of the same act, it is provided that if the bankrupt shall not within twenty-one days, (altered by the statute of 1854 to two calendar months) after the advertisement of the bankruptcy "have commenced an action, suit or other proceeding to dispute or annul the fiat or the petition for adjudication," the *Gazette* shall be conclusive evidence, &c. Finally, by the act of 1849, section 12, the period of appealing to the Lords Justices is limited to twenty-one days from the date of the

(1) 4 H. L. Cas. 337; s. c. 22 Law J. Rep. (N. S.) Bankr. 55.

decision or order of the Court or Commissioner. It was submitted, therefore, that the applicant should either have gone to the Commissioner within the seven or the additional fourteen days, or have come to this Court within the twenty-one days. The 233rd section had no application, inasmuch as no proceedings could be "commenced" before the Lords Justices, who had no original jurisdiction. This was an appeal; there can be no appeal but within twenty-one days; the period of two months applies only to original proceedings, such as actions and suits.

Mr. Daniel was not called on in reply.

LORD JUSTICE KNIGHT BRUCE.—This appeal was presented on the 7th of November, for the purpose of annulling an adjudication made on the 9th of September last, and advertised some few days after in the same September, and therefore, of course, within the two months mentioned in the 24th section of the 17 & 18 Vict. c. 119. I think that the alleged bankrupt was not bound to go before the Commissioner for the purpose of disputing or questioning the validity or sufficiency of the adjudication made by the Commissioner, whether upon the same evidence only as that upon which the Commissioner proceeded, or upon that and additional evidence. The proceeding, therefore, questioning the adjudication, was not, I think, a proceeding necessarily to be brought before the Commissioner. It was a question of appeal, which the alleged bankrupt was entitled to bring before this Court. It has been contended, however, that the period of limitation of twenty-one days is applicable to this case—a time which it may be assumed has been exceeded, for I do not allude to the vain endeavour which was made to bring the Commissioner's attention to the subject. It has been said that the period of two months, as altered by the 17 & 18 Vict., is not applicable in this instance. My opinion is, that it would be most unreasonable, as well as most inconvenient and mischievous, to hold that the period of two months is not applicable to this case. I think such a decision would be productive of infinite mischief. The language of the act admits the extension, and the necessity of the case requires it; so that, upon the question of time, the objec-

tion wholly fails. It appears to be the fact, that the alleged bankrupt and his brother, before and in the year 1860, were in partnership. In 1860 the partnership was, formally at least, dissolved, and the dissolution advertised in the *Gazette*. Nor was it until after 1860, in which this dissolution or alleged dissolution, or, at least, apparent dissolution and advertisement took place, it was affirmed, that this debt was incurred by a house of Miller & Co., bearing the same designation as that in which Henry Miller was certainly a partner. If it could be shewn that the dissolution was merely nominal, and that Henry Miller was still a partner, he would still be liable for the debt. But, in my opinion, there is no foundation for saying so. There certainly is some evidence to shew the probability of a continuing partnership. But that evidence has been met; and I think, upon a review of the whole of the evidence, that the bankrupt's statement of the case preponderates. In addition to which, when John Miller became bankrupt, the debt in question was proved on behalf of this very partner to have been considered as due from John Miller alone, and proof of it was made for the purpose of a dividend. That alone is *prima facie* evidence that it was the debt of John Miller. That evidence has not been answered; and I am satisfied that the debt was due from John Miller alone, and that Henry Miller was not in any sense liable for it. This renders it unnecessary to consider the question of the act of bankruptcy. But if it were incumbent on me to enter into that question, my view of the evidence upon that also is, that it preponderates in favour of Henry Miller's statement. In my opinion, there was not an act of bankruptcy; and I am of opinion that this adjudication must be annulled with costs.

LORD CHIEF JUSTICE TURNER.—I agree, and for the same reasons.

The deposit was ordered to be returned, with a set-off of an unpaid bill, and of whatever might be due under a judgment at law.

Mr. Bacon.—I ask that the bankrupt may not be allowed to bring an action.

LORD JUSTICE KNIGHT BRUCE.—No; we cannot make any such order.

WESTBURY, L.C. { *Ex parte* CHURCHILL, in
Dec. 5. { *re* GRIFFITHS, and in
{ *re* THORNEYCROFT AND
{ GRIFFITHS.

Consolidation of Proceedings — Two Adjudications — Costs of Official Assignees appearing only to consent.

One trader had been solely, and afterwards he and his partner had been jointly, adjudicated bankrupt: the Lord Chancellor, discharging an order made by the Registrar, gave leave to apply to the senior Commissioner as to the consolidation of the proceedings.

An official assignee, who has no other duty than to consent, will not be allowed his costs out of the estate.

In this case the bankrupt Griffiths had been in partnership with one Thorneycroft, as ironmasters, at Wolverhampton; and on the 6th of September 1862 an adjudication of bankruptcy was obtained against him (Griffiths) alone. On the 23rd of October following, both Thorneycroft and Griffiths were jointly adjudicated bankrupt. On the 31st of the same month Mr. Waterfield, the registrar, made an order staying all proceedings under the first bankruptcy, and directed that all costs of the separate petition should be paid out of the estate, and appointed a first sitting under the joint adjudication. On the 20th of November Mr. Commissioner Holroyd was applied to for an order that the proceedings might be conducted separately, and, after hearing the case argued, he adjourned the matter for the production of further evidence. On evidence it was shewn that Thorneycroft was a mere cipher, and that there was no separate estate.

Mr. Bacon and Mr. De Gez moved, on behalf of the petitioning creditor (Churchill), that the order of the registrar might be rescinded or varied; and that the senior Commissioner might consolidate the proceedings in the manner pointed out by the 88th section of the Bankruptcy Act, 1861.

Mr. Karslake and Mr. E. B. Lovell appeared for creditors.

Mr. Clement Swanston, for the bankrupt Griffiths.

Mr. E. Lloyd, for the official assignee, consented to any order the Court might see fit to make, and asked for his costs.

THE LORD CHANCELLOR.—Where official assignees have no other duty to perform than to give their consent, and the official assignee has here no other duty, I shall allow them no costs out of the estate. I must direct the order of the registrar to be discharged, with liberty to either party to make such application to the senior Commissioner in London as to the consolidation of the proceedings as they may be advised. There will be no costs on either side,—at all events, until it is ascertained whether there is any estate to administer.

LORDS JUSTICES.
Nov. 7, 8, 13, 23.

{ *Ex parte* CURRIE AND
OTHERS, in *re* THE
GREAT NORTHERN
AND MIDLAND COAL
COMPANY (LIMITED).

Winding up of Company—Contributory—Directors—Paid-up Shares.

Shares in a projected company, with limited liability, were allotted in payment of the purchase-money of property on which the intended company was about to carry on its business, and were accepted and treated by the vendor of such property as paid-up shares, and he afterwards transferred to each of the directors of the company 100 of them. One of the Commissioners of Bankruptcy in winding up the company placed the names of each of these directors on the list of contributories, and made a call upon them. On appeal, it was held, that as the shares had been allotted to a stranger as paid-up shares, they must be so considered, and the directors' names be removed from the list in respect of them.

The directors of the company made an order awarding fees to those of their body who should attend their board-meetings, and afterwards allotted shares to those members who attended, according to the number of their attendances, which shares they deemed to be fully paid-up shares; and, on appeal, it was held, that the Court had no power to alter the agreement which had been come to, and that the shares having been issued as paid-up shares must be so treated.

[For the report of the above case, see 32 Law J. Rep. (N.S.) Chanc. p. 57.]

WESTBURY, L.C. } *Ex parte DOWNMAN, in*
 April 18. } *re DOWNMAN.*

Order of Discharge—Absence of reasonable or probable Ground of Expectation of being able to pay Debts—Rash and Hazardous Speculation—Bankrupt Act, 1861, s. 159.

Semble—A speculation is not “rash and hazardous” within the meaning of the 159th section of the Bankrupt Act, 1861, unless it is not only dangerous, but such as no reasonable man would enter into.

This was an appeal from the judgment of Mr. Commissioner Goulburn, given on the 9th of March 1863, whereby the bankrupt's order of discharge was suspended for twelve months without protection, upon the ground that the bankrupt could not have had at the time when any of his debts were contracted “any reasonable or probable ground of expectation of being able to pay the same,” and that his insolvency was attributable to “rash and hazardous speculation” and extravagance in living. The bankrupt was described as a promoter of public companies, and his debts were contracted in the carrying out of two contracts which he had entered into for the formation of the Warmley Colliery and Spelter Company and the sale of the Nant-y-Cria Mine. The bankrupt had performed his part of these contracts, and had become entitled to 5,000*l.* under one contract, and 3,000*l.* under the other, both of which sums were wholly unpaid. The debts amounted to about 1,200*l.*, and were almost entirely incurred in respect of these two contracts. The bankrupt had a large family, and his private expenditure had been at the rate of 600*l.* a year, but this included 500*l.* a year separate income of his wife; and the trading upon false credit arising from the separate income of his wife was made one of the grounds for the Commissioner's decision.

The contracts had been given up to the assignees, who, being satisfied of the *bona fides* of the bankrupt throughout, did not oppose his application for his discharge.

Mr. Bacon now appeared for the bankrupt, in support of the appeal.

Mr. Roxburgh, for the assignees.

The LORD CHANCELLOR, without hearing a reply, said the learned Commissioner had

NEW SERIES, 32.—BANKR.

done quite right in giving this case a strict examination, which was the more necessary because he had not before him any opposing creditor, and also in referring to the situation in which the bankrupt was at the time when the debts were incurred. This was quite right and justifiable under the 159th section of the Bankrupt Act, 1861. It was incumbent, however, on his Lordship sitting in that Court, with reference to that section, to look only at those expenses which actually appeared to have been incurred within the time during which the debts coming within reach of the present bankruptcy were contracted. The learned Commissioner had charged the bankrupt with having, in the first place, contracted debts without any reasonable or probable ground of being able to pay them. Now the only transactions in which the bankrupt appeared to have been engaged during the period in which the debts were contracted were transactions relating to two large concerns, one a colliery, and the other a mine. Whatever might be thought of the prudence of such transactions, which would be considered afterwards, it certainly could not be said that they were not *bonâ fide*, and they appeared to have been likely to afford the bankrupt a considerable sum of money. Supposing then these transactions to have been *bonâ fide*, and supposing the debts that appeared upon the balance sheet to have been incurred solely or chiefly by reason of those transactions, and that those transactions did not deserve the name of rash and hazardous speculations, it would be impossible to consider the debts as having been incurred without reasonable probability of being able to pay them. He had no reason to believe but that what was done and stated to the Court by the assignees and creditors was done and stated in the honest discharge, as they believed, of their duty; they had given their opinion to the Court without any improper connivance, and the proceedings taken by the assignees also confirmed the view of these transactions being *bonâ fide*. His Lordship was bound to say, though he was very unwilling to come to a different conclusion from that arrived at by the learned Commissioner, yet he could not go so far as to say that these debts, amounting to 1,100*l.*, and which, with the exception of about 70*l.*,

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were entirely incurred in respect of those two transactions, were clearly proved to have been incurred without reasonable or probable ground of expectation of being able to pay them, for if either of those transactions had taken effect the bankrupt would have received a sum of money which would have more than covered the amount of his debts.

The next question was, whether these contracts, though *bonâ fide* entered into, did not deserve the name of rash and hazardous speculations. It was extremely difficult to assign anything like the limit that might be put upon language of that general character, which unfortunately had been introduced into the clause, and the form of which it was necessary to use, but which were so painfully indefinite as to leave the Judge a large amount of discretionary power, which might frequently lead to the decisions of one Judge being at variance with those of another. A gentleman contracted with the owner of a mine to give him a sum of money for that mine, the contract being dependent on the formation of a company. This was such a transaction as was frequently entered into, and flourishing concerns beneficial to all parties frequently originated in this way. He could not say that a transaction of that kind, apparently *bonâ fide* in this sense, that the scheme was practicable and capable of being fairly and honestly brought into operation, was to be branded with the name of a rash and hazardous speculation. There might, no doubt, be great danger in it, inasmuch as success was not certain; but in order to bring it within the condemnatory clauses of the act, it would be necessary to find that it was not only a speculation, but a rash speculation and a hazardous speculation. Probably, the important word in the clause was "rash," that is, such a speculation as no reasonable man would enter into. Having regard to what had taken place, many other persons appearing to have been collaterally engaged in the undertaking, he could not say that this could be judicially denominated a rash and hazardous speculation within the meaning of the words of the act. The third ground relied on was, and there was much truth in the learned Commissioner's remarks, that the bankrupt had traded upon false credit arising from the separate income

of his wife, but so long as the law permitted a wife to have a separate interest, that ought not to justify a charge of fraud against the bankrupt. Neither was there any ground for saying he had been extravagant in his private expenditure. His Lordship was therefore obliged to come to the conclusion, that the debts had not been contracted without reasonable and probable ground of being able to pay them. His Lordship quite agreed with the learned Commissioner in the necessity of examining cases with great care, but after that had been done he could not in this case bring the bankrupt's conduct within the meaning of the condemnatory clauses of the act. He therefore thought that the order of discharge ought to be granted. The assignees' costs would be paid out of the estate, and the deposit would be returned.

WESTBURY, L.C. }
 May 30; } *Ex parte BELL, in re*
 June 3. } LAFORREST.

Bankruptcy Act, 1861, ss. 159, 170.—
Order of Discharge—Date—Subsequently-
acquired Property.

The words "order of discharge" in the Bankruptcy Act, 1861, denote two different things: first, the order made by the Court on the application of the bankrupt, and which is made and pronounced by the Commissioner, subject to appeal, and is recorded in the proceedings; and, secondly, that further document or certificate which is formally drawn up and handed over to the bankrupt after the time allowed for appealing has elapsed. The order of discharge referred to by the 1st rule of the 159th section is the first of these, and the date from which it takes effect is the time when it is pronounced by the Court. Consequently, where, after the making of the order of discharge by the Commissioner, but before the expiration of the time required by the 170th section to elapse before the order of discharge should be drawn up, property devolved upon the bankrupt, it was held that he, and not the assignees, was entitled to it.

This was an appeal, on the part of the bankrupt, from a decision of Mr. Commis-

sioner Holroyd, upon a special case stated under the 56th section of "The Bankruptcy Act, 1861," the question being whether property to which the bankrupt became entitled after the granting of his order of discharge, but before the order was drawn up, passed to the assignees or not. C. R. R. Laforest was adjudged bankrupt on the 6th of October 1862, and William Bell was appointed official assignee, but no creditors' assignee was chosen. On the 28th of November the bankrupt passed his last examination, and it was adjudged by the Court that he was entitled to an order of discharge. The judgment of the Court not having been appealed from, the order of discharge was duly drawn up, signed and sealed on the 30th of December 1862, and bore that date.

On the 2nd of January 1863, a notice in the following terms and form was issued out of the Court of Bankruptcy, and appeared in the *London Gazette* as well as in the *Daily Telegraph* newspaper: "Notice is hereby given, that the Court acting in the prosecution of a petition for adjudication of bankruptcy filed on the 6th day of October 1862, by Charles Raymond Robert Laforest, of No. 59, Rupert Street, Haymarket, in the county of Middlesex, wine-merchant's clerk, did, on the 28th day of November 1862, grant the said bankrupt an order of discharge."

On the 2nd of December 1862, four days after the granting of the order, Jane Martha Welsh died, having by her will bequeathed to the bankrupt a legacy of 500*l.* and also one equal seventh-part of the residue of her estate; and the question for the opinion of the Court was, whether the surviving executor of the testatrix ought to pay the pecuniary and residuary legacies given to the bankrupt, or either of them, to him or to the assignee of his estate.

The case was first heard before Mr. Commissioner Holroyd, who considered that the memorandum made at the hearing of a bankrupt's application for an order of discharge simply gave the bankrupt an inchoate right to that order of discharge—a right which could not be perfected until after the lapse of the thirty days limited for an appeal, or, if an appeal, until after the determination of that appeal. Under the 141st section of the Bankrupt Law

Consolidation Act, 1849, all property which devolved upon a bankrupt before he should have "obtained" his certificate vested in the assignees for the benefit of the creditors. By the act of 1861 the order of discharge was substituted for the certificate, and took effect from its date. It could not, under the 170th section, bear date earlier than the day after the time allowed for appeal. He considered, therefore, that the official assignee was entitled to the legacy and the share in the testator's personal estate.

The bankrupt appealed from this decision.

Mr. Greene and *Mr. Hardy*, for the appellant, contended that the order of discharge pronounced by the Court bore date and took effect, subject to appeal, on the day when the same was pronounced—section 159, rule 1. The order of discharge referred to by the 170th section, was merely the document or certificate evidencing that order so pronounced. It was clear that the order of discharge might be made at the time of the application; and it was also clear that in this case it was made on the 28th of November. The 170th section was the only one which created any difficulty, and this section was inconsistent not only with the other sections of the act, but with itself, except on the supposition that two distinct orders were referred to, one the order of discharge as made, and the other the order or certificate as drawn up. The provisions of the act of 1849 were confirmatory of this view. By the 198th section of that act the Commissioner might allow the certificate at the meeting called for the purpose; by section 205, the certificate was to operate from its "allowance," but by section 206, it was not to be delivered to the bankrupt until the time for an appeal had expired. The granting an order of discharge under the act of 1861 was analogous to allowing the certificate under the act of 1849, and the date of the order of discharge was analogous to the delivery of the certificate. They referred to sections 140, 157, 158, 159, 160, 162, 164, 165, 169, 170, 171. and 172. of the Bankrupt Act, 1861.

Mr. Bagley, in support of the order of the Commissioner, relied upon the grounds stated in his Honour's judgment, and

referred to sections 203. and 204. of the Bankrupt Law Consolidation Act, 1849.

He also referred to *Ex parte Rawlings* (1).

Mr. Swanson appeared for the executor of the testatrix, and asked for his costs out of the legacy.

The LORD CHANCELLOR, without hearing a reply.—It is a matter of constant regret to me that I could not adhere to the original resolution I formed of abiding by the entire Consolidation Act which was brought into parliament in 1860. One of the difficulties, and not the least, attending legislation in this country is, that the parties who propose a bill to parliament have to consider what portions of it have a prospect of being carried, as well as what ought to be the form which legislation should take. The result is, that the entire Consolidation Act having been abandoned by the force of extrinsic circumstances, difficulties have arisen in consequence of the act of 1861, repealing portions of the law and leaving other portions unrepealed, and being obliged therefore to be fitted into and pieced on with the remnants of the old law. In some degree that has led to the difficulty here, because it has suggested topics of argument; but I think it will be found that the provisions of the new law and the regulations of the old law, in this respect at least, are perfectly harmonious. It became necessary to alter the phraseology of the old law, by reason of the great extension given to it, in submitting all debtors, whether traders or non-traders, to the law of bankruptcy. The old law as it stood in 1849, with reference to traders, is, beyond dispute, that from the time when the certificate was allowed, the discharge of the trader was complete, and after-acquired property therefore did not pass to his assignees. Now it will be found that the new law accomplishes the same thing, and the only thing requisite to be borne in mind for the entire appreciation of the provisions of the new law is, that the words "order of discharge" denote two different things; and whether they are to be held to denote one thing or the other, is to be determined by the context. The two things denoted by the order of discharge are these: first, the order made by the

Commissioner on the application of the bankrupt, which is made and pronounced by the Commissioner, and recorded in the proceedings. The other thing is, that further document, certificate or order of discharge, which is formally drawn up at a subsequent time, and handed over to the bankrupt. It would have been better if, in order to preserve different appellations for different things, the order of discharge, when intended to denote the certificate before it was formally reduced into the shape necessary in order to its being delivered to the bankrupt, had been called the "order for discharge"; and, if those words had been adopted, no possible ambiguity or difficulty could have arisen, because an order for discharge would have denoted the order made by the Commissioner, subject to appeal; and the order of discharge would have denoted the order handed over to the bankrupt as an indemnity and a security to him for the future. There is no difficulty in determining upon any of these sections, which of these two things is intended to be referred to. Let us take the 157th section, for the 140th merely enacts that "the Court shall appoint a public sitting for the bankrupt to pass his last examination, and also, unless the Court shall otherwise direct, to make application for his discharge." The 157th section speaks of the case of a discharge being suspended, and then it speaks of "such discharge, when allowed." That clearly means such discharge, when granted by the Commissioner after the time of such suspension has expired. Next we come to the 159th section. The first part of the section speaks of the hearing of an application for an order of discharge, and what shall be done upon it. Then it contemplates the possibility of criminal proceedings being directed, and after providing for what shall be done in that event, it takes up the cases where there is no such impediment to the granting of the order, and it says, "In all other cases the order of discharge shall take effect immediately from its date, subject to the appeal herein provided." The only attempt at argument which produced any effect at the moment, was the argument upon the words "immediately from its date," because, taking the 159th in connexion with the 170th section, and assuming that the actual thing denoted by the words "order of discharge" was the

(1) *Supra*, p. 27.

same in both sections, the argument was that the order of discharge spoken of in the 159th section must be that thing which is directed to be drawn up at the expiration of thirty days, and directed to be dated after the end of that period of time. But that is not so. The order of discharge spoken of in the 159th section is the order pronounced by the Commissioner, which has its appropriate and proper date as recorded in the proceedings in bankruptcy. Accordingly, I find it recorded that the order of discharge granted by the Commissioner in this case bears date the 28th of November. The entry is exactly correspondent to that of any other judgment pronounced by the Court; and accordingly the entry declares, after reciting that the bankrupt had passed his last examination and made application for his order of discharge, that it was adjudged by the Court "that the said bankrupt was entitled to such discharge, which was thereby granted." Well, now, when was that judicial act performed, and what was the effect of that judicial act? It was performed in the most complete manner, as far as the Judge was concerned, on the 28th of November. It was granted on that day, it was entered on that day, and that is the thing spoken of in the 159th section. Thus the words all have their appropriate effect. The order of discharge takes effect from the time when it is granted by the Commissioner, and that being the particular day when it is recorded, it is said with propriety that it shall take effect "immediately from its date"; but, inasmuch as a time is allowed during which it is competent to any party interested to apply to the Court to review the order, when it may be annulled, suspended or recalled, that condition is fulfilled by stating that it shall "take effect" subject to that power of appeal; that is to say, the order of discharge shall take effect from the time when it is pronounced, provided it be not annulled, suspended or recalled within the time allowed. Now, we will go through some of the subsequent sections to shew how easy it is to distinguish between the two things, and we shall find that the legislature has interposed certain words in various places, because, having provided, as we have already found, that the order of discharge is to take effect from the time when it is

pronounced, power being subsequently given to apply for a re-hearing, it became necessary to provide that the order should take effect from that day, provided it be not within the time allowed for appeal, recalled, annulled, or suspended. Take the 161st section, "The order of discharge shall, *upon taking effect*, discharge the bankrupt," &c. That throws us back to the 159th section, and accordingly, when we have ascertained from that when the order is to take effect, these words are perfectly consistent. The order is to take effect from the day when it is granted by the Commissioner. It is impossible to hold that the order of discharge spoken of in the 161st section can be the order of discharge which is afterwards to be delivered to the bankrupt, because it is said that "the order of discharge shall, upon taking effect, discharge the bankrupt," &c. These words, "upon taking effect," were inserted to provide for the possibility of the order being suspended; because, if the order be suspended by the Commissioner, the order can take effect only from the end of the period of suspension. Again, in the 162nd section, if a bankrupt, *after the order of discharge takes effect*, be arrested," &c. Why were these words "after the order takes effect" inserted? Why should not the production of the order of discharge by the bankrupt be sufficient? Because the writer knew well that the legislature intended the words "order of discharge" to apply to the order as soon as it is pronounced by the Commissioner, a thing which may be produced as giving evidence or notice of a proceeding, although at the time the actual order may not have been drawn up. The words, therefore, agree entirely with the words already referred to in the 159th section. The 165th section provides that a bankrupt in custody "shall, on obtaining an order of discharge, be entitled to be discharged from such custody forthwith." If you take the 140th section, you find that the Court is to appoint a public sitting for the bankrupt to pass his last examination, and also to make application for his discharge; and surely the bankrupt is said to have "obtained" his order of discharge the moment when the Court has granted it, although it is granted subject to the possibility of its being recalled within a limited time. The 166th

section still more clearly demonstrates this, because there the order of discharge is spoken of as an existing thing which a creditor may petition to have re-heard, and may appeal against. Now, the order of discharge is not to be drawn up and delivered to the bankrupt until after the expiration of the time allowed for appeal. Where the legislature has spoken of an order of discharge as a thing which may be appealed against, it means the order of discharge, which is pronounced by the Commissioner, for that order is pronounced subject to its being reviewed. The same interpretation applies to the 167th section, where the possibility of a creditor obtaining money for consenting to the allowance of the discharge of a bankrupt is provided for. When does he consent to the allowance of discharge? When the Commissioner pronounces the order. The 170th section says that the order of discharge is not to be drawn up until after the expiration of the time allowed for appeal — i. e., drawn up in a shape to be delivered to the bankrupt. But the thing here spoken of, and directed in section 172. to be drawn up in a particular form, is spoken of as an existing order; and finally, in the general orders made under the act, in speaking of what has been done at the sitting for passing the last examination of the bankrupt and allowing him to apply for his order of discharge, this language is used: "It was adjudged by the Court that the said bankrupt was entitled to such discharge, whereupon such order of discharge was and is hereby allowed and granted." These words, therefore, are in perfect harmony with the language of the enactments, namely, that the order of discharge is originally allowed to be granted by the Commissioner, and that there is liberty also reserved to the bankrupt, or to a creditor who has proved, to apply for a re-hearing. I do not think, therefore, there can be any doubt that the language and provisions of the present act are in perfect keeping with the provisions of the act of 1849, and that the words which are to be found in the 159th section are words that receive a clear and satisfactory meaning, as soon as we advert to the fact of their speaking of the order of discharge pronounced by the Commissioner, which is recorded in the proceedings and bears date the day on which it was granted;

and that there is, in addition to that, another thing denominated an order of discharge, viz., that formal document which at the end of thirty days is drawn up as evidence of the anterior order, and delivered to the bankrupt. It is quite palpable that the thing which takes effect is the thing which is subject to be appealed against. The only thing that can be appealed against is the order of the Commissioner. The thing, therefore, which takes effect is the order granted by the Commissioner, and that is in perfect keeping with the rest of the statute. I have no doubt, therefore, that the money which accrued to the bankrupt after the 28th of November did not fall into the estate. Mr. Bagley's observation was a correct one, that it is much to be regretted that the course was not taken of annexing a condition to the order, so as to make it operate like the orders formerly made in insolvency, where the Court declined to pronounce adjudication until the insolvent agreed to deliver up his after-acquired property to the creditors. The only condition that can be annexed to this order is, that the fund shall be subject to the costs of the assignee and of the petitioner. Subject, therefore, to these charges being deducted out of the legacy (if they have not been satisfied otherwise), the legacy will belong unquestionably to the bankrupt. On the question of costs I have by no means a desire to encourage the appearance of formal parties upon an argument, when they must know that their presence at that argument can be of no benefit to either side, and that nothing can occur to prejudice their rights. At the same time I am unwilling to discourage executors and trustees in pursuing a course which has unquestionably facilitated the determination of the question as to the disposal of this property. I therefore direct the costs of all parties, the assignees, the executor, and the bankrupt, to come out of the fund; but I cannot give the executor the costs of his taking advice on this subject out of the legacy. The order will extend to the costs of the hearing below, and of the appeal.

WESTBURY, L.C. }
 May 30; } *Ex parte* ALEXANDER,
 July 18. } *in re* THIN AND FLETT.

*Trust Deed—Examination of Witness—
 Right of Trustee to require a Witness to be
 summoned.*

The 197th section of the Bankruptcy Act, 1861, gives to the trustees and creditors under a trust deed, duly registered, the same powers, rights and privileges as are possessed by assignees and creditors under a fiat:—Held, therefore, on the authority of Cooper v. Harding (1), that such a trustee is entitled as a matter of course to summon as a witness any person whom he suspects to have property of the bankrupt in his possession, or supposes to be indebted to the bankrupt.

This was an appeal from an order made by the Commissioner of the Liverpool District Court of Bankruptcy, dismissing a witness who had been summoned to give evidence at the instance of the trustee of a deed of assignment for the benefit of creditors.

The deed was executed on the 21st of May 1862, and duly registered on the 21st of June following. On the 17th of April 1863 Mr. Alexander, the trustee, obtained a summons requiring Mr. Joyce personally to appear at the Court on the 22nd for the purpose of being examined, and to bring and produce all books, accounts, &c. relating to the transactions between himself and the debtors.

Mr. Joyce attended in pursuance of the summons, but objected to be sworn and examined until it had been proved that the trust deed had been assented to or approved of in writing by a majority in number, representing three-fourths in value of the creditors whose debts amounted to 10*l.* and upwards. On the other hand, it was contended, on behalf of the trustee, that the trust deed, bearing the registrar's certificate of registration, produced by him to the Court was all that was necessary to give the Court jurisdiction to examine any person in reference to the estate and effects of the debtors. The Commissioner, however, dismissed the summons on the ground that it

had not been proved that the trust deed was executed or assented to pursuant to the provisions in that behalf of "The Bankruptcy Act, 1861." From this decision Mr. Alexander, the trustee, appealed.

Mr. W. M. James and Mr. Bardswell, in support of the appeal, referred to the 197th section of "The Bankruptcy Act, 1861" (2). Under this section the trustees possessed all the powers which assignees under a fiat formerly had. They referred also to section 120.

[The LORD CHANCELLOR.—That section gives very large powers to the Court, but not to the assignees.]

Mr. North, for the witness, supported the decision of the Commissioner.—The registration of the trust deed is by no means *prima facie* evidence that all the requirements of the 192nd section have been complied with. The 197th section speaks of the registration of every *such* deed, and registration is not sufficient unless the deed is also such a deed as is referred to by section 192. It is competent for the Commissioner to receive evidence affecting the validity of a composition deed, *ultra* the certificate of registration—*Ex parte Page, in re Neal* (3).

The LORD CHANCELLOR directed the matter to stand over for inquiry into the origin of the power of assignees in bankruptcy to summon third parties to give evidence.

(2) This section enacts, that from and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors and trustees parties to such deed, or who have assented thereto or are bound thereby, shall, in all matters relating to the estate and effects of such debtor, be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same shall, as between themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt or his acts, estate and effects in bankruptcy.

(3) *Supra*, p. 14.

(1) 7 Q.B. Rep. 928.

Mr. James and Mr. Bardswell (July 18) traced the power of the assignees from the commencement of the bankruptcy system to the present time. It was first given by the 34 & 35 Hen. 8. c. 4. s. 2, and was continued in all subsequent acts down to the 6 Geo. 4. c. 16. s. 33. It is the right of the assignees to have the power of summoning a witness exercised by the Commissioner, if they know or suspect that he is capable of giving information, &c.—*Cooper v. Harding* (4).

Mr. North, for the witness, admitted that the trustee under the deed stood in the same position as an assignee in bankruptcy, and also that the suspicion of the party applying was sufficient to justify the issuing of the summons. The matter, however, was still in the discretion of the Court.

The LORD CHANCELLOR.—When this matter was originally mentioned to me I felt some anxiety on the subject, because if I acceded to the application, it would have the effect of giving to the trustee, under this trust deed, the very extraordinary power which has been conferred by the statute certainly upon the Commissioner, or upon the Court concerning jurisdiction in bankruptcy. I have always felt that this was a power of a very striking and anomalous character, and not easily to be reconciled with the principles upon which our jurisprudence and the administration of justice usually proceed. It was, therefore, my desire to have the matter thoroughly examined, in order that I might not make a decision, giving a trustee the opportunity of exercising this power, except after full research, and upon being fully satisfied of its being possessed by the trustee. The difficulty that occurred to me was this, whether the power was not to be exercised exclusively by the Court. If it is a power which was formerly possessed by the assignees,—if it was formerly a right of the assignees, or a remedy of creditors under a fiat, there is, as a matter of course, a corresponding power, right and remedy given to the trustees of a registered deed, and to the creditors who have given their assent to that deed. It was therefore with

a desire of ascertaining whether this power of summoning persons suspected of having part of the estate of the bankrupt in their possession, or of being indebted to him, to appear in the Court of Bankruptcy, without the ordinary protection, which, in a suit filed for discovery, is afforded to the defendant, was the settled right of assignees or creditors under a bankruptcy, that I desired the matter to stand over. The 197th section is as follows—[His Lordship read the section.]—Now I certainly think it would have been much better if this particular power had been made exercisable by the Court alone, and exercisable only after the Court had judicially ascertained that there was sufficient ground to warrant the exercise of the power. But the uniform practice, as has been shewn to me, and confirmed by this decision of the Court of Queen's Bench, has brought this right or power down to be considered as an ordinary "right or remedy" of assignees or creditors. That decision has even gone the length (if language means anything) of holding that the Commissioner not only is warranted, but is required to grant a summons almost as a matter of course, upon his being informed that a person having a *status* which gives him power to act in the bankruptcy, such as an assignee, or a creditor, or the solicitor who has acted in obtaining the fiat, states that he entertains the suspicion or the supposition that the person he wishes to summon may be under the description of being suspected of having property of the bankrupt in his possession, or supposed to be indebted to the bankrupt. I should be very glad if this power should in future be exercised only by the Court; and if the Commissioner, instead of acting in a mere ministerial way, should think it his duty to require some evidence upon oath to be laid before him, upon which a *prima facie* case, warranting that suspicion or supposition, may be justly founded. It is an intolerable thing that a power of this kind should exist by which the liberty of the subject may be invaded, that a man should be summoned and tortured by questions in a Court of limited jurisdiction, a Court sitting only for the benefit of persons who have interests adverse to him, and compelled to answer these questions without the protection that other Courts give to

persons in his position. I am bound, however, to hold that trustees or creditors under a trust deed have a right to examine any third person; and it follows therefore that the Commissioner is bound to grant a summons at the instance of persons claiming under a trust deed, as he would at the instance of assignees, and also creditors under a *flat*. I say *also* creditors, because the 120th section of the Consolidation Act of 1849 says that 'after adjudication' it shall be lawful for the Court to summon, &c.; that is to say, before the appointment of assignees, and as soon as there has been an adjudication. I think it is a power which ought to be exercised with more care and circumspection, and with more of judicial discretion than has been hitherto, apparently, observed. At the same time I am bound to say that the language attributed to the Court of Queen's Bench, in the case referred to, is a sufficient justification for the existence of the practice. The order will be to discharge the order of the Commissioner, and remit the matter back to him; with a declaration that the trustees and creditors under the trust deed, being duly registered, are entitled to the same powers, rights and privileges, including that of summoning witnesses, as are possessed by assignees and creditors under a *flat*.

WESTBURY, L.C. { *Ex parte* FOX, *in re* THE
April 18. { MOSELEY GREEN COAL
AND COKE COMPANY
(LIMITED).

*Joint-Stock Company — Winding up—
Contributory — Removal of Name improperly
placed on the Register of Shareholders
—Form of Application.*

*A person's name having been improperly
placed on the register of shareholders in a
public company was, on the winding up of
the company, placed by the Commissioner
on the list of contributories. On appeal,
held, that the name being on the register, the
Commissioner could not do otherwise than
place it on the list of contributories.*

*The proper course in a case like the fore-
going is to apply, under the special statutory
jurisdiction (see 19 & 20 Vict. c. 47. s. 25,
25 & 26 Vict. c. 89. s. 35.), to remove the
name from the register of shareholders.*

NEW SERIES, 32.—BANKER.

*In such a case, a single notice of motion
may be given intituled both in Chancery and
in Bankruptcy, seeking to remove the name
as well from the register of shareholders as
from the list of contributories.*

This was an application to discharge an order of Mr. Commissioner Goulburn, dated the 6th of March 1863, whereby the name of Sir Charles Fox was ordered to be placed upon the list of contributories of the Moseley Green Coal and Coke Company (Limited).

It appeared from the evidence of Sir Charles Fox, taken *vidé voce* before the Commissioner, that he was appointed the engineer of the company, and consented to accept twenty paid-up shares of 5*l.* each, in part payment of his professional charges.

On the 30th of October 1861 the secretary to the company sent him a certificate for the twenty shares, and also a form of receipt which he requested Sir Charles Fox to sign and return at his earliest convenience.

In reply to this Sir Charles Fox wrote to the secretary declining to sign the receipt on the ground that the doing so would, in the event of the company being wound up, make him a contributory.

It appeared from the minutes of the company, that at one meeting of the shareholders Sir Charles Fox had taken the chair. He, however, denied this, or that he had ever attended any meeting, except in the capacity of engineer.

The Commissioner held, that as the name appeared upon the register of shareholders, which could only be altered in the way pointed out by the 25th section of the Joint-Stock Companies' Act, 1856, 19 & 20 Vict. c. 47 (1), this was conclusive evidence of his being a shareholder, and that he was therefore liable as a contributory.

Mr. Amphlett and Mr. Doria, for the appellant.—Under the 19th section of the act of 1856 two things are necessary to constitute a shareholder: not only must his name be on the register, but he must have accepted shares.

(1) This act is now repealed and a jurisdiction similar to that given by the 25th section is conferred by section 35. of "The Companies Act, 1862" (25 & 26 Vict. c. 89).

Mr. Cole and Mr. Roxburgh, for the official liquidator, cited—

Birch's case, 2 De Gex & J. 10; s. c. 27 Law J. Rep. (N.S.) Bankr. 4.

Whittel's case, 2 De Gex & J. 577.

THE LORD CHANCELLOR.—I think the Commissioner could not have taken any other course than he has done after the language reported in the two cases that have been cited; but it does not appear to me, upon the evidence, that Sir Charles Fox ever agreed to become a shareholder in this company; and, altogether, the placing his name on the register appears to have been a very unwarrantable act on the part of the secretary. His agreement was to accept twenty shares, fully paid up, in part payment of his professional charges; but to enter him on the register as a person who had accepted twenty shares, and to debit him with 1*l.* apiece, were acts which were not authorized by what had taken place. With regard to the allegation that he attended meetings as a shareholder he states, and there is nothing to call his statement into question, that he attended the meetings in the capacity of engineer only; and I cannot take the books of the company as evidence that he ever attended any meetings in the capacity of a shareholder. I therefore hold that, if any application had been made, he would have been entitled to have his name expunged from the register. It does not appear that he ever was called upon to pay any money in respect of these shares. The fact of his being on the list of shareholders seems to have been concealed from him till the 30th of October, when he received the letter of the secretary informing him that the shares had been allotted to him, and requesting him to sign the receipt. This letter he answered without delay, returning the certificates. I am, therefore, clearly of opinion that Sir Charles Fox's name was improperly placed on the list of shareholders. It will be necessary, however, to intitle the notice of motion in Chancery as well as in Bankruptcy, and to make it an application to remove the name from the register of shareholders as well as the list of contributories; and then, upon the amended notice of motion, I propose to declare that Sir Charles Fox never was a shareholder, and order his name to be

removed both from the register and from the list of contributories. Deposit to be returned. I cannot give him any costs, on account of the reported cases; and, besides, he has not come here with a correct application.

WESTBURY, L.C. } *Ex parte* LUBBOCK, in
May 22. } *re* FLOOD AND LOTT.

Secured Creditor—Interest subsequent to the Bankruptcy.

Under the usual order made upon the petition of an equitable mortgagee, directing the securities to be realized and applied in payment of principal, interest and costs, and giving the equitable mortgagee leave to prove for the deficiency, the calculation of interest must be made to the date of the bankruptcy only, and the mortgagee cannot claim to retain, in the first instance, out of the proceeds of the securities, interest accrued subsequent to the bankruptcy.

This was an appeal, by Sir John William Lubbock, Bart., the surviving partner in the firm of Lubbock, Foster & Co., bankers, from the order of the Commissioner of the Exeter District Court of Bankruptcy, dated the 17th of April 1863, whereby Sir J. W. Lubbock was ordered to repay to the assignees of the bankrupts the sum of 275*l.* 2*s.*, which he was therein stated to have been paid over and above 20*s.* in the pound upon a debt of 7,179*l.* 18*s.* 6*d.*, and that no further dividend should be retained on the proofs for 2,708*l.* 7*s.* 6*d.* and 6,000*l.* therein mentioned, and that no further dividend should be paid to Sir J. Lubbock out of the joint or separate estates of the bankrupts.

Christopher Samuel Flood and Harry Buckland Lott, bankers at Honiton, in Devonshire, were declared bankrupt upon a fiat issued on the 23rd of November 1847. At the time of the bankruptcy Messrs. Lubbock, Foster & Co. were creditors on the joint estate for 7,310*l.* 7*s.* 11*d.* At the same time they held the joint and several promissory-notes of the two bankrupts as collateral security for 6,000*l.* They also held as equitable mortgagees, first, the title-deeds of property belonging to the joint estate of the bankrupts, secondly the title-deeds

of property belonging to the separate estate of Flood, and, thirdly, the title-deeds of property belonging to a Mr. Mules, which had been deposited with the bankrupts as a security for money due to them.

In 1849 Messrs. Lubbock & Co. presented a petition to the Court of Bankruptcy, praying for a declaration that they were equitable mortgagees of the estates comprised in the deeds and securities deposited with them, and that it might be referred to the Commissioner acting in prosecution of the fiat to take an account of what was due to the petitioners for principal and interest by virtue of the said several securities, and that the same estates and securities might be sold, and that out of the monies which should arise and be produced from such sale, and out of the rents and profits in the mean time, after payment of costs, the sum due to them, with subsequent interest, might be paid; or if the same should not be sufficient, then that the petitioners might be at liberty to prove for the residue against the joint or separate estates of the bankrupts as they might be advised.

On the 6th of August 1849 an order was made by Sir J. L. Knight Bruce, V.C., the chief Judge of the Court of Bankruptcy, upon this petition, by which it was declared that the petitioners were equitable mortgagees upon the premises comprised in the title-deeds, and it was referred to the Commissioner to take an account of the principal and interest due to them in respect of their securities, and the premises were directed to be sold, and the monies arising from the sale to be applied, after payment of the expenses incident to the sale, and of the costs of the application, in payment to the petitioners of what should be found due; and if the monies arising from the sale should not be sufficient for that purpose, the petitioners were to be at liberty to go in and prove under the fiat for the deficiency, and be admitted creditors thereunder for what they should so prove, and be paid a dividend or dividends thereon rateably and in equal proportion with the rest of the creditors.

On the 13th of June 1850 the Commissioner (Mr. Commissioner Bere) made his report, by which he found that 7,179*l.* 18*s.* 6*d.* was due to Lubbock & Co. by virtue of the securities for principal and interest cal-

culated to the date of the fiat, together with a further sum of 834*l.* 1*s.* 6*d.* for interest to the 31st of May 1850, making altogether 8,014*l.*, and not including interest subsequent to the last-mentioned date.

Messrs. Lubbock & Co. having elected to prove against each of the separate estates of the bankrupts on the promissory-notes for 6,000*l.*, on the 12th of August 1851 the Commissioner made another order, on the application of Messrs. Lubbock & Co., ordering that their claim against the joint estate should be withdrawn, and that they should be at liberty to prove such amount as might be due to them on the promissory-notes against the several separate estates of the bankrupts.

Several sums of money, amounting in the whole to 5,854*l.* 16*s.* 3*d.*, being the proceeds of the deposited securities, were from time to time paid to Messrs. Lubbock & Co. They also received 1,354*l.* 3*s.* 9*d.* dividend on the separate estate of Flood, and 387*l.* 10*s.* dividend on the separate estate of Lott. These sums together, amounting to 7,596*l.* 10*s.*, exceeded the amount of the debt found due to the date of the fiat by 416*l.* 11*s.* 6*d.*, but Sir J. Lubbock claimed to have the proceeds of the securities applied in the first place in payment of interest accrued due since the fiat upon so much of the debt as from time to time remained unpaid; so that if Lubbock & Co. were not entitled to any interest on the 7,179*l.* 18*s.* 6*d.* found due to them after the 23rd of November 1847, other than the rents were sufficient to satisfy, they had been overpaid by the amount of 416*l.* 11*s.* 6*d.*, which the official assignee claimed to have repaid by them, after deducting the costs to which their solicitors were entitled, and which would reduce the amount to the above-mentioned sum of 275*l.* 2*s.*

Several sums of money had also been paid to Messrs. Lubbock & Co. in respect of rents accrued due before such sale of the property comprised in the securities; but it was not contended that they were not entitled to apply them in reduction of interest.

Upon the application of the creditors' assignees and official assignee of the estate of the bankrupts, the order now appealed from was made by Mr. Biggs Andrews,

Q.C., the Commissioner of the Exeter District Court of Bankruptcy.

Mr. Daniel and Mr. De Gex, for the appellants, cited—

Ex parte Shepherd, in re Plummer, 2 Mont. D. & D. 204; s.c. 1 Phil. 56.

Ex parte Peacock, 2 Glyn & J. 27.

Mr. Bacon and Mr. Bevir, for the assignees, were not called upon.

The LORD CHANCELLOR.—This case has been very ingeniously argued, but when carefully considered does not present much difficulty. The present petitioner had at the date of the bankruptcy a debt of 7,179*l.* 18*s.* 6*d.*, in respect of which he held several securities as equitable mortgagee. I will take those securities upon the representation of the learned counsel for the appellant to have consisted, first, of property belonging to the bankrupts jointly; secondly, of property belonging to one of the bankrupts severally; and thirdly, of deeds to which they laid claim as relating to property belonging to a Mr. Mules, who in this respect may be assumed to have acted as a surety. Now, the security of the appellant was a security belonging to him simply as equitable mortgagee. Nothing is better settled by the practice of this Court for the last sixty years than that where security is held by a creditor, and after a bankruptcy he presents his petition, to have that security realized, he is not entitled to any interest subsequent to the date of the fiat. Now the language of orders made by the Court is to be construed with reference to the settled rules of the Court, and this observation particularly applies to the order made in August 1849. The present petitioner presented this petition in April 1849, upon which this order was made, viz., that the Commissioner should compute the principal and interest due to the petitioners in respect of their securities, that the property should be sold, and out of the proceeds the costs should be paid, and after payment to the petitioners of what should be found due to them as aforesaid, the surplus, if any, should be paid to the assignee. All that we have to do is to construe that order, and it must be construed with reference to the rule of the Court. I am not at liberty to assume that the Court in using that language intended to depart

from the ordinary rule; neither does there appear to have been any special circumstances existing at the time of the order, which can be used for the purpose of setting that rule aside. I am bound therefore to say, without reference to the prayer of the petition, which abundantly confirms that conclusion, that under the direction to compute principal and interest, interest is to be computed according to the rules of the Court, and must therefore stop at the date of the fiat. That being so, the form of the order settles the whole question as to the joint security, inasmuch as the form of the order gives the whole proceeds over to the assignee, after payment of the costs, principal and interest so computed. The attempt on the part of the petitioner seems to be founded entirely on the erroneous act of the Commissioner in finding that a sum was due to the petitioner for interest calculated to the date of the fiat, together with a further sum for interest accrued due since the date of the fiat. That computation was made in error, and was not justified by the order; and the attempt to press that unwarranted act on the Court is such as I cannot listen to. But then it is said, that by the election of the petitioner the matter is concluded; but it is plain that this is not so. The election was exercised in respect of 6,000*l.* that was proved against the separate estates of the two bankrupts. That left the present petitioner entitled to the benefit of the order of August 1849, to the extent of the surplus, viz. 1,179*l.* 18*s.* 6*d.* He has actually received that sum by virtue of the order of August 1849, and having received in respect of the separate estate the whole of the 6,000*l.*, and under the order of August 1849 the whole of the 1,179*l.* 18*s.* 6*d.*, the present attempt is reduced simply to an attempt to have paid to the petitioner interest subsequent to the date of the fiat—an attempt which is utterly precluded by the terms of the order. The Commissioner, therefore, has come to a right conclusion, and the present application must be refused, with costs.

WESTBURY, L.C. } *Ex parte* LAWRENCE, in
May 22. } *re* BEALE'S ASSIGNMENT.

*Trust Deed—Examination of Trustee—
The Bankruptcy Act, 1861, s. 136.*

The Court of Bankruptcy has jurisdiction to summon a trustee under a deed of assignment for the benefit of creditors to be examined touching his dealings with the trust estate; and the Court of Appeal will not inquire into the sufficiency of the grounds upon which such a summons has been issued.

This was an appeal from an order of Mr. Commissioner Fane, directing a warrant to issue for the committal of the appellant to the Queen's Prison until he should submit himself to be sworn in this matter.

The appellant was one of the trustees of a deed of assignment executed by Beale for the benefit of his creditors, and had been summoned upon the application of three of the creditors to attend an adjourned meeting under the deed to be held before Mr. Registrar Roche on the 2nd of March last. Mr. Lawrence attended this meeting, and being required to be sworn in order to his being examined touching his dealings with the trust estate, declined to be sworn, whereupon the Registrar referred the matter to the Commissioner; and upon Mr. Lawrence continuing his refusal to be sworn, the Commissioner made the order of committal.

Mr. Swanston, for the appellant, referred to the 136th section of the Bankruptcy Act, 1861, and contended that there was no "claim, dispute or difference" which justified the issuing of the summons. A *prima facie* case ought, at all events, to be made out against the trustee before he could be called upon to be examined. At all events; the Registrar had no authority to issue the summons.

Mr. Bagley, who appeared for the creditors, was not called upon.

The LORD CHANCELLOR said that a trustee under a registered deed for the benefit of creditors stood in the same relation to the creditors as an assignee in bankruptcy did to those who had proved their debts, and it was his duty to submit

to an examination when required. No doubt the better rule of practice would be, that there should be some *prima facie* ground alleged for the application before a summons was granted for the examination of a trustee; but it was not for the Court of Appeal to determine the sufficiency of those grounds, if they appeared sufficient to the Commissioner. The Commissioner had a discretionary power, and the Court would not interfere with his discretion. His Lordship, after referring to the 197th section of the act, said, that where the relation of trustee and *cestui que trust* existed, if the *cestui que trust* desired information as to the trust estate, this was quite sufficient "claim, dispute or difference" within the meaning of the 136th section. It had been objected that the summons, being issued by the Registrar, and not by the Commissioner, was irregular, but if the Commissioner thought fit to have the trustee examined, his decision would operate retroactively, and the trustee could not be permitted to fence with the Court so as to obstruct the rendering of the accounts. The appeal must be dismissed with costs.

WESTBURY, L.C. } *Ex parte* MORGAN, in re
July 18. } PENNELL.

Practice—Bankrupt Law Consolidation Act, 1849, s. 27.—Registrar sitting for the Commissioner.

An order made by a registrar sitting for the Commissioner under the 27th section of the Bankrupt Law Consolidation Act, 1849, must shew, on the face of it, the nature of the circumstances under which the registrar was authorized so to sit.

Mr. Charles Russell moved in this case, on behalf of the assignees of the bankrupt's estate, that the claim of Messrs. Sichel & Alexander against the estate might be disallowed and the proof expunged. The motion was by way of appeal from the order of Mr. Registrar Thring, whilst acting for and in the absence of the Commissioner of the Liverpool District Court of Bankruptcy.

The LORD CHANCELLOR asked by what

authority the registrar had heard the application.

Mr. Russell pointed out the 27th section of the Bankrupt Law Consolidation Act, 1849, which enacts that any registrar of the Court may, during vacation or during the illness or absence from any other reasonable cause of any Commissioner thereof, act for and as the deputy of such Commissioner; and any such registrar so acting shall have and exercise all power vested in the Court except the power of commitment, the hearing of any disputed adjudication, or the hearing or determining of any question of the allowance or suspension of any bankrupt's certificate. The order of the registrar was probably invalid, inasmuch as it did not comply with the 44th Rule of 1849, which provides that, "except in cases of emergency, the nature whereof shall be entered on the proceedings, no registrar shall sit or act for any Commissioner without the express request in writing of such or some other Commissioner."

Mr. Little appeared for Messrs. Sichel & Alexander.

The LORD CHANCELLOR said that he felt it to be his duty to see that these orders were properly made. It was essential not only that the order should be properly made, but that it should shew on the face of it that it was properly made. There was nothing on the record in this instance to shew that the Commissioner was absent, "from illness or any other reasonable cause," or that the registrar had been expressly, in writing, requested to act for him. If the order had been made, as one of the learned counsel had suggested, by consent, then there was no appeal. He could not allow any further irregularities in these matters; and he certainly could not act upon the order at present.

After some further discussion, it was arranged that a communication should be made to the Commissioner, to ascertain whether the registrar had been duly authorized to act for him; and if not, that the matter should be referred back to the Commissioner.

WESTBURY, L.C. } *Ex parte SPYER, in re*
May 6; } JOSEPHS.
July 30.

The Bankruptcy Act, 1861, ss. 192, 197.
—*Trust-Deed for Benefit of Creditors—*
Power enabling Trustees to pay Creditors
under 10l. in full.

A power in a deed of assignment for the benefit of creditors enabling the trustees to make such arrangements with the creditors whose debts are under 10l. as they may deem expedient, is inconsistent with the provisions in the Bankruptcy Act, 1861; but where the deed shewed a clear intention that the estate should be administered as in Bankruptcy, —Held, that the particular power might be rejected as repugnant to the general tenor of the deed, and that its existence formed no objection to the validity of the deed nor to the capacity of registering it under the statute.

The question in this case was as to the validity of a deed of assignment for the benefit of the creditors of Walter Josephs. By this deed, which was dated the 5th of September 1862 and made between Walter Josephs, of the first part, Jones Spyer, trustee for himself and the rest of the creditors of the said Walter Josephs, of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being respectively creditors of the said W. Josephs, of the third part, after reciting among other things that the said W. Josephs had become and was then justly and truly indebted unto the said several persons parties thereto of the second and third parts in the several sums of money set opposite to their respective names in the schedule thereunder written, which he was unable to pay in full, and he had therefore proposed and agreed to assign all his estate and effects unto the said Jones Spyer for the benefit of his creditors as therein-after mentioned; it was witnessed that, in pursuance of the said agreement and in consideration of the premises, the said W. Josephs bargained, sold, assigned, transferred and set over unto the said Jones Spyer, his executors, administrators and assigns, all and every the stock-in-trade, goods, wares, merchandises, books of account, debts, sum and sums of money and

all securities for money, vouchers and other documents, and other writings, and all other the personal estate and effects whatsoever and wheresoever of the said W. Josephs (except leasehold estates and shares in any company or undertaking) in possession, reversion, remainder or expectancy, upon trust to collect and receive, or sell and dispose of the said thereby assigned premises, and stand possessed of the monies to arise from such sale, and of the profits in the mean time, upon trust, in the first place to retain and reimburse himself all costs, charges and expenses of preparing and making such sales, &c., and also all costs, charges and expenses of preparing the present indenture, and also to pay all salaries, wages, charges and allowances to be made to clerks, accountants, agents and subordinates; and in the last place to pay, retain and satisfy rateably and proportionately, and without any preference or priority, to the said Jones Spyer and the other persons parties thereto of the third part who should execute the deed, the several debts or sums of money set opposite to their respective names in the schedule thereto, and all other the creditors of the said Walter Josephs (subject to the covenant thereafter contained for verifying the amounts thereof), and to pay the residue (if any) of the said monies unto the said W. Josephs, his executors, administrators or assigns.

The deed also contained the following proviso:

"Provided always, and it is hereby covenanted and agreed by and between the several parties hereto, that it shall be lawful for the said Jones Spyer, at the expense of the said trust estate, to require the amount of any debt or debts of any or either of the several creditors parties hereto to be verified by solemn declaration, or in such other manner as to the said trustees shall seem expedient; and in the event of any such creditor or creditors refusing or failing so to verify his or their debt or debts, or declining to execute these presents, then such creditor or creditors so refusing or failing or declining as aforesaid, shall lose all benefit; dividends and advantage to be derived from or otherwise claimed under these presents, anything herein contained to the contrary notwithstanding. And thereupon the said Jones Spyer is hereby authorized

and empowered, but it is not incumbent on him, to pay such last-mentioned dividends or dividend unto Walter Josephs, his executors, administrators or assigns, and the said Jones Spyer is hereby authorized and empowered to pay or make such arrangements with the creditors whose debts are under 10*l.*, and to pay the costs (if any) of the creditors proceeding against the said Walter Josephs for the recovery of their debts as he the said Jones Spyer may deem expedient."

And the deed contained a release by the several creditors parties thereto of the second and third parts.

Certain creditors having claimed a specific lien on the proceeds of several parcels of goods supplied by them to Josephs, the trustee of the deed presented a petition to the Court of Bankruptcy for a declaration that no such lien existed, and that such proceeds formed part of the estate divisible amongst the creditors under the deed. Upon the petition coming on to be heard before Mr. Commissioner Fane, his Honour was of opinion that several of the provisions of the Bankruptcy Act, 1861, had not been observed, and that he was therefore unable to proceed in the matter.

From this decision the trustee now appealed.

Mr. Bacon and *Mr. Roxburgh*, for the appellant, supported the deed.—They cited *Ex parte Morgan* (1).

Mr. Sargood, for the respondents, the creditors claiming the specific lien, contended that the deed did not satisfy the requirements of the 192nd section. The clause excluding creditors who should fail to execute was fatal.

[The LORD CHANCELLOR pointed out that this clause was nonsense; it enabled the trustee to require the amount of debt of any of the creditors parties thereto to be verified, and in the event of such creditor or creditors refusing to execute, such creditor or creditors so refusing, &c. should lose all benefit.]

Then the clause which authorized the testator to pay the creditors whose debts were under 10*l.* in full invalidated the deed: no inequality in the distribution of the assets amongst the creditors could be

(1) *Ante*, p. 15.

tolerated in a deed registered under the 192nd section. He cited *Gardner v. Chapman* (2).

Mr. Roxburgh replied.

The LORD CHANCELLOR said, the only difficulty he felt was as to the clause empowering the trustee to pay in full creditors under 10l., and upon this point he reserved his judgment; he did not think the rest of the deed objectionable.

The LORD CHANCELLOR (July 30).—This was an objection to the validity of a trust-deed, founded upon the circumstance that in the deed a power is given to the trustee of paying in full creditors under 10l. It is a power without any obligation to exercise it, a power committed entirely to the discretion of the trustees. It was said that to pay these creditors in full was at variance with the rule of administration in bankruptcy, and that therefore the deed was avoided. If it had been a trust, or absolute direction to pay, there might have been ground for the objection; but inasmuch as the deed proposes only to give liberty to the trustee, if the exercise of that liberty be at variance with the duty and obligation of the trustee as declared by the rest of the deed and the law applicable to it, then the liberty being repugnant to the higher duty is simply a power which the trustee has no right to exercise. I must therefore hold, that the power is no objection to the validity of the deed; but that the power being repugnant to the duty of the trustee cannot be exercised by him. Much misapprehension has arisen with respect to these trust-deeds from not attending to the full effect and meaning of the 197th clause of the act of 1861. There is, undoubtedly, some obscurity in the antecedent enactments of section 192, arising in a great degree from amendments and alterations that were made in the language of the original bill; but, nevertheless, it is clear that the operation and effect of a trust-deed duly registered in conformity with the 192nd section are defined with accuracy by the 197th section. If a deed has been duly and completely registered under the 192nd section, that deed has the full operation and effect attributed to it by the 197th

section, and it subjects the whole estate and effects of the debtor to be applied for the benefit of his creditors, and the rights of the creditors are defined by, and must be collected from, the 197th section. Creditors under a deed of trust are put in the same position in which creditors under a fiat are placed by the Bankrupt Law. Secured creditors, therefore, rank under the deed of trust for the amount remaining after deduction of the value of their securities. With regard to the doubt that has been suggested, whether the deed of trust affects the whole of the estate of the bankrupt, it is positively declared by the 197th section that the creditors shall have the benefit in like manner as if the debtor had been adjudged a bankrupt, and that the trustees and the creditors shall have the same powers, rights and remedies with respect to the debtor and his estate and effects (words which are used without any qualification or deduction), and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt or his acts, estate and effects in bankruptcy. Then follows a direction that, except the deed directs otherwise with respect to jurisdiction, the Court in Bankruptcy shall have plenary jurisdiction to decide every question. Now that exception refers to what may very naturally be put into a deed, a proviso for questions being settled by arbitration. It may be also possible that some different rule of administration may be adopted; as, for example, that there should be no distinction between joint and separate creditors. But the whole effect of this 197th section, if it be properly attended to, construed and appreciated, is to give to the deed, the moment it attains the character of being a duly registered deed, a comprehensive effect upon all the estate and effects of the debtor, and the particular operation of making the positive and relative rights of the trustees and creditors claiming under it the same as the rights of assignees and creditors under a fiat. This is still further exemplified by the 200th section, for where it is not competent to have a deed that shall answer entirely the requisites of the 192nd section, the model deed, which is given by the schedule, conveys all the estate and effects of the debtor in like manner as

(2) 7 Com. B. Rep. N.S. 317; s. c. 29 Law J. Rep. (N.S.) C.P. 281.

if he had become a bankrupt. It is further illustrated by the 198th section, which deprives the creditor who has assented to the deed of trust, or is bound by the deed of trust, from having recourse to any process whatever, either against the estate or the person of the debtor. I am, therefore, of opinion, in the present case, that the objection is not well founded. The deed of trust states an intention to have the whole estate of the debtor administered as if it were a case of bankruptcy, and that the debts shall be paid to the creditors, and all questions relating to the trust estate decided according to English Bankrupt Law. The particular power or liberty given to the trustees is, therefore, repugnant to and inconsistent with the general tenor of the deed and with the enactment under which the deed now comes. I, therefore, hold that that power cannot be exercised, and that it forms no objection to the validity of the deed, and the capacity of registering it under the statute.

WESTBURY, L.C. } *Ex parte PAINE, in re*
April 15. } GLEAVES.

Baron and Feme—Mortgage of Wife's Estate—Bill for Redemption by Wife—Disclaimer by Assignees of Husband—Proof of Mortgage Debt, how far allowed—Dismissal of Bill to redeem—Foreclosure.

At the hearing of a suit instituted by the wife of a bankrupt for redemption of a mortgage executed by the husband and wife of the wife's real estate, the assignees of the bankrupt, who were co-defendants with the mortgagee, disclaimed their right to redeem, and a decree was made giving the first equity of redemption to the wife. After this decree, the Commissioner in bankruptcy allowed the mortgagee to prove against the estate of the bankrupt for the full amount of his principal and interest. Upon appeal to the Lord Chancellor, it was held that the disclaimer of the assignees operated only in acceleration of the wife's right to redeem, but if she did not exercise the right, then, the purpose for which the disclaimer was given having ceased to exist, the assignees' equity of redemption would continue as before. Consequently, the mortgagee could only be admitted to prove, subject to the condition that in the event of

the bill being dismissed as against him, the interest of the bankrupt in the mortgaged premises should be sold, and proof admitted for the residue of the mortgage debt, after deducting the proceeds; or, in the event of redemption by the wife, the proof should be admitted subject to the same being expunged, or remaining wholly or partially for the benefit of the person paying the mortgage debt.

Explanation of the rule that a dismissal of a bill for redemption operates as a decree for foreclosure (1).

This was an appeal by the assignees of a bankrupt against the decision of Mr. Commissioner Holroyd, whereby Mr. Thomas Pyke, a mortgagee of premises of which the bankrupt and his wife were seised in right of the wife was admitted to prove for the whole amount of his mortgage-debt and interest. *Gleaves v. Paine* (2), where the facts of the case will be found reported, was a suit instituted by the wife of the bankrupt against the assignees and the mortgagee for the purpose of having her interest in the mortgaged estate defined and settled, and for redemption of the mortgage.

By the decree of the Lord Chancellor, as ultimately drawn up, after considerable discussion before the Registrar, it was declared that, the defendants, the assignees, by their counsel, *disclaiming all right to redeem* the mortgaged premises, the plaintiff was entitled to redeem the same, and it was ordered that upon the plaintiff paying to the defendant, the mortgagee, what should be found due for principal and interest and costs, upon an account thereby directed to be taken, the said defendant should re-convey the mortgaged premises to the trustees of a settlement to be executed for the wife and children; otherwise, the bill to be dismissed, with costs, as against the mortgagee. The words in *italics* were, at the instance of the solicitors to the assignees, substituted for those originally used by the Registrar, "*disclaiming all right and equity of redemption.*"

After this decree, the Commissioner, who had at first rejected the claim of Mr. Pyke

(1) See *Cholmley v. the Countess of Oxford*, 2 Atk. 267; *The Bishop of Winchester v. Paine*, 11 Ves. 194, 199.

(2) *Ante*, Chanc. 182.

to prove without realizing or accounting for his security, on the 3rd of March 1863, admitted him to prove for the full amount of his claim.

Mr. J. H. Palmer and *Mr. E. F. Smith* appeared for the assignees, in support of the appeal, and urged that the disclaimer by the assignees of their right to redeem could not be made the foundation of any larger right to prove on the part of the mortgagee. Their disclaimer was only a waiver of their right in favour of the plaintiff, and did not bar their equity of redemption as against the mortgagee, and could not possibly be made the foundation of any larger right to prove. A creditor holding security cannot be allowed to prove till he gives up or realizes every security given to him by the bankrupt. If the disclaimer operates in favour of the mortgagee so as to preclude the assignees from redeeming, it is a foreclosure of the life interest, and the debt is satisfied. No proof should be allowed till the life estate is realized.

Mr. Cole and *Mr. Rigby*, for the mortgagee, contended that the assignees, having disclaimed their equity, had no longer any interest in the property. The mortgagee was entitled to prove for the whole debt under the order pronounced upon the hearing of the appeal.

The LORD CHANCELLOR (without calling on *Mr. Palmer* for a reply).—It is impossible for me to leave the proof in the manner in which it now stands on the proceedings, namely, in a simple and unqualified form. There has been a misapprehension, I think, of the nature and effect of the decree. Every decree for redemption may be denominated, in a certain sense, an optional decree, because the decree leaves it in the power of the plaintiff either to redeem or to submit to have his bill dismissed with costs against the mortgagee, which it is said—though I give no opinion upon it—has the effect of a decree of foreclosure. The present decree follows entirely that form, with one exception, that inasmuch as the defendants are several, and one of them, the assignee of the husband, becomes entitled to the first life estate, and therefore has the first right to redeem, the decree proceeds to give the right of redemption to the party who would stand second in order, by reason of the

person entitled to the first estate declining the right to redeem. That part of the decree requires to be fully understood, as well as the other part of the decree dismissing the bill requires to be understood as to its consequences.

Now, it is quite plain, I think, upon the language of the decree, and it certainly becomes plain from the nature of the facts and circumstances, that all that the disclaimer of the assignees was intended to do, and all that it has done upon this decree, is to accelerate the wife's right to redeem: the wife, therefore, had given to her the first right of redemption; but, as I have said, that redemption is optional, and if the wife should hereafter elect deliberately not to exercise that right of redemption, undoubtedly the disclaimer of the assignees, which was intended only to accelerate that right, can no longer be founded upon as amounting either to a contract or to the repudiation of an estate which is in force and effectual, after the purpose for which it was intended and given has ceased to exist. Supposing, therefore, which is a possible thing, that the wife should refuse to exercise the right of redemption, then the other part of the decree would take effect, by which the wife's bill is dismissed with costs as against the mortgagee. *Mr. Cole* contends that in that event the disclaimer would be equally operative, or that if the disclaimer did not operate, the principles of this Court would come into play, and, either on the one ground or on the other, the assignees would be deprived altogether of the right which they had in respect of the bankrupt's life interest. I am by no means satisfied that that would be the result of the decree. I cannot extend the decree, in that contingency, beyond its words, and the effect of the decree would only be to dismiss the bill of the wife, and possibly to preclude any further bill being filed by her; which may have the effect of annihilating her equity of redemption, seeing that the equity of redemption is a thing available only in this Court; and, consequently, if the bill of the party entitled to it be dismissed, and that dismissal precludes any further claim, then the equity of redemption ceases to exist, merely for the reason that it is no longer capable of being enforced. But that applies only to the individual who has

filed the bill, and it would be impossible upon that ground, and upon the effect of that reasoning, to say that, the right to redeem belonging to the defendant, the equity of redemption of the defendant is equally lost and annihilated by the failure of the plaintiff to redeem. I cannot think, therefore, that if the event should happen of the wife not fulfilling this decree and redeeming the plaintiff, whereby her bill would be dismissed, the assignees would any longer be bound by their disclaimer, nor would their interest in the bankrupt's estate be affected by that order of dismissal, for they would be restored to the right of the bankrupt's life interest in the property in question.

But, then, nothing having been done under this decree, and it being very uncertain what will be done under it, Mr. Pyke, the mortgagee, applies in bankruptcy to prove his debt. The contention of the assignees is this: that the ordinary rule should have been applied to that proof, subject to the contingency of this decree coming into operation. The decree may come into operation in two ways, either by means of the redemption or by means of the dismissal. If it comes into operation by means of the redemption, then unquestionably the life interest of the bankrupt will be effectually destroyed by the decree; and I therefore am of opinion that in directing the interest of the bankrupt to be sold, that direction should have been given only subject to the contingency of Mrs. Gleaves, the plaintiff in equity, redeeming the mortgagee, in which event the interest of the assignees in the estate would be put an end to; but if the decree takes effect by the dismissal of the plaintiff's bill, then the life interest of the husband would remain intact, and the order for admitting the mortgagee to prove should in that event have been in the form prescribed by the old order of Lord Loughborough, namely, directing the estate of the husband to be first sold and the proceeds deducted from the debt, the proof being admitted only for the difference. I think, therefore, that the form of the proof must be modified in that way. Undoubtedly another question will arise in the event of the decree being carried into effect by the wife redeeming the mortgagee, namely, whether she will be entitled to the benefit of that proof; that will be a question that will be raised again

in the Bankruptcy Court upon any application by the wife, after payment of the mortgage debt, to be admitted to the benefit of the proof; but I think I must vary the order by directing that, in the event of the plaintiff's bill being dismissed in the cause of *Gleaves v. Paine*, the life interest of the husband transferred to the assignees by the bankruptcy shall be sold, and the proceeds deducted from the proof, and the proof admitted for the residue; but declaring that, in the event of the plaintiff in equity redeeming the mortgagee in the manner expressed in the decree, then the proof shall stand, without prejudice to any question as to the right to expunge the same, either wholly or partially. What I mean to express is this: that if the redemption decree fails altogether, and the bill is dismissed against Pyke, then the proof must follow the ordinary form, as if there had been no decree at all; but in the event of the redemption taking effect and the debt being paid, there will arise that question to which Mr. Smith has adverted, namely, whether the proof ought to be entirely expunged, or ought to stand, wholly or partially, for the benefit of the plaintiff in the cause in equity, considered as a surety for her husband; and what I desire to express is, that this order shall be without prejudice to any question that may arise in that state of things; because undoubtedly a very material question will arise, to what extent the wife is to be regarded as a surety, having regard to the fact that part of the mortgagee's security belongs to the husband in his own right, and a part only was the property of the wife. The appellant will take back the deposit; but I cannot give him any costs. It is a case of considerable complication, and undoubtedly the Commissioner had great difficulty in dealing with it by reason of the unusual form of the decree. The assignees will have their costs out of the estate. Of course, I can see what is behind all this; but these exercises of ingenuity are seldom productive of any profit, and seldom do more than augment the expense of litigation. It is nothing but an ingenious device to get, if possible, the benefit of the estate, as well as a dividend out of the bankrupt's property.

The following order was ultimately made: Let the proof stand, but subject to the following conditions, viz. that in the event of

the plaintiff's bill in *Gleaves v. Paine* being dismissed against the defendant Pyke with costs, then the life estate of the bankrupt in the mortgaged premises is to be sold, and the proceeds of the sale are to be deducted from the debt, and the proof is to be admitted for the balance only. But that in the event of the plaintiff in that suit redeeming the mortgage under the decree, then the proof is to be admitted, subject and without prejudice to the right to have the same expunged, or to be made to stand, wholly or partially, for the benefit of the plaintiff. Deposit to be returned. No order as to costs, except the assignees to have their costs out of the bankrupt's estate.

WESTBURY, L.C. { *Ex parte* THE DUDLEY
April 15. { AND WEST BROMWICH
BANKING COMPANY, *in*
re HOPKINS.

Practice—Time for Appealing—Date of Order.

The date of an order is the day when it was made, and the time for appealing under the 12 & 13 Vict. c. 106. s. 12. runs from that day, and not from the day when the order was drawn up.

Ex parte Heslop not followed.

Mr. Daniel and Mr. Little appeared in support of an appeal from an order of the Registrar of the Birmingham District Court of Bankruptcy, sitting for the Commissioner. —The order was dated the 18th of February when, in fact, it was pronounced, but was not drawn up till the 26th of March.

Mr. Bacon and Mr. De Gex objected, that the appeal, not having been entered within twenty-one days from the date of the order, was too late.

Mr. Daniel contended, that the date of the order must be taken to be the day when it was drawn up, and not when it was pronounced—*Ex parte Heslop* (1).

The LORD CHANCELLOR declined to follow that case. The order must be considered to date from the day when it was pronounced. The appeal was too late, and must be dismissed.

WESTBURY, L.C. { *Ex parte* DAVIS, *in re*
May 30; { HARRIS.
July 18.

Partnership—Construction of Deed.

In 1856 an agreement was entered into between J. H. and R. F. D. under which the former was to carry on business during twenty-one years for the benefit of himself and of any person whom the latter might name within eight years. R. F. D. was to make advances, and to become surety to a bank for J. H.'s drafts, and the profits were to be applied, first, in payment of a salary and allowances to J. H., then in repayment of the advances made by R. F. D. with interest, and subject thereto were to belong as to one-third to J. H., and as to two-thirds to the nominee of R. F. D. R. F. D. died in 1861 without exercising his right of nomination, and in 1863 J. H. became bankrupt. On application by the executors of R. F. D. to prove under the bankruptcy for the amount due to his estate under the arrangement,—Held, that the agreement did not constitute a partnership between J. H. and R. F. D., and that the executors of the latter were entitled to prove.

This was an appeal from an order of Mr. Commissioner Hill, the Commissioner for the Bristol District Court of Bankruptcy, rejecting a proof for 693*l.* 3*s.* 7*d.* tendered by the executor of Richard Francis Davis, Esq., deceased, on the ground that the existence of a partnership between the bankrupt Harris and Davis had been established, and no accounts had been taken.

The claim arose under the following circumstances. In 1855, and up to the time of his decease, Richard Francis Davis, was a director of the Blaenavon Iron and Coal Company, who were the owners of three shops, at Blaenavon, Garndyraris and Pwll-du. Harris, the bankrupt, who had married a sister of R. F. Davis, being in very straitened circumstances, R. F. Davis, with a view to assisting him, proposed that he should take these shops, which were then to let, and carry on business there as a general shopkeeper, R. F. Davis advancing him 1,200*l.* to stock the shops, and becoming his surety to the company for payment of certain bills which it was arranged they were to accept for him; and the bankrupt on his

(1) 1 De Gex, M. & G. 477.

part agreed to pay R. F. Davis all advances made by him, and to admit into partnership with him any nominee of R. F. Davis to be named within eight years, such nominee to be entitled to two-thirds of the capital and profits of the business.

This agreement was expressed in the defeasance to a bond in the penalty of 5,000*l.* given by the bankrupt to R. F. Davis, and dated the 7th of January 1856, which contained recitals that Harris had agreed to take a lease of the premises for twenty-one years, and to carry on there the business of a general shopkeeper in the name of John Harris & Co.; that Harris had proposed to the company that they should accept his drafts upon them in the above name, with which he was to pay for goods, &c., to which the company had agreed, on having a sufficient surety; and that Harris had proposed to Davis that he should be such surety, and that he (Davis) should advance to Harris capital to assist him in providing goods and furniture, such advances not to exceed 1,200*l.*; that Harris, as a consideration to induce Davis to become such surety, had further proposed to Davis that the business should be carried on by Harris and such other person or persons as the said Davis should, at any time within the space of eight years from the date of the bond, nominate or appoint; and that the said Harris and the said nominee or nominees of the said Davis as aforesaid should be partners in the business on the terms thereafter contained; also that Harris had further proposed, as a further consideration, &c., that he (Harris) would deliver to Davis, if required by him so to do, the promissory notes of Harris, payable to Davis on demand, for the amounts of the drafts of Harris on the said company, and for the amounts of the advances made by Davis, such notes to be a security for the payment by Harris of the said drafts, and for the repayment to Davis, his executors or administrators, of the advances of Davis; and that Davis had consented to the proposals, and had become surety as aforesaid, and the company had agreed to grant a lease of the said premises, and to accept the drafts; that it had been stipulated and agreed between Harris and Davis, that Harris, his executors and administrators, should, during the term, carry on the business for the benefit of himself and the person or persons

to be nominated by the said R. F. Davis, as co-partners with the said John Harris, upon the terms after mentioned; and should immediately upon the nomination by the said R. F. Davis, his executors or administrators, of a person or persons to be a partner or partners as aforesaid in the said business, admit and receive the said nominee or nominees of the said R. F. Davis, his executors or administrators, to be a partner or partners in the said business, &c.; and that the said partnership should commence and take effect immediately on the nomination in writing of such person or persons as aforesaid by the said R. F. Davis, his executors or administrators, &c., and that the said partnership should remain and continue for the term of twenty-one years from the date of the bond: the clear profits to be applied in the following manner: 100*l.* per annum during the period of eight years from the date thereof to be paid to Harris, for the services of himself and his wife; Harris to have board and lodging for himself and family; the remainder of the said profits to be applied annually in or towards paying to the said R. F. Davis, his executors or administrators, the amount that should be from time to time due to him for his advances to Harris, or the said co-partnership, with interest at 5*l.* per cent.; after Davis had been fully paid, the stock-in-trade and profits of the business to belong to the said co-partners in the following proportions: one-third to Harris, his executors or administrators, and the remaining two-thirds to the nominee or nominees of the said R. F. Davis, his executors or administrators; and all losses, damages, and expenses to be incurred or occasioned in or about the carrying on of the said business, to be borne by the said co-partners in the same proportions as the profits of the said business were to be divided between them; Harris, until such nomination by the said Davis as aforesaid, to provide and keep books, &c., such books to be always kept in the several counting-houses or other places where the business should be usually carried on, and where the said Davis, his executors or administrators, and each and every of the partners, should at all convenient times in the day have free access to them; monies, bills of exchange, &c., to be deposited

or lodged with the cashier for the time being of the company, and to be applied in taking up the drafts of Harris, and for the purposes of the business, in reimbursing Davis and the paying the 100% a year to Harris; after payment of the advances by Davis, with interest as aforesaid, the profits of the business to be divided at the end of every year between the said partners in the proportions aforesaid; that Harris should not, either before the nomination by the said Davis, his executors or administrators, of a person or persons to be a partner or partners in the said business, or during the continuance of the said co-partnership, except with the permission in writing first obtained of the said R. F. Davis, his executors or administrators, or the said co-partner or co-partners, carry on any business on his own account or any other business; that he should use his best endeavours to promote the success of "the co-partnership business thereby agreed to be established," and until such nomination as aforesaid, and after such nomination of the said co-partners, should every year during the continuance of the said co-partnership make out accounts, &c., of all monies received and paid by and on account of the said co-partnership, and of all gains or losses which should have accrued or been sustained in the said business, and of all debts, &c., and of all other the joint-stock or effects then belonging thereto, so that the precise state of the business might be clearly ascertained; the estimate to be signed or subscribed by each and every of the said partners. Previously to ascertaining the state and condition of the said joint trade in manner last mentioned, no division of the profits of the preceding year was to be made. Harris, until the nomination of such person or persons as aforesaid by the said Davis, his executors or administrators, and after such nomination the said partners, was and were to give to Davis, his executors or administrators, his promissory note, or their joint promissory note (as the case might be) payable on demand, for the amount of each and every draft so to be made by Harris, or by the said Harris for himself and partner or partners, or by his said partner or partners, on the said company; and also a like promissory note for every sum of money so to be advanced by the said

R. F. Davis as thereinbefore mentioned. Harris, his executors or administrators, was to stand possessed of the term as a trustee for the purposes of the said co-partnership, and should not, without the consent in writing of the said Davis, his executors or administrators, or of the said partner or partners, give notice to the company to determine the lease, &c. If at any time during the said co-partnership, and after the determination thereof, any dispute should arise, &c., or of and concerning the true construction and meaning of these presents, it was to be referred to arbitration in manner therein mentioned. The person or persons to be nominated by the said Davis, his executors or administrators, as partner or partners in the said business might at any time thereafter sell and dispose of his or her share or shares in the said business, &c., to any person or persons, who should thereupon become a partner or partners with the said Harris in the said business. If Harris should die in the lifetime of his present wife, his share in the business was to devolve upon and be enjoyed by his then present wife for the benefit of either herself alone, or if she should have children, for the benefit of herself and children, but the management of the business was to be vested in such person or persons as the said partner or partners entitled to the largest share in the said business should direct. If the wife should die in Harris's lifetime (which happened), the share of Harris in the business was on his death to cease, and the partnership thereby covenanted to be entered into by Harris should so far as related to the said Harris, his executors or administrators, be at an end; but the executors or administrators of Harris should be entitled to be paid by the surviving or continuing partner or partners such a sum of money for his share, &c., as should be fixed by arbitration. Subject to the last proviso, Harris was to be at liberty to sell his share; provided that before such sale he should have given a notice in writing of his intention to each of the said partners, and in such notice should offer to sell his said share to the other or others of his said partners, at a specified price, &c. If Harris should die before the nomination of a person or persons to be a partner or partners in the said business, the interest of Harris, his executors or administrators, in the said

business, and the capital, stock-in-trade, &c. should cease. If Harris died in the lifetime of his wife, his one-third was to devolve on his then present wife, and Davis, his executors, or administrators, was to be at liberty to nominate a person or persons to carry on the business with the wife for her benefit as to one-third of the business, and for the benefit of such nominee or nominees as to the other two-thirds, subject as aforesaid. If the death of Harris previous to the nomination of a partner or partners, should happen after the death of his then present wife, then Davis, his executors or administrators were empowered to nominate a person or persons to carry on the business for the benefit of such nominee or nominees, but subject to the conditions and provisions thereinbefore contained.

The bankrupt, accordingly, commenced trading at Blaenavon and the other places, under the firm of John Harris & Co., and continued so to trade until his bankruptcy, which took place on the 12th of February 1863. Davis became surety for him to the Blaenavon Iron and Coal Company, as provided by the bond, and advanced large sums of money to him, considerably exceeding 1,200*l.* The bankrupt, from time to time, made payments on account and in part satisfaction of such advances, and accounts were from time to time agreed upon between them.

Davis died on the 24th of November 1861, without ever having exercised the right of nomination reserved to him by the terms of the bond, having by his will appointed his son, the appellant, his executor. The testator's estate was now being administered in Chancery, in a suit of *Davis v. Davis*, and the chief clerk of Vice Chancellor Wood, by his certificate, had found a debt of 670*l.* 7*s.* 4*d.* to be due from the bankrupt to the estate of the testator, including interest up to the end of 1861, and by an account subsequently agreed on between the bankrupt and the executor, and made up to the 1st of January 1863, the bankrupt admitted himself to be then indebted to the testator's estate in 693*l.* 3*s.* 7*d.*, for which amount the proof was tendered.

On the 4th of May 1863 the question of the alleged partnership was argued at length before the Commissioner; who came to the conclusion, upon the construction put by

him on the terms of the bond, that the testator became, upon the execution thereof, and continued up to the time of his death, a partner with the bankrupt, and that the bond was an attempt to secure the profits of the business without incurring any liability for its losses.

From this decision the executor appealed.

Mr. W. M. James and *Mr. Bagshawe* appeared for the appellant.

Mr. Lindley, for the respondents.

Cox v. Hickman, 8 H. L. Cas. 268, was cited.

The LORD CHANCELLOR (July 18).—This is an appeal from the decision of the learned Commissioner of the Bristol Court of Bankruptcy rejecting a proof tendered by the appellant, who is the executor of a gentleman named Richard Francis Davis. The ground on which the Commissioner rejected the proof is, that there was a partnership between Richard Francis Davis and the bankrupt John Harris. I agree with the learned Commissioner in this, that the question depends wholly upon the conclusion to be derived from a peculiar instrument, a bond dated the 7th of January 1856, and which is an ingenious piece of mechanism. It appears that Mr. Richard Francis Davis was the manager or managing director of an iron and coal company in Wales, called the Blaenavon Iron and Coal Company. It seems to have occurred to Mr. Davis that it would be a profitable speculation to establish general shops in three localities in Wales, for the purpose of supplying the goods that would be required by the miners and other persons employed by the company, and he accordingly made an arrangement with the bankrupt, John Harris, that John Harris should carry on that business. The terms of the arrangement are embodied in this bond. They were, that the Blaenavon Iron and Coal Company should lease three houses fit to be converted into shops, in three different localities, to the bankrupt Harris; that Harris should purchase the goods necessary for the business, and should pay for them by drafts upon the Blaenavon Company. Those drafts were to be honoured by the Blaenavon Company, upon the guarantee of Mr. Davis. Mr. Davis was to be the surety of Harris for the payment of those drafts to the Blaenavon Company,

after they were honoured by the Company. It was also arranged that Davis should advance to Harris sums of money to enable him to fit up the premises and shops, and to commence the business. It was then arranged that Harris should be the manager of the business for the term of eight years, and should receive, as remuneration for management, the annual sum of 100*l.* a year, and an allowance for the board and lodging of himself and his family. And it was then arranged that all the profits resulting from the business should be applied, in the first place in payment of Harris's salary, and then the expense of his maintenance, and then in payment of the monies advanced by Mr. Davis, together with interest at the rate of 5*l.* per cent. thereon; and, subject thereto, that the whole of the profits should be regarded as profits of a partnership, which Mr. Davis reserved to himself the power of creating, by nominating any person or persons whom he should think proper to select to become partners with Harris in the business. The result, therefore, of the arrangement was, that until the partnership should be created by Davis, there might be, if there were sufficient profits for the purpose, a sum of money, the division of which would be suspended until the formation of that partnership. The terms of the deed are very peculiar. The learned Commissioner appears to have considered that they amounted to a present partnership. I think in that he has mistaken the effect of the deed. No partnership can possibly arise until the person to become partner has been nominated by Davis; and I am by no means of opinion that there is any present contract of partnership between Harris and Davis. And the criterion that there is not, may be taken to be this, that supposing Harris to have become bankrupt before Davis had nominated a partner, then any money reserved as profits to be hereafter distributed between the partners when the partnership was formed, would, by the operation of that bankruptcy, be the property of Harris, the power of creating the partnership being put an end to by the event of such bankruptcy. I think, therefore, that all the provisions of the bond on which the learned Commissioner has relied as indicating the creation of a present partnership, ought to be construed, with reference to the general intent

of the bond, as provisions which shall become operative only subject to the condition and after the nomination of a partner by Davis, an event that never took place. The bankruptcy of Harris took place before there was any nomination of a partner, and in reality, therefore, there was no contract of partnership, for this plain reason, that there was no individual to answer the description and to fulfil the capacity of partner with Harris. It is impossible to hold that the power of nominating a partner given to an individual constitutes that individual himself a partner. It is true that the arrangements which are contained in the deed would probably absorb the whole of the profits before the possibility of any division between the co-partners. But then that is the result of the contract of the lien between Harris and Davis, which, I think, is well constituted by the bond, and is not at all affected by, or merged in, the power that Davis reserved to himself of hereafter creating, if he should think fit, a partnership between some nominee of his own and Harris.

I must therefore take the only subsisting contract between Harris and Davis, at the time of Harris's bankruptcy, to have been the contract of debtor and creditor, in respect of the advances made by Davis to Harris, and the payments made by Davis on account of Harris; and, consequently, I think the proof ought to have been admitted, supposing the figures to be correct, into which, of course, I do not enter. That the executor of Davis had a right in respect of his testator's advance to prove against the estate of Harris is, I think, clear. It has been faintly suggested that Harris was in reality only the agent of Davis. I do not think there is any foundation for that suggestion, or that that view of the case can be supported. Mr. Harris, no doubt, had a substantive and independent interest. In truth, Mr. Harris would be entitled to the whole of the profits after the payment of Mr. Davis, in the event of no partnership (which has been the fact) having ever been created by Davis nominating a person to become a partner. I must, therefore, reverse the order, and declare that the executor is entitled to prove in respect of the debt due from Harris to his testator at the time of the bankruptcy.

INDEX

TO THE SUBJECTS OF THE CASES IN THE
COURTS OF CHANCERY
AND THE
COURT OF APPEAL IN BANKRUPTCY,
IN THE
LAW JOURNAL REPORTS,
VOL. XLI.—XXXII. NEW SERIES.

CHANCERY.

ACCOUNT—against a manager of a colonial estate.
See Administration of Estate, *Bernard v. Davies*.

— See Chief Clerk's Certificate. Mortgage.
Partners. Trade Mark.

ACQUIESCENCE. See Ancient Lights. Baron and
Feme. Breach of Trust. Contributory. Mortgage.

ADMINISTRATION OF ESTATE—In an administration suit an inquiry as to wilful default will not be directed upon a mere general allegation of neglect. Some particular instance must be alleged and proved, so as to raise at all events a case of suspicion in the mind of the Court. *Massey v. Massey*, 13

— If an absolute owner in fee of a West India estate appoints a manager, he is entitled to a lien on the inheritance for what is due to him on account of his management, and the costs of the cultivation. But if appointed by a tenant for life he can acquire no lien on the inheritance for the costs of such management and cultivation after the death of the tenant for life, yet if the emblements are growing on the estate at the decease of the tenant for life, he will be entitled to a lien for sums expended in their production, if the person in remainder is entitled to the benefit thereof. If, upon notice, the manager refuses to give up possession to the remainderman, and claims a lien on the estate for monies expended during the life of the tenant for life, he will be treated as a mortgagee in possession, and on such principle accounts will be directed against him. If a mortgagor (owner in fee) of a West India estate appoints a manager and dies, the costs of management and cultivation are not a lien on the estate against the mortgagees, who have

not acquiesced in the appointment. *Bernard v. Davies*, 41

— Testator directed payment of his debts, &c., and gave all the residue of his real and personal estate to his wife and another person, appointing them executrix and executor, upon trust to pay the income to his wife for life, for her own use and the bringing up and educating his children; and after her decease he made certain specific gifts, one being to his daughter Fanny Charlotte, of his messuage and premises situate No. 4, Turnham Green Terrace, held of the Prebend Manor. And there was also a general residuary gift to the wife. The wife borrowed 600*l.* in aid of the personalty and residuary realty, and therewith paid debts, and died. It was held, that in marshalling the assets, the whole income received by the wife during her life, as well as the corpus of the first residuary gift to her, was liable for costs, before resorting to the specific gifts. Also, that a small piece of garden severed from the house No. 4 by a road, but held under the same manor and usually occupied therewith, passed by the devise. *Hibon v. Hibon*, 374

— A creditor of a testator, although not either plaintiff or defendant, may, after decree in an administration suit, with a view to establish his debt in equity against the testator's estate, obtain an order that testator's executor may make an affidavit stating the documents in his possession relating to the claim of the creditor—so held, by the Lords Justices, overruling a decision of one of the Vice Chancellors. *Re M'Veagh and M'Veagh v. Croall*, 521

— Where one of two partners has died, and after his death the surviving partner has become bankrupt, and the joint creditors have received a divi-

dend under the bankruptcy out of the joint estate, but have not been paid in full, they will, in the administration in Chancery of the estate of the deceased partner, be entitled to come against so much only of his estate as may remain after payment of his separate creditors. *Lodge v. Prichard*, 775

— Advances to wife. See Baron and Feme.

— Separate use. See Power of Appointment.

— See Debtor and Creditor. Investment. Lien. Trade Mark. Will.

AFFIDAVIT. See Chief Clerk's Certificate. Costs.

ALIENATION. See Baron and Feme.

AMBASSADOR. See Jurisdiction.

AMENDMENT—Where a substantial point is taken at the bar upon the evidence, but is not sufficiently raised upon the pleadings, the Court may either give leave to amend or dismiss the bill without prejudice; but the practice of allowing a cause to stand over for amendment should be very sparingly resorted to, and only upon special grounds. *Gossip v. Wright*, 648

ANCIENT LIGHTS—The plaintiff, the owner of a house with ancient lights, having rebuilt it with additional windows, receiving light and air from the defendant's premises, the defendant proposed to build so as to obstruct these new windows, and in so doing would necessarily also obstruct the ancient lights. It was held, on the authority of *Renshaw v. Bean*, that he had a right to do so, and an injunction was refused. But it was held, the plaintiff, upon his undertaking to close up the new windows, was entitled to an injunction on payment of costs. *Weatherly v. Ross*, 128

— If an adjoining owner knowingly permits a messuage and premises to be rebuilt of an increased size and height, with the alteration of ancient lights, and the opening new lights upon an additional floor, he cannot object to them after they are complete, or assert a right to raise a party-wall, and build upon his own property so high as to render the new buildings less accessible to light and air than they were at the completion of the work. *Cutching v. Bassett*, 286

ANNUITY—Testator gave leaseholds to trustees upon trust to receive the rents and profits and to pay the annual sum of 60*l.* to H. for life, and after the death of H. to raise by sale or mortgage the sum of 400*l.* for the children of H. and after the death of H. and the raising and payment of the 400*l.*, to assign the said leaseholds, or such part thereof as should remain undisposed of, unto T. absolutely. The income proving insufficient to satisfy the annuity, it was held that it was chargeable upon the corpus. *Phillips v. Gutteridge*, 1

— Testator directed his trustees to set apart out

of his personal estate 10,000*l.* consols and to pay the dividends thereof to his sister for life, and after her decease to retain so much of the 10,000*l.* as should be sufficient to realize the yearly income of 150*l.*, and to pay the dividends of the trust fund so retained to his nephew until he should become bankrupt, or assign away or encumber his interest, in which cases the trust declared for the benefit of his nephew was to cease and determine, and the said sum of 10,000*l.* was to fall into testator's residuary estate. The nephew died without having become bankrupt, or encumbered his interest. It was held, the interest given to the nephew was not an absolute interest, but one only for his life. *Banks v. Braithwaite*, 198

— Marriage will not determine an annuity given to a feme sole for life until she shall be bankrupt or insolvent, or shall assign or dispose of it, or do any act whereby the annuity, or any part thereof, shall be vested, or become liable to be vested, in any other person. *Bonfield v. Hassell*, 475

— Testator leaving large property, real and personal, gave, by his will, elaborate directions as to realization, and gave to his executors and trustees 400*l.* a year each for five years after his decease, which he called "annuities or allowances," a sufficient sum to be set apart for that purpose. He then directed a general conversion of all his personality not specifically given, and investment in Government funds or upon mortgage, to be divided into thirteen parts, which parts he gave to thirteen persons therein named for life, with remainder to their children. And testator gave power to his trustees to retain any part of his property in the same form as at his decease, and directed the income of the part retained to be applied in the same manner as the income of the proceeds of sale. It was held, the gifts to the executors were to be regarded as annuities payable out of income; also that the tenants for life were entitled to the actual income accruing due during the first year after testator's decease on property remaining unconverted. *Scholefield v. Redfern*, 627

— Return of consideration stated in the deed. *Edwards v. Williams*, 763

— See Legacy. Legacy Duty.

ANSWER—A bill being dismissed with costs, a new bill was filed, neither seeking discovery nor an answer; but a voluntary answer was put in, alleging that the new bill was the same in substance as the original bill, and as evidence thereof a print of such original bill was appended to the answer. On motion to take such answer off the file for irregularity, as being a schedule of documents within the terms of the Orders of March, 1860, it was held, the case was neither within the language nor the spirit of the Orders, and the motion was refused, with costs. *Wright v. Wilkin*, 227

APPORTIONMENT—Lady M., being entitled under

her late husband's will to a life interest in certain shares in the Alliance Insurance Company, (the dividends on which were under the deed of settlement to be declared half-yearly, and made payable in the months of April and October in each year,) and also to a life interest in certain shares in railway and gas companies, died in November 1860. Subsequently a dividend was declared on the shares in the Alliance Company for the half-year ending on the 25th of March 1861, and on the shares in the railway and gas companies for the half-year ending the 31st of December 1860. The executrix of Lady M. now claimed an apportioned part of these dividends; and it was held, that the dividends on the shares in the Alliance Company were apportionable under the Apportionment Act, because the profits were by the deed of settlement of the company divisible at fixed periods. The apportionment must be made with reference to the last previous time when the dividends were made payable, and not to that when they were earned. The dividends on shares in companies incorporated by acts of parliament containing clauses similar to section 91. of the Companies Clauses Consolidation Act, or in which the last-mentioned act is incorporated, are not within the Apportionment Act. *Re Maxwell's Trusts*, 333

— Where stocks are sold between dividend days, the Court will not apportion the proceeds of sale, so as to give a tenant for life the value of the current dividend included in the sale monies. And the rule is the same though the subject matter sold may consist of debentures or securities carrying interest *de die in diem*. *Semble*—the practice of the Court in declining to recognize the equity to an apportionment is governed by considerations of convenience and saving of expense. *Scholefield v. Redfern*, 627

APPROPRIATION. See Legacy.

ARBITRATION. See Injunction.

ASSIGNMENT—of after-acquired property. See Bill of Sale. And see Trade Mark.

ATTACHMENT—Where a married woman had upon her own application obtained an order to answer separately from her husband, and made default in answering, an attachment was issued against her. *Bull v. Withey*, 638

BANKER—In 1847 the customer of a bank gave a mortgage to the bankers to secure, with interest at 5l. per cent., money due and to become due to them upon a running account, on which it had been usual to make annual rests, and charge compound interest on the balances. In 1855 the customer assigned his property to trustees for benefit of creditors. It was held, the bankers had no right to make rests after the relation of banker and customer had ceased, and that the mortgage was a security only for the balance due at the date of the assignment, with simple interest from that time at 5l. per cent. per annum. By an assignment for benefit of creditors, full

powers of borrowing money at interest from bankers and others were conferred upon the trustees of the deed. Two of the trustees carried on business as bankers in partnership with other persons, and a third was a clerk in the bank. An account was opened by the trustees with the bank, and advances were made upon this account, in respect of which the banking firm claimed to make annual rests and to charge interest on the balances according to their usual practice as bankers; but it was held, that having regard to the fiduciary position of the trustee partners, only simple interest could be allowed. *Crosskill v. Bower and Bower v. Turner*, 540

— If bankers take a mortgage security from a customer for a fixed sum owing to them by the latter, the relation of banker and customer ceases thenceforth as to that sum, and it cannot be included in the customer's banking account so as to entitle the bankers to charge compound interest thereon; and in reference to the sum so secured, the mutual rights and obligations are thenceforth those of mortgagees and mortgagor. Bankers cannot refuse to allow income-tax to a customer upon interest accruing on a mortgage security. As between a banker and his customer, the mode in which the account has habitually been made out, will be viewed as evidence of an agreement that it should be taken in that way; and in the absence of any special agreement, express or implied, evidence as to the custom of bankers is receivable for the purpose of determining the principle upon which the account is to be taken. Bankers took a mortgage security for a fixed sum owing to them by a customer, and subsequently continued the mortgage debt as part of the general account between them, which embraced various dealings and transactions, making rests and charging compound interest. The Court directed the usual accounts to be taken of what was due in respect of the mortgage security, and a separate account of the other dealings and transactions, reserving the question as to the mode in which the latter account should be taken (and more particularly whether with rests or not) for consideration in chambers. *Mosse v. Salt*, 756

BANKRUPTCY—Traders having overdrawn their account at the bank, and being hopelessly insolvent, gave to the bankers a bill of sale comprising their whole property to secure the existing debt and future advances, with a stipulation that no further advances were to be made until the debt was reduced to 300l. Two days afterwards they sent letters to their creditors offering a composition of 10s. in the pound. It was held, affirming the decision of one of the Vice Chancellors (see page 25), that the bill of sale was an act of bankruptcy. *Lacon v. Liffen*, 315

— By an agreement dated the 11th of April 1862, B. & B, shipbuilders at Sunderland, contracted to build a vessel for F, who agreed to pay for the same upon certain terms therein mentioned. On the 12th of April 1862, B. & B, by deed, assigned the contract to S, to secure an

antecedent debt, and an advance then made (amounting together to 500*l.*), and also future advances; and by the assignment it was declared that, subject to F.'s right, S. should be entitled to a lien on the vessel for the above sums. On the 19th of May 1862 the agreement of the 11th of April 1862 was cancelled, and by memorandum of agreement, dated the 20th of May 1862, B. & B. contracted to complete the vessel for, and to sell it to, S. for 1,150*l.*, of which the 500*l.* already advanced was to be taken in part payment. Neither the deed of the 12th of April 1862 nor the agreement of the 20th of May 1862 was registered under the Bills of Sale Registration Act (17 & 18 Vict. c. 36). On the 2nd of June B. & B. became bankrupt; and the vessel was then incomplete. Upon a bill filed by S. against the assignees in bankruptcy of B. & B. for the purpose of obtaining a declaration that S. was entitled to a lien or charge on the vessel, or for specific performance of the agreement of the 20th of May 1862, one of the Vice Chancellors decided (see p. 388) that S. was entitled, under the deed of the 12th of April 1862, to a lien or charge upon the vessel, and a sale thereof was ordered. Upon appeal, it was held that the lien under the deed of the 12th of April was destroyed, either by the cancellation of the agreement with F. or by the fact that the 500*l.* thereby secured was merged into and taken as part payment of the purchase-money under the agreement of the 20th of May; but that under the latter instrument plaintiff was entitled to a lien on the unfinished ship for the 500*l.* actually advanced. Also that no registration of the instrument of the 20th of May was necessary, under the Bills of Sale Act; and that the vessel was not in the order and disposition of the builders as reputed owners at the time of their bankruptcy within the meaning of the Bankrupt Act. *Swainston v. Clay*, 503

BANKRUPTCY (continued)—Where a bankrupt, after having by fraud procured his bankruptcy to be annulled, filed a bill against the solicitor and the auctioneer of his assignees to set aside a sale of his property made by the assignees to such solicitor and auctioneer, but did not make his assignees parties to the suit, the Court, as it did not appear that even if the property were re-sold at the highest price which it might be presumed it would bring, any portion of the purchase-money would, after payment of his creditors, be payable to the bankrupt, dismissed the bill, but without costs. *Adams v. Swoorder*, 567

— See Parties.

BARON AND FEME—A married woman has no equity to a settlement out of her fee-simple estates, as against the mortgagee of her husband's life interest therein. Distinction between property of the wife which the husband takes absolutely and that in which he only takes a life interest. A defendant disclaiming but not stating that he never did claim any interest, is not entitled to his costs on having the bill dismissed. *Durham v. Crackles*, 111

— A wife, suing in *forma pauperis* without a next friend, held to be entitled as against the assignees in insolvency of her husband to a settlement for her separate use for life of the rents of real property, the legal estate in which was vested in trustees for her benefit for life. *Barnes v. Robinson*, 143

— *Semble*—a married woman is not entitled to a settlement out of her fee-simple estates. *Sturgis v. Champneys* disapproved of. *Gleaves v. Paine*, 182

— Voluntary settlement by wife before marriage without knowledge of husband, pending treaty for marriage, declared invalid. And a law-stationer, executor of the person who had bequeathed the above fund to the lady, having advised and framed the settlement, and although not a party thereto, having been made a defendant to the suit; it was held, that, as his conduct had been mainly the occasion of the litigation, the husband was entitled to a decree against him, together with the other defendants, with costs. Acquiescence without full and sufficient knowledge and understanding of the circumstances of the case, in respect of which such acquiescence is alleged to be a bar, cannot be of any avail. *Prideaux v. Lonsdale*, 317

— T. W. having become lunatic, was taken to an asylum in London. His wife, who at the time of her marriage was entitled to separate property, removed to London in order to be near her husband, and borrowed money on his credit to meet the expense of such removal of herself and husband, and to provide herself with necessaries. T. W. died, and a bill was filed for the administration of his estate. The persons who had made the advances to the wife carried in their claim for the amount against T. W.'s estate. It was held, by one of the *Vice Chancellors* and affirmed on appeal, that the claim must be allowed. *Semble*—that a woman possessed of separate estate is entitled to maintenance by her husband, although he be lunatic, and is not bound to pledge her separate estate in order to provide herself with necessaries. *Davidson v. Wood*, 400

— If freeholds of inheritance be vested in trustees upon trust for a married woman for her separate use, she does not thereby acquire any additional power of disposing of the equitable fee, and cannot do so otherwise than by deed duly acknowledged under 3 & 4 Will. 4. c. 74. *Serés*—as respects an estate in lands limited for the separate use of a married woman during her life: this she may alienate, in equity, by deed unacknowledged. *Adams v. Gamble* dissented from. *Lechmere v. Brotheridge*, 577

— The mere filing of a bill by a married woman to enforce her equity to a settlement is not sufficient to confer upon her children a right to a settlement in the event of her death. *Steinmetz v. Halthin* overruled. *Wallace v. Auldjo*, 748

— See Investment. Reconveyance. Parties. Settlement. Will.

BILL OF REVIEW—Trustees of a fund to which a lady was entitled for life, with remainder to her children, on her death paid the fund into Court under the Trustee Relief Act, and under orders of the Court three-fourths were paid out. One child then claimed the fund as the only legitimate child, and presented a petition for leave to file a bill of review. It was held, that orders under the Trustee Relief Act stood, *pro hac*, on the same footing as a decree in a suit, and a probable case being put forward, founded on facts discovered since the date of the orders, leave was given. *In re Smyth and Arnold's Estates*, 779

BILL OF SALE—After acquired chattels may be assigned in equity, and words of agreement to assign, or of licence to seize, may in equity operate as an actual assignment: but if, according to the proper construction of the words used, a mere licence to seize is intended, they will have no effect until actual seizure. Effect of want of notice of deposit of bill of sale to the assignor, as regards priority over subsequent bills of sale. *Reeve v. Whitmore*, and *Martin v. Whitmore*, 497

— See Bankruptcy.

BILL TO PERPETUATE TESTIMONY—See Discovery.

BILLS AND NOTES—Bill of exchange limiting liability. See Company.

BOND—Post-obit. See Mortgage.

BREACH OF TRUST—Where a breach of trust has been committed from which a trustee alleges that he has been released, it is incumbent on him to shew that the release was given by the *cestui que trust* deliberately and advisedly, with full knowledge of all the circumstances and of his own rights and claims against the trustee, and without pressure or undue influence. But where a *cestui que trust*, shortly after attaining twenty-one, pressed for payment of a sum of money to which he was entitled, and four years afterwards accepted from one of his trustees a packet of deeds, which the co-trustee (the father of the *cestui que trust*) had deposited by way of security on the occasion of a misappropriation by him of the trust fund before the *cestui que trust* came of age, and at the request of his father signed and sent a release in writing (not under seal) to such trustee, and took no further steps till after his father's death, six years later, and ten years after he came of age, when, the security turning out insufficient, he filed a bill to have the deficiency made good by the surviving trustee; it was held, reversing the decision of the Master of the Rolls, that all the requisites for constituting a valid release had been complied with, and the *cestui que trust* must be taken to have had full knowledge of the value of the security, notwithstanding

ing he had never opened the packet of deeds. *Farrant v. Blanchford*, 237

CALLS—by the Court of Bankruptcy. See Winding up of Companies.

CASE—under 22 & 23 Vict. c. 63. See Power of Appointment.

CHARGE—F. H., by his will, gave certain annuities, and directed that they should be paid by his trustees out of the rents of his real estate. Testator then devised his real estates to trustees, upon trust out of the rents and income to pay the annuities, and subject thereto upon other trusts. F. H. died, and the rents and income of his real estates were insufficient to satisfy the annuities. It was held the gift was not specific, but demonstrative, and that the deficiency must be paid out of the capital of testator's residuary personal estate. *Paget v. Huish*, 468

— on corpus. See Legacy.

— of debts. See Limitations, Statute of.

— See Merger of Charge.

CHARGE ON LAND—An order of the Court of Probate directing the payment of a sum of money does not, by being registered with the Senior Master of the Court of Common Pleas at Westminster, constitute a valid charge on land. *Pratt v. Bull*, 21, 144

CHIEF CLERK'S CERTIFICATE—Upon a motion to vary the chief clerk's certificate, an affidavit filed after such certificate is filed cannot be read. *Re Hooper*; and *Bayliss v. Watkins*, 108

— In a suit between a contractor and a railway company, praying a settlement of accounts between them, a decree was made directing an inquiry whether anything, and what, was due to the contractor in respect of the works executed and materials supplied under the contract. That decree was not appealed from. The chief clerk, by his certificate, found that a lump sum was due, and that in a schedule he had set forth the particulars of such sum, and that the evidence adduced on the inquiry was that set forth in another schedule. On an objection to the form of the certificate, the Lords Justices (overruling a decision of one of the Vice Chancellors) held, that the certificate must be discharged; for that the chief clerk ought, in finding the lump sum to be due, to have stated how that amount was arrived at, so as to enable the Court to judge whether he had come to a right conclusion. *M'Intosh v. the Great Western Rail. Co.*, 412

CHURCH—A church of an ancient chapelry within a large parish had exercised from time immemorial parochial rights, had separate churchwardens, rates, &c., and the incumbent performed the various religious offices and received the fees. The right of presentation to the chapelry was in the rector of the parish. The

chapelry was described as a "parish" in the Ecclesiastical Survey, but in recent local acts of parliament the church of the chapelry was referred to as a "church or ancient chapel-of-ease." It was held, the chapelry was not a distinct parish, and that under the power conferred by 59 Geo. 3. c. 134. s. 16, authorizing the assignment of a district to a chapel-of-ease or parochial chapel, the Ecclesiastical Commissioners were authorized to divide the chapelry into districts, and to assign a particular district to the ancient chapel. Whether under the Church Building Acts (58 Geo. 3. c. 45. and 59 Geo. 3. c. 134) the Ecclesiastical Commissioners have power to divide a parish into districts, or only to carve new districts out of the parish—*quære*. The incumbent of a district parish validly constituted under the Church Building Acts (58 Geo. 3. c. 45. and 59 Geo. 3. c. 134), has an exclusive right to celebrate marriages by banns, between persons both of whom are resident within the district parish. Whether after the creation, under the 6 & 7 Vict. c. 37. (Peel's Act), of new parishes out of parts of any existing parish, the incumbent of the old parish still retains by virtue of the saving clause (s. 18.) the right to publish banns and celebrate marriages between persons both of whom are resident in the new parishes—*quære*. Where a licence is granted, in due form, for marriage at a particular church, the incumbent is under no obligation to inquire whether there has been a sufficient residence by one of the parties to justify the granting of the licence. His proper course is to assume the regularity of licence and to perform the marriage ceremony. *Tuckniss v. Alexander*, 794

COLONIAL ESTATE. Expenses of management. See Manager.

COMITY OF NATIONS. See Ship and Shipping.

COMPANY—A director of a joint-stock company, registered under the Joint-Stock Companies Act, 1856 (19 & 20 Vict. c. 47.), cannot make a binding contract for profit to himself in a transaction with the company. Where a director had advanced money to the company from time to time under an arrangement for receiving a bonus or commission of 6d. per ton on the amount of produce sold by the company, and the account between him and the company as entered in the company's books included this commission, the Court refused to allow it, but directed the account to be taken, allowing interest on the advances at 5l. per cent. *Ex parte Hill, in re the Cardiff Preserved Coal and Coke Co. Limited*, 154

— A clause in the deed of settlement of a joint-stock company gave power to the directors "generally, where these presents are silent or do not otherwise provide, to act in the direction of the concerns of the society in such manner as at their absolute discretion they shall think most conducive to the interests of the society." Whether under such a clause it is competent to the

directors to purchase the business and take the assets and liabilities of another company—*quære*. Where, however, the shareholders had acquiesced in the amalgamation, and the dealings had been such that it was impossible to replace the companies in their original position, it was held to be too late to disturb the arrangement which had been made, whether within the power of the directors or not. *Semble*—the Court has power to relieve against mistakes in law, as well as mistakes in fact. Observations (per Wood, V.C.) as to the costs of the creditors' representative, and rule laid down (per Turner, L.J.) as to cases in which costs of the appearance of creditors' representative will be allowed. *Re the Joint-Stock Companies Winding-up Act, 1848; Re the Saxon Life Assur. Soc.; the Anchor Assur. Co.'s case; the Bra Assur. Soc.'s case; Re the Bra Assur. Soc., Williams's case; the Anchor Assur. Co.'s case*, 206

— By deed of settlement of a joint-stock company established under 7 & 8 Vict. c. 110, the directors were empowered to issue bills of exchange and promissory notes, but such bills and notes were only to bind the shareholders to the extent of their interests in the company. The directors, by deed-poll under the common seal of the company, and signed by three directors, appointed an agent in Canada, and empowered him to draw bills of exchange upon the company. To discharge claims against the company in Canada, the agent drew and gave there two bills of exchange, such bills containing no notice of any restricted liability. Upon the company being wound up, the holders of these bills put in claims for the amount, together with interest and damages calculated according to certain Statutes of Canada; and it was held, the appointment of the agent was valid, and the bills in question were drawn by him so as to bind the company, notwithstanding section 45. of the act, and the provisions in the deed of settlement for limiting the liability of the shareholders; and accordingly that the holders of the bills were entitled to prove under the winding up against the company. And it was held, also, that the proof being against the company as the virtual drawers, the claimants were entitled to the interest and damages given by the law of Canada, where the bills were drawn. A proviso in a bill of exchange drawn by a joint-stock company, limiting the liability thereunder is repugnant and void. *Re the State Fire Insurance Co.—Ex parte Meredith's and Convers's Claims*, 300

— The G. W. Railway Company were empowered to take shares in the M. Railway Company, and accordingly took shares to the full extent of their powers, in the names of trustees, who were registered as the holders of such shares. Afterwards the M. Railway Company were authorized to extend their railway, and to create new shares; and they resolved at a general meeting to allot the new shares rateably amongst the proprietors of the original shares. The G. W. Railway Company claimed to be entitled to a proportion of these shares, and filed a bill to

enforce their claim, the trustees being joined as co-plaintiffs. It was held, by one of the Vice Chancellors, on demurrer, that it was *ultra vires* for the G. W. Railway Company to take any of the new shares. That the M. Railway Company could not be compelled to allot shares either to the G. W. Railway Company or to their trustees, as payment by the G. W. Railway Company on calls of such shares would involve a breach of trust; and that the bill being framed so as to assert a claim on the part of the G. W. Railway Company alone, any possible title in their co-plaintiffs, the trustees, to have the shares allotted to themselves individually, could not be relied upon for the purpose of sustaining the bill. Also, that where a public company is engaging in a transaction which is *ultra vires*, the Court, in adjudicating upon that transaction, can only deal with the law as it exists, and will not take into consideration the possibility of further powers being obtained by the company. On appeal, the Lords Justices considered that the points involved were of too great difficulty to be decided conveniently upon demurrer, and they overruled the demurrer, making the costs on both sides costs in the cause. *The Great Western Rail. Co. v. the Metropolitan Rail. Co.*, 382

— A company cannot covenant not to oppose a bill which if passed would deprive the shareholders of the protection afforded by the Wharnclyffe order. *Semble*—Though a public company may apply for an act of parliament, it cannot legally covenant with a third party to do so, since it would thereby render its funds liable in the event of its not applying. Shareholders in a company, the directors of which have affixed the company's seal to an agreement, some of the provisions whereof are illegal, are entitled to have the agreement set aside so far as it is *ultra vires*, leaving the operation of the rest of the agreement to be adjusted by litigation or otherwise between the contracting parties. *Mauvrell v. the Midland Great Western (of Ireland) Rail. Co.*, 513

— Under the articles of association of a joint-stock company, the company was empowered at a special meeting to increase the capital of the company by the issue of new shares, to be of such nominal value and subject to such conditions as to payment of calls or proportion of profits, as might be determined; and it was held, this did not authorize the issue of preference shares. *Moss v. Syers*, 711

— See Contributory. Public Company. Winding up of Companies.

COMPENSATION. See Interest.

CONFIRMATION OF SALES ACT. See Practice.

CONFLICT OF LAWS. See Settlement.

CONTRACT—Upon sale by defendant to plaintiffs of a business of a horsehair manufacturer, defendant by written contract agreed not to buy,

sell, manufacture, or directly or indirectly interfere in the trade or business of a horsehair manufacturer, except for the benefit of plaintiffs; and subsequently in a deed of assignment (executed in pursuance of the previous contract) defendant covenanted that he would not directly or indirectly carry on the business of a horsehair manufacturer within 200 hundred miles from B, without the consent in writing of plaintiffs, except for their benefit and at their request. Defendant, besides being a manufacturer of horsehair, was, at the time of the sale, a general dealer in unmanufactured horsehair; he also purchased and sold manufactured horsehair, which was usual both with dealers and manufacturers. It was held, upon evidence as to the mode of carrying on the business, that the limit of 200 miles was reasonable; also that defendant had sold so much of the business as belonged to that of a horsehair manufacturer, though forming part also of the business of a horsehair dealer; and that he must be restrained from the purchase and sale of manufactured horsehair. *Harms v. Parsons*, 247

— A father, in contemplation of the marriage of his daughter, wrote to her intended husband, saying "that she should be entitled to her share in whatever property he (the father) might die possessed of." The father, by his will, gave to his daughter only a life interest in a portion of his property, and died, leaving real and personal estate. Upon a bill by the husband and wife, it was held, the letter did not affect the real estate, but that it bound the father to leave his daughter a legal share of the personality equal to what she would have taken if he had died intestate. *Laver v. Fielder*, 365

— See Company. Specific Performance.

CONTRIBUTORY—A company was in process of being wound up. By the deed of settlement of the company it was provided that no person should be or continue a director unless he was the holder of a particular amount of stock. The company was managed by a board of directors at the chief office in London, and by boards in various towns, in the latter of which local agents or deputies, called provincial directors, had conferred upon them limited authority. C. was one of these provincial directors, but had no shares in the company, and, on a question of his liability to be placed upon the list of contributories, it was held, that the clause requiring the qualification for directors did not apply to those who held the office of provincial directors, and that C. was not liable to be placed on the list of contributories. The creditors' representative is not as of right entitled to appear separately on appeal; and it appearing in this case that he had no interest distinct from the official manager, the greater part of his costs were disallowed against the estate. *Ex parte Cotterell, in re the National Assurance and Investment Association (the Bank of Deposit)*, 66

— The directors of a company having treated

shares as forfeited for non-payment of calls, and the company being afterwards ordered to be wound up, the shareholder's name will not be placed upon the list of contributories on the application of the official manager. Whether it would be done on the application of the creditors' representative—*quære*. *Re the State Fire Insur. Co., Webster's case*, 135

CONTRIBUTORY (*continued*)—Upon the compromise of an action brought by G. against a company in which he was a shareholder, it was arranged that G. should transfer his shares to S, who was the managing director, and should receive from the company a sum of money as the price of his shares and in satisfaction of his claim. Accordingly, the money was paid, the shares were transferred, and the transfer registered. Two years afterwards the company was ordered to be wound up, and the official manager placed G.'s name on the list of contributories on the ground that the transfer was invalid, S. being a trustee for the company, and the assent of the shareholders to the transaction not having been obtained. The Court, under the circumstances, declined to impute to G. knowledge that S. was a trustee for the company; but independently of this it was held, that the transaction having been acquiesced in by the shareholders for two years, their consent must be presumed as against the company, and accordingly G.'s name was ordered to be taken off the list. Where an act has been done by a public company, to the legality of which certain formalities are requisite, and the circumstances are such that knowledge and acquiescence may be imputed to every shareholder, the Court will, as against the company, infer that the necessary formalities have been complied with. *Re the British Life and Fire Assurance Society—Dr. Grady's case*, 326

— On the 10th of August 1860, at a meeting of five persons, held before the formation of and for the purpose of forming a joint-stock company, this resolution was passed: "Each of the gentlemen present agrees to hold 100 shares in the company, and also to execute the articles and memorandum of association when ready, and act as directors of the company." At a meeting held on the 4th of August the draft articles of association were submitted to the five gentlemen and approved, and ordered to be engrossed for execution at the next meeting. On the 25th they all signed the memorandum of association for twenty-one shares each, and executed the articles of association. By one of the articles the qualification of directors was fixed at 100 shares, and by another it was provided, that until directors were appointed, the subscribers thereto should be deemed to be directors. The company was afterwards wound up in bankruptcy. It was held (affirming a decision of one of the Commissioners), per *Turner, L.J.*, that by the resolution of the 10th of August and the articles of association taken together, and per *Knight Bruce, L.J.*, that by the effect of the resolution and articles and of the proceedings in January 1861, (reported *ante*, pp. 57, 58,) the five gentle-

men were contributories in respect of 100 shares each, in which number the twenty-one shares for which they had subscribed the memorandum of association should be included. *Ex parte Currie, in re the Great Northern and Midland Coal. Co. (Limited)*, 421

— The 54th section of 7 & 8 Vict. c. 110. prohibits the transfer of his shares by a shareholder only if he shall not have paid the full amount payable as well as due, in respect of every share held by him. Therefore, in a case governed by that act, non-payment of a call made before, but not payable until after, the execution of a transfer, forms no objection to the validity of the transfer. The non-return of a transfer to the Registrar of Joint-Stock Companies, under 7 & 8 Vict. c. 110. s. 13, though leaving the transferor liable for the debts of the company as between himself and the creditors of the company, does not leave him so liable as between himself and the other shareholders; and, consequently, the omission to make such return affords no ground for placing him on the list of contributories. The creditors' representative has a right to appear on a contributory summons under a winding-up, and have his costs. *In re the British Provident Life and Fire Assurance Society, re Orpen*, 633

CONVERSION. See Re-conversion.

COPYHOLD—Descent amongst collaterals. See Gavelkind.

— Enfranchisement. See Lands Clauses Consolidation Act.

COPYRIGHT—Certain novels, the copyright in which belonged to T, were dramatized, and the dramas, containing some of the most important scenes and incidents of the novels, copied verbatim, were printed and published by L. On an application, by T, for an injunction to restrain the sale of the dramas, it was held that printing and selling the dramas was an infringement of T.'s copyright. If a plaintiff shews that his copyright has been infringed, the Court will grant an injunction without proof of actual damage. *Whittingham v. Wooler* explained. *Tinsley v. Lacy*, 535

— A bookseller, H, wrote and published a descriptive catalogue of books; another bookseller, A, published a descriptive catalogue in which many of the descriptions were copied verbatim from H.'s catalogue; and it was held, that such copying was an infringement of H.'s copyright, and that H. was entitled to an injunction accordingly. *Hotten v. Arthur*, 771

COPYRIGHT OF DESIGNS—The proprietor of a design duly registered under the acts for the copyright of designs, whether he be a British subject or a foreigner, forfeits the benefit of the acts unless the proper registration marks are attached to all articles and substances to which the design is applied, whether the same are sold

abroad or in the British dominions. *Sarazin v. Hamel*, 380

— The 6 & 7 Vict. c. 65. applies only to new designs having reference to some purpose of utility; and in order to obtain the benefit of the act, the purpose must be specified in the description supplied for registration. And where a coachmaker caused to be registered, under 6 & 7 Vict. c. 65, a design for a dog-cart, specifying as the purpose of utility that, "higher front wheels could be used or closer coupling effected," and the design consisted of parts 1, 2, 3, 4, of which 1, 2. and 3. had nothing to do with front wheels or closer coupling, and No. 4. was not new; it was held, that no exclusive privilege was gained by registration. *Windover v. Smith*, 561

— See Pleading.

COSTS—Where the Court refuses an interlocutory application with costs, without hearing the other side, affidavits, notice to read which in opposition has been given, and which have actually been briefed for that purpose, are to be entered as read, though not in fact read. *Catholic Printing and Publishing Co. Lim. v. Wyman*, 53

— A lady, before lunacy, became the mortgagee of certain premises. After her lunacy committees were appointed, and one of them called in the mortgage money and served the mortgagor with a petition praying that the committees might be appointed to re-convey the mortgaged estate to him. The Court decided that the mortgagor was entitled to his costs of appearance out of the lunatic's estate. *In re Rowley*, 158

— The costs of a motion to stay proceedings under a decree, pending an appeal to the House of Lords, must be paid by the party applying, whether successful or unsuccessful on the appeal. *Topham v. Portland*, 606

— The fee of 2d. per folio for revising the print of a defendant's answer can be allowed only in those cases where the defendant swears to and files a printed answer. The sums paid for office copies of answers at 4d. per folio, and for ordinary printed copies at 1d. per folio, are payable to the defendant, and when received by his solicitor must be applied in reduction of the cost of printing the answer. *Attorney General v. Etheridge*, 706

— A solicitor who has included in his bill of costs a lump or gross sum, may on taxation before the Master supply a detailed statement showing how the sum is made up, and the Master may allow such of the items contained in the detailed statement as are proper, not exceeding in the aggregate the gross sum originally charged; but the Master can in no case allow more than the original amount. Six railways, forming parts of a general system, were projected by the same persons. An act of parliament was obtained authorizing the construction of two only, the

NEW SERIES, 32.—INDEX, *Chanc. & Bankr.*

other four being abandoned, and the special act provided that the expenses, costs, and charges of obtaining and passing the act, and incidental and preparatory thereto should be paid by the company, and it was held, the costs incurred in relation to the abandoned railways were to be regarded as costs incidental and preparatory to the obtaining of the act, and were properly payable by the incorporated company. *In re Tilkeard*, 765

— According to the rule of the Court, as now settled, the costs of a joint re-investment of purchase-moneys for lands taken by different companies must be borne by the companies equally, without reference to the amounts of the purchase-moneys; but the Court will apportion the ad valorem duty on the conveyance, according to the amounts contributed by each company to the consideration-money. Where three companies take lands, and two of them subsequently become amalgamated with another company, the costs of a joint re-investment must be borne, as to two-thirds, by the company which represents the two amalgamated companies. *In re Maryport and Carlisle Railway Act, 1855, &c.*, and *Lord Lonsdale's Settled Estates*, 811

— See Ancient Lights. Baron and Feme. Company. Contributory. Executor. Lands Clauses Consolidation Act. Payment into Court. Security for Costs. Taxation. Trust and Trustee. Will.

COVENANT—in gross. See Deed, and See Company. Injunction. Lease.

DAMAGES—Jurisdiction of Courts of Equity. See Specific Performance.

DEBTOR AND CREDITOR—James W, by settlement made on the marriage of his son Charles, covenanted with trustees to bequeath by his will to his son, if living, or to his then intended wife if he were dead, a legacy or sum of not less than 2,500*l.* to be held upon the trusts of the marriage settlement. By his will, James W, after reciting a power of appointment he had over a sum of 10,000*l.* comprised in his own marriage settlement in favour of his children, (which sum, in default of appointment, was settled upon the children in equal shares,) appointed to Charles 2,500*l.* in full discharge of his (testator's) covenant for payment or bequest of that sum contained in the settlement. It was held, first, that the appointment made by testator in exercise of the power contained in his own settlement could not operate as a satisfaction of the personal liability created by his covenant; and, secondly, that the covenant did not merely confer a right to receive a legacy of the amount named after payment of simple contract debts, but created a specialty debt in favour of those claiming under the settlement. *Graham v. Wickham*, 639

— See Guarantie.

DEED—By a deed made in 1770, between the East

B

India Company and Robert Lord Clive, after reciting that in 1766 five lacs of rupees, bequeathed to Lord Clive by a former Nabob of Bengal, and in 1767 three lacs of rupees, the gift of the then Nabob of Bengal, had been paid to the East India Company, and cash notes given to Lord Clive for the amount, and that in pursuance of a scheme therein recited for making a provision for officers and privates in the Company's service who might be disabled by age, war or disease, Lord Clive had delivered up the cash notes to be cancelled: it was agreed between Lord Clive and the Company that the eight lacs of rupees should remain in the hands of the Company, and that the Company should allow yearly a sum equivalent to 8½ per cent thereon, and that the Company and their successors should be perpetual trustees, subject to the proviso therein contained, of the said fund of eight lacs of rupees for the due application and appropriation of the interest and produce thereof, for the relief of invalid and superannuated officers and soldiers in their military service, and upon the Company ceasing to employ a military force then for the relief of invalid and superannuated officers and seamen in their marine service; and the deed contained a covenant by the Company for repayment to Lord Clive, his executors, administrators or assigns, of the full sum of five lacs of rupees, subject to a due proportion of existing charges, in case it should happen that the Company should cease to employ a military force in their actual pay and service, and also ships for carrying on their trade. In 1834 the Company ceased to employ ships for carrying on their trade. In 1858 the property (except only the capital stock), liabilities and military forces of the Company were transferred to the Crown. It was held (by the House of Lords, reversing the decision of the Master of the Rolls), that the covenant was not to be regarded as a stipulation for the restoration of a trust fund, but as a covenant in gross, and that upon the true construction of 21 & 22 Vict. c. 106. (the act transferring to the Crown the property and liabilities of the Company) five lacs of rupees were payable by the Secretary of State for India to the representative of Lord Clive, subject to the existing charges properly attributable to and payable out of the interest thereof. *Walsh v. the Secretary of State for India*, 585

DEED OF GIFT—Reservation of beneficial interest. Resulting trust. See Mortmain.

DEFENCE ACT—Interest on compensation for lands required to be kept free from buildings. See Interest.

DELAY. See Settlement.

DEMAND—by service of bill. See Friendly Societies.

DEMURRER—Previously to obtaining their act the projectors of a railway agreed to pay to a landowner claiming under a settlement 20,000*l.* over and above the value of the land and the compensation to be paid for severance. The money not being paid, the landowner filed a bill for specific

performance, but died *pendente lite*, and a person who came into possession of the estates, under a remote limitation in the settlement which the prior landowner had treated as barred, filed another bill, in substance the same as the former, and prayed that, "if necessary and proper, his suit might be taken as supplemental to the former suit." Defendants demurred for want of equity to so much of the bill as sought to make the suit supplemental. Demurrer overruled, with costs. *The Earl of Shrewsbury v. the North Staffordshire Rail. Co.* 674

— Where a probable, though not a perfectly clear, equity was alleged by the bill, the Court overruled a demurrer and allowed the plaintiff to go to the hearing, reserving the points raised. *Bromley v. Williams*, 716

— See Interest. Jurisdiction. Pleading.

DEPOSIT. See Vendor and Purchaser.

DESCENT. See Gavelkind.

DEVISE—Estate in fee simple, with executory devise over. See Waste.

— of real estate charged with payment of legacies. See Limitations, Statute of.

— See Administration of Estate. Will.

DISCOVERY—On a bill to perpetuate testimony, as in other suits, plaintiff is entitled to such discovery only as is material to the relief asked or the order required, and as the only relief which can be prayed is the perpetuation of testimony, and as the answer put in by the defendant cannot be used against him in any further proceedings, the plaintiff can only require the defendant to answer such facts as will entitle the plaintiff to file a replication, and examine witnesses on the issues stated in the bill. Consequently, where a plaintiff had already obtained from a defendant an answer entitling him to proceed to examine witnesses, exceptions for insufficiency were overruled with costs. A bill to perpetuate testimony cannot be converted into a bill of discovery. The distinctions between bills of discovery proper, bills to perpetuate testimony, and proceedings to obtain the examination *de bene esse* of a single witness or of aged or infirm witnesses, pointed out and explained. *Ellice v. Roupell*, 624

— Upon a bill of discovery in aid of a defence to an action at law, the plaintiff in equity is entitled to a discovery only of such facts, deeds, papers, &c. as may help him to make out his defence at law. He cannot compel the plaintiff at law to disclose how he means to establish his case there. *Inglby v. Shafto*, 807

DISSENTERS' CHAPEL. See Trust and Trustees.

DOMICIL—A mere change of residence is not sufficient to constitute a change of domicile, although

it may be tolerably certain that the new residence will be continued for life. There must be an intention to change the domicile. *Moorhouse v. Lord* (House of Lords), 295

— See Settlement.

EASEMENT. See Ancient Lights. Injunction.

— Testator was entitled to a moiety only of each of two farms, called T. and P, the remaining moiety of each belonging in equal shares to W. and L. The testator by his will, gave "my farm called T." to W. and E, their heirs and assigns, as tenants in common, and he gave them 200*l.* towards rebuilding and repairing the house, &c. "on my said farm T." He then devised "my farm called P." to plaintiffs in like manner, but without any similar gift for repairs. After his death L. conveyed all his interest in the two farms to plaintiffs. It was held (affirming the decision of one of the Vice Chancellors), that W. must elect whether he would take under or against the will. Also, upon his electing to take against the will, that the benefits he would have taken under the will must be apportioned in compensation of the disappointed devisees, in proportion to the value of the gifts which they lost by his election; and the consequential inquiries as to those values were directed in *Chambers. Howells v. Jenkins*, 788

EQUITY—Right of, not lost by not pleading a set-off at law. See Guarantee. And see Company.

ESTOPPEL. See Patent.

EVIDENCE—Although the Court may in special cases permit new evidence to be given upon an appeal (e. g. where the evidence sought to be introduced is documentary and cannot have been tampered with), it will not allow fresh affidavits made by persons who have given evidence at the original hearing to be read on a re-hearing. *Glover v. Daubney*, 547

— Admissibility of parol evidence to rectify mistake in written agreements. See Vendor and Purchaser. And see Presumption of Death.

EXECUTOR—Executors having retained in their hands large balances arising from the estate without investing them, an inquiry was directed as to the propriety of their conduct, and they were charged with interest at 4*l.* per cent. upon a portion of such balances. And it was held, that, in pursuance of the general principle, the executors could not be allowed the costs occasioned by the inquiry. *Colyer v. Colyer*, 101

— See Administration of Estate.

EXPECTANT HEIR. See Mortgage.

FELON—In November and December 1860, A. committed acts, in respect of which he was, on the 8th of June 1861, taken into custody, and, on the 21st of the same month, convicted of

felony. Prior to his apprehension, viz., on the 23rd of May 1861, he executed a voluntary settlement of personal estate belonging to him upon his wife and children. It was held, such settlement was fraudulent and void as against the Crown. *Re Saunders's Estate. Saunders v. Wharton*, 224

FIXTURES—A railway company gave notice to take part of a manufactory, and were required by the owner, under the 92nd section of the Lands Clauses Act, to take the whole. A valuer, on behalf of the company, went to the manufactory, and, without entering it, valued it at a specified sum, and that amount was paid into court under the 85th section of the Lands Clauses Act, in the usual way. The company were then proceeding to take possession, and to issue their warrant to summon a jury, when the owner of the manufactory insisted that the valuation had not included certain fixtures upon the premises, such as a steam-engine, shaping and turning lathes, &c., and that the company were bound to take such fixtures. The company contended that the fixtures being trade fixtures and removable by the owner, he could not compel the company to take them. The owner then filed a bill and moved for an injunction to restrain the company from taking possession, or summoning a jury, without making compensation for the fixtures; and it was held, that although the fixtures in question were trade fixtures, which the lessee might remove during the term, the company were bound to take them; and that whatever a railway company are bound to take under section 92, they must, in proceeding under section 85, cause to be valued, and pay the value into court. *Gibson v. the Hammer-smith Rail. Co.*, 337

FORECLOSURE—Upon the hearing of a foreclosure suit it appeared that two only out of three tenants in common beneficially entitled to the equity of redemption were before the Court; and it was held, the Court could neither decree a sale nor a partial foreclosure. Plaintiff was ordered to pay the costs of the day to the defendants who appeared. *Caddick v. Cook*, 769

FOREIGN COURT—Judgment *in rem* and *inter partes*. See Ship and Shipping.

FOREIGN SOVEREIGN. See Jurisdiction.

FORFEITURE. See Waste.

FRAUD—Although a person who is accessory to a fraud from which he has himself derived no pecuniary benefit may be made a party for purposes of discovery and to make him answerable for costs, he cannot be made liable for damages in equity, and after his death a bill cannot be maintained against his representatives. *Walsham v. Stainton*, 557

— See Mortgage. Parties. Settlement. Will.

FRIENDLY SOCIETIES—If the treasurer of a friendly

society makes an assignment of his estate and effects to trustees for the benefit of his creditors, the circumstance that the trustees of the society have been guilty of negligence in not auditing the accounts, does not deprive the society of the right confirmed by the 18 & 19 Vict. c. 63, to recover out of the estate of the treasurer what is due from him to the society in priority to his general creditors. The service of a bill filed in this court to compel payment of what is due from the assignees of a treasurer of a friendly society is a demand in writing, within the meaning of the 18 & 19 Vict. c. 63. s. 23. *Absolum v. Gehring*, 786

GAVELKIND—The custom of gavelkind being that the lands of an intestate dying without issue are partible amongst his brothers equally, the Court will apply all the incidents of descent to that custom, and the descendants of a deceased brother will stand in the same position *jure representationis* as their respective parents would have occupied; nor does the right of representation stop at the children of a brother, by analogy to the Statute of Distributions. Therefore, where a man died, intestate and without issue, seised of gavelkind lands, leaving a nephew and two sons of a deceased nephew, it was held that the latter were entitled *jure representationis* to the share which their father, if living, would have taken. *Hook v. Hook*, 14

GUARANTIE—A surety gave to a creditor a guarantee to the extent of 5,000*l.* against losses that might arise from advances to be made to his principal. Advances were made to the principal to an amount considerably exceeding 5,000*l.*, and after his death the creditor proved in an administration suit for the whole debt, and received dividends thereon. He afterwards recovered the 5,000*l.* in an action against the surety; and upon bill filed by the surety, it was held the surety was entitled to be paid such a proportion of the past and future dividends as was received in respect of the 5,000*l.*, and that he had not lost his equity by not pleading a set-off to the action. *Thornton v. M'Kewan*, 69

HEIRLOOMS—Testator devised freehold estates to trustees upon trust during the life of his son J. M. to make certain payments out of the rents, and after J. M.'s decease in trust for his first and other sons successively in tail male, then in trust for his daughter A. L. for life, with remainder to her first and other sons successively in tail male, with ulterior trusts. Testator gave the use and enjoyment of his plate to his daughter during her life, and after her decease he gave the same in the nature of an heirloom to the person who for the time being should be in the actual enjoyment and possession of his freehold estates under the limitations of his will. Testator died, and in 1844 (J. M. being then alive) A. L. and her eldest son H. W. M. L. executed a disentailing assurance. A. L. and H. W. M. L. died in 1856, and the latter left E. M. L. his eldest son. J. M. died in 1861 without issue. It was held, the words "actual enjoyment and

possession" did not import as a condition that the legatee of the plate should be in the physical perception of the rents and profits of the devised estates, and therefore that notwithstanding his estate had been barred by the disentailing assurance, E. M. L., as being the person who under the limitations contained in the will, would have come into possession of the freehold estates in the natural order of events, was entitled to the plate. *Hogg v. Jones*, 361

ILLEGITIMACY. See Jurisdiction.

INCLOSURE ACTS—Trustees of settled estates with a power of sale and exchange under which the sale monies were made applicable in satisfaction of charges on the settled estates, and as to the surplus in the purchase of other lands, sold a portion of the settled estates and paid the proceeds to a tenant for life, who expended the greater part thereof upon allotments made under the Inclosure Acts in fencing, draining, road-making, &c., and died without creating any charges under the acts. It was held, the money was not expended in accordance with the provisions of the settlement either in satisfaction of an existing charge or in the purchase of lands; but that, though the forms of the Inclosure Acts had not been complied with, any sums properly expended for the purposes mentioned in the acts, not exceeding 5*l.* per acre, ought to be allowed to the executors of the tenant for life. *Vernon v. Earl Manser*, 244

INCOME TAX—By a marriage settlement, made in 1810, certain hereditaments were limited to the use that the intended wife might, upon the decease of her husband, receive a joint rentcharge in lieu and bar of dower, thirds and freebench; and the rentcharge was to be payable without any deduction in respect of any taxes already imposed or thereafter to be imposed, upon the hereditaments, or the yearly rentcharge, or the intended wife in respect thereof. It was held, that, assuming the terms of the deed to amount to an express contract that the jointure should be paid free of income tax (which it would seem they did), still the income tax must be paid by the jointress, the 103rd section of the 5 & 6 Vict. c. 105. prohibiting any such contract. Succession duty having been claimed by the Board of Inland Revenue as upon a succession accrued on the death of the husband, which occurred in 1856, it was held, that having regard to the abandonment by the jointress of her dower and thirds, the settlement was clearly a contract "for valuable consideration for money or money's worth" within the 17th section of 16 & 17 Vict. c. 51, and that no succession duty was payable. *Semble*—the decision must have been the same if there had been only the consideration of marriage. *Floyer v. Bankes*, 610

— See Banker.

INFANT—Where a suit to administer the estate of a testator is instituted by a stranger on behalf of infants, without communication with the

family, and contrary, as alleged, to their wishes, and no explanatory affidavit is filed, the next friend being the son and articled clerk of the solicitor in the suit and having the same address; on motion to restrain the next friend from proceeding with the suit, or for an inquiry, an inquiry will be directed whether the suit is for the benefit of the infants, and if so whether the next friend shall be continued. *Towsey v. Groves*, 225

— The next friend of an infant had been also appointed guardian and receiver in the cause, and a motion was made on behalf of the infant to remove him from all those offices, and restrain him from dealing with the property the subject of the suit; the notice of motion being signed by a solicitor as solicitor for the infant, but without any next friend being named. The motion was refused on the ground of irregularity, with leave to amend by adding a next friend for the purposes of the motion. *Cox v. Wright*, 770

— Trust for Sale. See Specific Performance.

INJUNCTION—On the 16th of March F. and S. obtained an interim order restraining T. from obstructing their ancient lights by continuing the erection of certain buildings. On the hearing of the motion for an injunction, it appeared that the parties had been at issue as to their rights since the 27th of January; and it was held this ought to have been stated to the Court on the application for the interim order, and that after the delay which had occurred, such an *ex parte* application was improper. *Fuller v. Taylor*, 376

— The underlessee of certain premises entered into an agreement with the freeholders for a new lease, dating from a period anterior to the expiration of the underlease. Disputes, however, having arisen between them, defendant purchased a reversionary interest of ten days, and, on the expiration of the underlease, brought his action of ejectment against the underlessee, who still remained in possession with the avowed object of getting into possession and obtaining a lease to himself. The cause was tried after the determination of the reversionary interest, and a verdict was returned for plaintiff at law. Upon a bill filed by the underlessee to restrain him from issuing a writ of possession, it was held, the proceedings at law were vexatious and contrary to *bona fides*; and an injunction was granted. *Buckland v. Gibbins*, 391

— When it may be expressed in general terms. *Elliot v. the North-Eastern Rail. Co.*, 402

— The Court will deal with a reference to arbitration as with an action at law, and grant an injunction, restraining persons from proceeding with it. *Mansell v. the Midland Great Western (of Ireland) Rail. Co.*, 513

— The circumstance that a lessor has a right of re-entry for breach of a covenant does not pre-

clude him from coming to a Court of equity to restrain the commission of the breach. *Parker v. Whyte*, 520

— A tenant from year to year filed a bill against adjoining tenants holding under the same landlord to restrain the erection of new buildings interfering with the free access of light and air to the premises occupied by him. The landlord thereupon gave the tenant notice to quit, and, at the time of the hearing, only eight months of the tenancy were unexpired; and it was held, by the Master of the Rolls, that the slender extent of plaintiff's interest constituted no sufficient reason for denying him the protection of the Court; and, it appearing that plaintiff had remonstrated with defendants previously to the erection of the new buildings, a mandatory injunction was awarded compelling defendants to pull them down. But, upon appeal, the Lords Justices held, that—though the extent of plaintiff's interest did not necessarily disentitle him to relief, yet it was a material ingredient for consideration; and as it was not clear that plaintiff had sustained material injury, the inconvenience to defendants of compelling them to pull down their building would be far greater than any which plaintiff could endure if the building were allowed to stand, and he were left to bring an action for damages—the bill ought to be dismissed without costs, without prejudice to any action plaintiff might be advised to bring. *Jacomb v. Knight*, 601

— Injunction obtained *ex parte* dissolved, with costs, it appearing that when the order for it was made the office-copy of the affidavits in support of it had not been delivered out of the office of the clerks of records and writs. *Elsey v. Adams*, 616

— Upon motion for an injunction on behalf of the corporation called "The London Assurance," to restrain "The London and Westminster Assurance Corporation (Limited)" from using the latter title, the Court refused to make any order. *The London Assurance v. the London and Westminster Assurance Corporation (Limited)*, 664

— G. H. B., an engineer, received a written authority from the directors of the B. U. and T. Railway Company on their behalf to enter into a contract for the construction, by P. & B. (railway contractors), of their line of railway for 215,000*l.*, 63,000*l.* to be paid in debentures and the balance in shares of the company. G. H. B. negotiated the contract with P. & B. and on behalf of the B. U. and T. Railway Company signed an agreement. In the mean time the directors of the B. U. and T. Company, having arranged for the sale of their undertaking to the L. B. and S. C. Railway Company, repudiated the authority given to G. H. B. On a bill, filed by the contractors, praying specific performance, and that the B. U. and T. Company might be restrained by injunction from parting with their shares, it was held, that as the Court could not compel P. & B. to carry out their part of the

agreement, it would not interfere to prevent the B. U. and T. Company from parting with their shares. Where a contract contains an express negative covenant and complete justice can be done between the parties, the Court will grant an injunction to restrain breach of the negative covenant; but the Court rarely interferes where there is no distinct negative stipulation, but the negative obligation is inferred only from the positive contract. *Peto v. the Brighton, Uckfield and Tunbridge Wells Rail. Co.*, 677

INJUNCTION (continued)—There is no general rule of practice to the effect that the Court will not, in a suit for specific performance by the vendor restrain an action by the purchaser to recover the deposit. The purchaser of certain property by private contract having paid his deposit, considered the title defective, and brought an action for the recovery of such deposit. The vendor then filed a bill and moved for an injunction to restrain such action; and it was held, that a court of equity is the proper tribunal to try a question of title, and that on bringing the deposit into court, the injunction must be granted. *Kell v. Nokes*, 785

— See Ancient Lights. Copyright. Lease. Trade Mark.

INSURANCE AGAINST FIRE—Under an agreement with their landlord S. W. M. and J. M. insured certain houses of which they were joint tenants from year to year for 500*l.* The houses were burnt down, and S. thereupon informed the insurance company that he was the person entitled to the benefit of the policy, and claimed to have it laid out in rebuilding the houses. The insurance company entered into an arrangement with W. M. and J. M., and cancelled the policy. S. thereupon rebuilt the houses at his own expense, and filed a bill to compel the insurance company to pay him so much of the sum due on the policy as had been properly expended by him in rebuilding. It was held, upon a demurrer by the company, that no sufficient request had been made to the company to satisfy section 83. of 14 Geo. 3. c. 78. That S. was not entitled under the above section to rebuild the houses himself and then call upon the company to refund the money so expended. A tenant from year to year insuring is not limited in his claim on the insurance company to the extent of his interest in the property insured. Where a new right has been created by act of parliament, the proper method of enforcing it is by mandamus at common law. *Quare*—whether section 83. of 14 Geo. 3. c. 78. applies to property not lying within the bills of mortality. *Simpson v. the Scottish Union Fire and Life Insur. Co.*, 329

INTEREST—Under the Defence Act, 1860, certain lands were taken absolutely by the Secretary of State for War, and other lands were required to be kept free from buildings. The amount of compensation for both classes of land was agreed upon; and plaintiffs, by their bill, claimed interest at 5*l.* per cent. on the amount paid as compensation for the lands required to be kept free

from buildings from the date of the agreement to the time of payment. But it was held, on demurrer, that the compensation paid for lands required to be kept clear of buildings was only a payment for damage, and did not carry interest. *Earl of Suffolk v. Lewis*, 232

— See Bankers. Mortgage. Partners.

INTERIM ORDER. See Injunction.

INVESTMENT—A wife with the knowledge and approval of her husband invested money belonging to the latter in the purchase of Government stock in their joint names. Subsequently, under the authority of a power of attorney given to her by the husband, she sold a portion of the stock and kept the money in her custody, and it so remained at the husband's death. It was held, that the stock remaining in the joint names of the husband and wife survived to her, but there being no evidence of an intention on the part of the husband to make an absolute gift to the wife, that the proceeds of sale of the stock formed part of the husband's general assets. *Re Gadbury*, 780

— Costs of separate investments. See Lands Clauses Consolidation Act. And see Costs.

IRREGULARITY—Printed bill appended to answer not within Orders of March 1860. See Answer.

JUDGMENT—of Court of Probate. See Charge on Land.

JURISDICTION—The Court of Chancery, in the exercise of its ordinary equitable jurisdiction, can entertain a suit against a committee of a lunatic's estate, asking for an account of his dealings therewith during the period of his committeehip. *Scammell v. Light*, 53

— By 25 & 26 Vict. c. 42. (Rolt's Act), it is obligatory on the Court of Chancery to decide all questions of law or fact on the determination of which the title to relief or remedy in equity depends. *In re Hooper*, 55

— Although the Courts in this country cannot make an order against a foreign ambassador who does not submit himself to the jurisdiction, yet the Court of Chancery will restrain a third party from handing over to him a fund the right to which is in dispute, notwithstanding his title to the fund may be absolute at law. *Gladstone v. Musurus Bey*, 155

— By a concession from the Turkish Government certain persons were authorized to form a bank, to be called the Bank of Turkey, with the sole privilege of issuing paper-money and bank-notes in Turkey. Shortly afterwards, and before the Bank of Turkey had commenced business, the Turkish Government granted a similar concession to the directors of the Ottoman Bank. A bill was filed by the Bank of Turkey against the Ottoman Bank and the Sultan, seeking a decla-

ration of the rights of the Bank of Turkey, and an injunction to restrain the Ottoman Bank from issuing paper-money or bank-notes in Turkey. But it was held, on demurrer, the Court has no jurisdiction to interfere with the acts of a foreign Sovereign, who, having entered into a contract with British subjects, makes a grant in derogation of that contract, nor to restrain British subjects from doing in a foreign country whatever they are authorized to do by the sovereign power there. *Gladstone v. the Ottoman Bank*, 228

— A Court of equity will not entertain a suit by a party residing within its jurisdiction against parties who reside in a foreign jurisdiction, in respect of property situate there, and upon a contract entered into there, which contains no special provision affecting in any way the jurisdiction of the *locus contractus*. A general demurrer for want of equity will lie if it appears on the face of the bill that a foreign Court and not the Court of Chancery is the proper tribunal in which to try the question raised. The service of a defendant out of the jurisdiction under the modern practice of the Court does not "*per se*" give the Court jurisdiction in a case not properly falling within its jurisdiction; and a defendant so served is not bound, if he contests the jurisdiction of the Court, to move to discharge the order for service, but he may raise the objection to the jurisdiction by demurrer. *Cookney v. Anderson*, 305

— The jurisdiction of the Court to direct process to be served on a defendant out of the jurisdiction, and to proceed upon such service as if it had been made within the jurisdiction, is confined entirely to such suits as answer the description contained in the 2 Will. 4. c. 33. and 4 & 5 Will. 4. c. 82; and the 7th Rule of the 10th Consolidated Order, giving power to the Court where a defendant "in any suit" is out of the jurisdiction, to order service upon him extends only to such suits as are within the above-mentioned statutes. Where it appears on the face of a bill that the suit is one in which the Court is not warranted in exercising jurisdiction against persons resident abroad, it is not necessary that defendants who have been served out of the jurisdiction should move to discharge the order of service. If they demur to the jurisdiction, and for this purpose a general demurrer for want of equity is sufficient, the same reasons that would be effective for discharging the order of service are equally available for the allowance of the demurrer. *Cookney v. Anderson*, 427

— In December 1859, M. J. G. eloped from her husband, J. H. G., there being at that time two children of the marriage. Proceedings for obtaining a divorce were immediately commenced by J. H. G.; a decree *nisi* was pronounced on the 13th of February 1861, and made absolute on the 22nd of May 1861. On the 4th of May 1861, M. J. G. was delivered of a full-grown male child. In order to determine the status of this child, J. H. G., in January

1862, vested 2,000*l.* reduced annuities, in trustees, upon trust for "all and every the children then living of the marriage of J. H. G. and M. J. G.," and a suit was instituted seeking that the rights of the parties interested under this settlement might be declared, and the trusts of the settlement might be carried out under the direction of the Court:—Held, that although the real object of the settlor might be, and probably was, to obtain a decision from the Court that the child in question was illegitimate, and although the decision of the Court might affect property of far greater value, those circumstances were not sufficient to warrant the Court in withholding the exercise of its ordinary jurisdiction. A suit such as that above mentioned, is not properly a fictitious suit, but is rather analogous to the class of cases in which a fund is settled on an infant with the view of founding an application to the Court respecting the custody of the infant's person. *Semble*—that if the settlement had been made by a mere stranger with a malicious or improper motive, the Court could have declined to exercise jurisdiction. *Gurney v. Gurney*, 456

— See Trust and Trustee. Winding up of Companies.

LANDLORD AND TENANT. See Insurance against Fire.

LANDS CLAUSES CONSOLIDATION ACT—A railway company having taken land which was the subject of a suit, and paid the money into court, the parties obtained an order for re-investing a large portion of the money in land. They then applied by petition for a small portion of the remaining fund to be invested, and they served all the parties to the suit. The Court considering this purchase to be for the benefit of the parties, and neither capricious nor unnecessary, it was held, the railway company must pay the costs. *Brandon v. Brandon, in re the South-Eastern Rail. Co. and the Lands Clauses Consolidation Act*, 20

— Non-liability of railway company to costs of application to the Court to sanction trustees releasing mortgaged part of an estate contracted to be sold to the company. *Ex parte Phillips, in re the London and South-Western Rail. Co.*, 102

— Notice by a railway company to take land under their compulsory powers, and the subsequent fixing of the purchase and compensation money by arbitration, together constitute a contract for sale and purchase, which the Court will enforce at the instance of the vendor. *Mason v. the Stokes Bay Pier and Rail. Co.*, 110

— Copyhold lands taken under the Lands Clauses Act, 1845, are enfranchised under the 96th section of that act, and no fine is payable to the lord under the 6th section of the Copyhold Act, 1858, as a condition of compulsory enfranchisement. Therefore, where the lord of the manor was tenant for life, it was held that he was not entitled to any part of the money

paid into court by a railway company as compensation for the enfranchisement of copyhold land taken by them. *Re Sir Thomas Maryon Wilson's Estates*, 191

LANDS CLAUSES CONSOLIDATION ACT (*continued*)

—A railway company took lands which stood limited to a tenant for life, with remainder, subject to a charge of 20,000*l.*, to four sisters as tenants in common in tail, and paid the purchase-money into Court under the Lands Clauses Act. A petition was presented for payment out of court to the owner of the charge, in part satisfaction thereof; and upon the petition, the tenants in common in tail, and other parties having charges, appeared separately. It was held, the company were liable to pay the costs of all parties. *In re the London and North-Western Rail. Co.'s Act*, 1846, and *the Rugby and Stamford Rail. Act*, 1846, *in re the Settled Estates of Baroness Braye*, 432

—Where a re-investment of purchase-moneys paid into court by two railway companies is sought, the costs of the re-investment are to be borne by the two companies in equal shares, and not in proportion to the amount paid in by each company; and this rule will not be departed from except in cases of extreme hardship. *In re Byron's Estates*, 584

—See Fixtures.

LEASE—P. demised a house and shop to the agents of a company; the lease contained a covenant not to use any part of the premises for the purpose of sales by auction. The agents of the company sub-let to S, who made no inquiry as to the terms of the original lease. S. being about to hold sales by auction upon the premises, P. filed a bill to restrain him from so doing; and it was held, that S. having neglected to inquire into the provisions of the original lease, he did so at his own risk, and could not be treated as taking without notice. *Parker v. Whyte*, 520

—Refusal of mortgagee to concur in. See Specific Performance.

LEASES AND SETTLED ESTATES ACT—The Court, in making an order for a lease of mines under the Settled Estates Act, will, in a proper case, authorize a lease, not only of the mines themselves, but also of so much land as may appear necessary for the convenient and effective working of the minerals. *Re Revelly's Settled Estates*, 812

LEGACY—Testator directed that the income of certain property should be enjoyed by his wife and his unmarried daughters during their lives, and after the death of the last survivor of his wife and unmarried daughters, the principal should be divided equally among the two eldest children born in legitimate wedlock to each of his sons and daughters. But in case there be only one child living to any of his married sons and daughters, that that child should receive only

the proportion divided equally, according to the number there may be. It was held, that after the death of the widow and unmarried daughters those children only were entitled to take who were living at the period of distribution, and the property was not vested in those who were *priores natu*. *Madden v. Ikin*, 3

—Testatrix bequeathed her residuary estate to such persons as B. C. should appoint by deed or will, and in default of appointment to his next-of-kin. B. C. made his will, but died before the testatrix; and it was held the will could not operate as an execution of the power, and that the gift in default of appointment took effect, and the next-of-kin were entitled. Upon an intended marriage between B. C. and C. W., which, under 5 & 6 Will. 4. c. 54, was void in its inception as being contracted with the husband of a deceased sister, C. W. assigned various mortgage debts, stocks and securities to trustees by way of settlement. She afterwards by will directed her trustees to hold all the trust monies and the securities upon trust in the proportions mentioned for the several persons named who should be living at the decease of B. C.; she then gave several legacies to persons by name. C. W. survived B. C.; she destroyed the settlement and also the assignment of some of the securities to the trustees, and took re-transfers of stock into her own name, and died without altering her will. It was held, the legacies were not adeemed by the destruction of the deeds, but that they were adeemed to the extent to which she had called in, received and re-invested the trust monies on new securities. C. W., believing herself to be the wife of B. C., made her will; and after reciting her desire to give several legacies, she requested B. C. (who died before her) to pay several legacies out of property of hers which she assumed he had become entitled to on their marriage; and it was held that they were demonstrative legacies, and payable out of the general estate. *Jones v. Southall*, 130

—Testatrix directed the trustees of certain funds over which she had a power of appointment, from and immediately after her death, to stand possessed thereof upon the trust to raise thereout 5,000*l.*, and to pay the same to the five children of her deceased sister in equal shares. The shares of sons to be paid at twenty-one, the shares of daughters at twenty-one or marriage, and to apply the income arising from the residue of the trust funds as in the will mentioned; and it was held, this was a vested legacy, that it was severed from the remainder of the trust funds, and that the legatees were entitled to the interest of the fund set apart to answer it. *Dundas v. Murray*, 151

—Testator gave all his real estate to uses to secure an annuity to his wife, and subject thereto to the use of trustees, of whom his son B. was one, for 800 years, and subject thereto he gave a particular house to his son T., and devised the residue of his real estate to T. & B. as tenants in common in fee. He then declared the trusts

of the term to be to secure the annuity and then by sale or mortgage to raise sufficient for the payment of so much of his debts, funeral and testamentary expenses and legacies as his personal estate not specifically bequeathed should be insufficient to pay. He also gave legacies of 1,500*l.* each to his two daughters, the legacy of the second being to the trustees of the term in trust for her and her children, and all the residue of his personal estate to his sons T. & B. as tenants in common, and appointed them his executors. By a codicil, the testator gave the legacy of 1,500*l.* of one of the daughters who had died subsequently to the date of his will, to the trustees of the term in trust for her only child. The personal estate was amply sufficient for payment of the debts, funeral and testamentary expenses and legacies, all of which were paid by T. & B., except the two legacies of 1,500*l.*, upon which they paid the duty, the word "received" being struck out of the legacy receipt in the usual way, and the words "retained in trust" left standing. The surplus of the personal estate was used by T. & B. for their own purposes, and they mortgaged the real estate to various persons for large amounts, and applied the mortgage monies in carrying on their business. The child of the deceased daughter filed a bill against T. & B., and subsequently against their assignees in bankruptcy, and the various mortgagees, claiming on his own behalf and that of his aunt and her children to have the legacies raised. It was held, that, notwithstanding the original sufficiency of the personal estate at the time of the testator's death, the real estate was well charged with the legacies of 1,500*l.*, which, as they had not in fact been paid out of the personal estate must be raised out of the real estate. By one of the mortgage transactions referred to, the term was treated as subsisting, and the mortgage money was paid to B., as surviving trustee of the term professedly, but the mortgagees knew that the advance was really to T. & B. for their private purposes: in the other cases, the advances were avowedly made to T. & B., and the money was paid to them, the debts and legacies being treated as satisfied, but the mortgagees made no inquiry as to this, and in some cases had constructive notice that the legacies remained unpaid. It was held, that all the mortgagees must be postponed to the legatees. Also, that the payment of duty and signature of the legacy receipt was no evidence of a valid appropriation of the legacies by T. & B. as executors. *Howard v. Chaffer and Howard v. Robinson*, 686

— Testator gave to trustees all his real and personal estate, with power, "if they should consider it advisable, but not otherwise," to sell his real estate, or any part thereof, and upon trust to realize the personal estate, and invest the proceeds of the real and personal estate and pay the income to his wife for life; and after her death he gave out of the investments directed to be made certain general and charitable legacies, the charity legacies to be paid out of his personal estate only; and after giving the income of the

NEW SERIES, 32.—INDEX, *Chanc. & Bankr.*

residue to A. C. for life, he directed his trustees, after the decease of the said A. C., out of his personal estate to raise and pay a further charitable legacy of 500*l.* The wife died, and the personal estate and proceeds of sale of certain portions of the real estate which had been sold by the trustees were insufficient for payment of all the legacies. It was held, first, that the legacies payable at the death of the wife had no priority over the 500*l.* legacy payable at the death of A. C.; secondly, that the charitable legacies ought to be first provided for out of the pure personal estate; and, thirdly, that the trustees were bound to exercise their power of sale over the real estate to the extent necessary for providing for the general legacies. *Nickisson v. Cockill*, 753

— See Charge. Presumption of Death. Will.

LEGACY DUTY—Testator gave the residue of his personal estate to trustees, upon trust to set apart 10,000*l.* consols, and pay the dividends to his sister for life, and after her decease to retain so much of the said sum of 10,000*l.* as should be sufficient to realize the clear yearly income of 150*l.*; and he directed the trustees to pay the dividends and other income of the stock so directed to be retained by them to his nephew. It was held, the nephew took the annuity subject to legacy duty. *Banks v. Braithwaite*, 85

LIEN—A receiver in a legatees' suit, advertised furniture, in a leasehold house, for sale. The superior landlord claimed rent, but took no other step, and the furniture was sold; and it was held, the landlord had no lien on the proceeds of the sale, but must come in with the other creditors. *Re Sutton*; and *Sutton v. Rees*, 437

— on inheritance and emblements for expenses of management. See Manager.

— See Bankruptcy. Costs.

LIMITATIONS, STATUTE OF—A general charge of debts upon real estate, with a direction to raise sufficient, "by mortgage or otherwise," to pay them, does not create an express trust in favour of creditors, or prevent the Statute of Limitations, 3 & 4 Will. 4. c. 27, from running against a specialty debt of testator. Payment of interest upon a specialty debt of a testator by one devisee of a moiety of his real estate, will not prevent the Statute of Limitations from barring the debt as against the devisee of the other moiety. *Dickinson v. Teasdale*, 37

— A devise of real estate, subject to and charged with the payment of legacies, does not create a trust for securing their payment or prevent the Statute of Limitations (3 & 4 Will. 4. c. 27.) from running against the legatees. *Proud v. Proud*, 125

LUNACY—A lunatic petitioned for the *supersedeas* of a commission, under which he had been found lunatic, his petition being supported by medical

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evidence that he had recovered. The committee opposed the petition, and filed his own affidavits and those of medical witnesses. The Lords Justices had several interviews with the lunatic. Ultimately they ordered all proceedings under the commission to be suspended for a stated time, giving the lunatic his personal liberty and the full possession and control over his property in the mean time; with liberty to apply. The commission was afterwards superseded. *In re Blackmore*, 486

LUNACY (continued)—Under special circumstances the Court made an allowance out of a lunatic's estate to one of the two next-of-kin (a first cousin) of the lunatic, the other next-of-kin consenting. *In re Croft*, 481

— The stock of a railway company, though transferable only by deed under 8 Vict. c. 16. s. 14, is included in the description of "stock" as defined by the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), and an order may therefore be made under the 140th section of the latter act for the transfer into the name of the Accountant General of stock of that description belonging to a lunatic. *In re Ives*, 678

— Suit asking an account of committee's dealings with the estate. See Jurisdiction.

— Costs of Mortgage. See Costs.

MANDAMUS. See Insurance against Fire.

MARINE INSURANCE—A club or association of shipowners was formed for the mutual assurance of ships belonging to the members, and the regulations by which the association was governed provided for the management of affairs by a finance committee, consisting of treasurer, secretary, &c., for the creation of a general fund or stock, by payment of premiums, &c.; and if the funds were at any time found insufficient the treasurer was to collect from each member such a per-centage as might be deemed necessary. No provision was made for granting policies, and the regulations were apparently framed on the assumption that policies would not be needed. It was held, notwithstanding 35 Geo. 3. c. 63. s. 11, that the association was not illegal.—Whether, in order to found a valid claim for a loss, in any particular case, a policy must have been granted, *quære*. Upon a bill filed by a member of the above-described association, to recover the amount of a loss incurred by him, alleging that no finance committee had been appointed, it was held, that seven of the members were properly made defendants as representing the whole body, and that the treasurer and secretary (though not alleged to be members) were properly made defendants as being the active managers of the concern, and having the control of the funds. *Bromley v. Williams*, 716

MARRIAGE. See Annuity. Church. Contract.

MARRIAGE SETTLEMENT—By marriage settlement

8,000*l.* was assigned by the father of the intended wife to trustees, to be held after his decease upon trusts as to 2,000*l.*, part thereof, for the wife, her husband and children, and as to the residue, upon trust for the husband absolutely; and it was covenanted that all the property which the wife, or the husband in her right, should during the coverture become seised or possessed of or entitled to, should be settled upon the trusts therein declared of the premises thereby settled. It was held, first, that property to which the wife became entitled in reversion during the coverture was bound by the covenant; and, secondly, that the sum given by the settlement, in trust for the husband absolutely, was not settled. *Hughes v. Young*, 137

— Covenant to bequeath. See Debtor and Creditor.

MARSHALLING ASSETS. See Administration of Estate.

MERCANTILE LAW—General lien of consignee. See Principal and Agent.

MERGER OF CHARGE—T. J. and J. A. L. were trustees of a sum of 9,200*l.* as to the whole fund upon trust for J. M. for life, and after his decease as to 5,000*l.* upon trust for H. E. C. M. and as to 4,200*l.* upon trust for T. J. the trustee. The fund was advanced to T. J. who gave a mortgage for the amount on property belonging to him in fee; and by the mortgage deed trusts were declared of the mortgage money for J. M. for life, and after his decease as to the 4,200*l.* for T. J. *his executors, administrators and assigns*. J. M. died, leaving T. J. surviving, who died, seised of the property and absolutely entitled to the 4,200*l.*, without expressing any intention either that the charge should or should not merge. It was held, that the declaration of trust for T. J. *his executors, administrators and assigns*, was to be regarded merely as the statement of the trust then affecting the fund, and not as affording any indication of an intention to keep the charge on foot; and that T. J. the owner of the estate, having subsequently become absolutely entitled to the charge, the charge must be treated as having merged. *Tyrwhitt v. Tyrwhitt*, 553

MINES—Upon a compulsory sale of land to a railway company, with an exception of minerals, the right to work the minerals is subject to the company's right to adjacent and subjacent support. *Elliot v. the North-Eastern Rail. Co.* (House of Lords), 402

— Right of mortgagee to work. See Mortgage.

MINERALS. See Railway.

MORTGAGE—Where a mortgagee of freehold estates enters into possession, he may work mines under the estate, if the security is insufficient for the payment of his principal, interest, and costs. A mortgagor not allowed to surcharge a mortgagee

with the value of minerals which he or his lessees had raised after entering into possession, when he knew that the mines were being worked for four years, and allowed the work to proceed without remonstrance or complaint. *Millett v. Duvey*, 122

— A bequest contained in a will, dated in 1857, of all a testator's personal estate, "subject to the payment of his debts," renders such personal estate primarily liable for the payment of a sum of money with which the testator's real estate was charged by way of mortgage. Dictum of *Lord Campbell in Woolstencroft v. Woolstencroft* not followed. *Eno v. Tatam*, 159

— A bequest contained in a will, dated in 1857, of all a testator's personal estate, "subject to the payment of his debts," renders such personal estate primarily liable for the payment of a sum of money with which the testator had charged it by way of mortgage; notwithstanding 17 & 18 Vict. c. 113, which makes the mortgaged lands primarily liable to bear mortgage debts; the direction to pay debts out of a particular fund amounting to a sufficient indication of a "contrary or other intention" within the meaning of the act. Dictum of *Lord Campbell in Woolstencroft v. Woolstencroft* explained by *Lord Justice Turner*. *Eno v. Tatam*, 311

— An account settled and signed by an expectant heir for the purpose of a post-obit security is not conclusive as between him and the person dealing with him; but the right of such heir to re-open the accounts does not extend to transactions not of a post-obit character forming items in the account. A person giving a voluntary bond to an agent, in order that money may be raised upon it, is bound by his agent's acts, although he may receive no part of the money raised; but an assignee of the bond can only hold it as security for the actual amount advanced by him upon it. The assignee of a post-obit security takes it with notice of all its legal incidents, including the right of the reversioner to open settled accounts between himself and the original mortgagor. Recitals in the mortgage deed of an account settled are not binding on the reversioner even as against sub-mortgagees. Where a security is set aside on the ground of undervalue, costs are not given against the mortgagee; otherwise, where there has been misconduct. *Tottenham v. Green*, 201

— In November 1856, an acknowledgment in writing was signed by the devisee of a mortgagor and given to a first mortgagee, whose mortgage was dated in May 1831, that a large arrear of interest was due on such mortgage. Upon a bill filed in July 1861, by the first mortgagee against the mortgagor and the subsequent mortgagees for payment of his mortgage-money and interest, or for a foreclosure,—it was held, by *Stuart, V.C.*, that the above acknowledgment bound the property in mortgage as against the subsequent mortgagees existing at the date of such acknowledgment, and entitled the first mortgagee to an account in respect of interest upon his mortgage-

money for more than six years prior to the filing of the bill. But, upon appeal, this decision was reversed by the Lord Chancellor. *Bolding v. Lane*, 219

— A sum of 15,000*l.* was intrusted to the solicitors of the respondents for the purpose of investment. The solicitors appropriated 5,000*l.* to their own use and invested 10,000*l.* on mortgage, representing to their clients that the whole of the 15,000*l.* had been duly invested. Afterwards, being pressed by the respondents for the securities, they fraudulently and without consideration procured from the appellant, for whom they were also acting as solicitors, the execution of two deeds, mortgaging his equitable interest in certain estates which they handed over to the respondents as the securities for the 5,000*l.* The solicitors soon afterwards became bankrupt, and nearly three years afterwards the appellant first discovered from the assignees in bankruptcy the particulars of the transactions between the solicitors and the respondents, whereupon he filed a bill against the latter to set aside the mortgages, and the Master of the Rolls made a decree in his favour, which was reversed by Lord Chancellor Campbell, on the ground of acquiescence and confirmation by the appellant. It was held (affirming the decision of the Master of the Rolls, and reversing that of Lord Chancellor Campbell), that the appellant was entitled to the relief sought by his bill. *Wall v. Cockerell* (House of Lords), 276

— Under a decree of foreclosure the solicitor of the mortgagee attended at the place named for payment before the time fixed; the mortgagee did not attend until after the commencement of the time, but both remained until the time had expired, the mortgagor did not attend, and as the money remained unpaid the decree was made absolute. *Lechmere v. Clamp*, 276

— A will executed before the 1st of January 1855 is a will already made within the meaning of 17 & 18 Vict. c. 113, notwithstanding it does not come into operation by the death of testator till after that day. Nor will a mere republication by codicil, giving no new operation to the material dispositions in the will, deprive it of the character of a will already made. Therefore, where a testator, by his will, dated before the 1st of January 1855, devised real estate (which was then subject to certain mortgages) to T. P. in fee, and after that day made a codicil which did not affect or refer to the devise, it was held that the devisee was entitled to have the devised estate exonerated out of the personality. *Rolfe v. Perry*, 471

— There is no rule in equity which disables a mortgagee from purchasing or accepting a purchase of the equity of redemption of the mortgagor; and the circumstance that the release is made subject to a right of redemption by the mortgagor within a given time makes no difference in this respect. *Gosrip v. Wright*, 648

— Where a mortgage to secure an existing debt

payable by instalments, with interest to the times of payment, contained a proviso that, in the event of the debt not being punctually paid by instalments as specified in the deed, the full amount of the debt should immediately become payable, the Lords Justices, on appeal from one of the Vice Chancellors, held, that the proviso was not in the nature of a penalty, and refused to grant relief to the mortgagor against it. *Sterne v. Beck*, 682

MORTGAGE (*continued*)—In order to affect a principal with constructive notice of facts within the knowledge of an agent, it is necessary not only that the knowledge should be derived from the same transaction, but it must be knowledge of facts which are material to that transaction and which it was the duty of the agent to communicate. Therefore, the transferee of a mortgage is not affected by the knowledge of the solicitor acting for him in the matter of the transfer, of an incumbrance subsequent to the original mortgage, so as to prevent him from making further advances, such knowledge not being material to the business of the transfer. The employment of a solicitor to do a mere ministerial act, such as the procuring the execution of a deed, does not so constitute him an agent as to affect his client with constructive notice of matters within the knowledge of the solicitor. *Wyllie v. Pollen*, 782

— Exoneration of mortgaged estates. See Will. And see Bankers. Foreclosure. Receiver. Vesting Order.

MORTMAIN—A piece of land being conveyed to trustees upon trust to permit a church and schools to be built thereon, the deed of conveyance was sought to be set aside, on the ground that there was an antecedent agreement between the donor and the trustees that the donor should have a life interest in the land. It appeared that part of the produce of the land had been applied for her benefit, but the existence of any such agreement was denied by the trustees; and it was held, that in the absence of clear evidence of an agreement that the deed should not take effect in possession, but that the beneficial interest should be retained by the donor, the deed was valid. In such a gift the conveyance to the trustees creates a right on the part of the charity to have the intermediate profits applied to the purposes of the charity, and there is no resulting trust in favour of the donor. *Fisher v. Brierley*, 281

MULTIFARIOUSNESS—In the year 1771, G. assigned fifty-five shares in a Scotch public company called Carron Company to his bankers as security for a debt and further advances. In 1813 the bankers sold fifteen of such shares to J, and in 1817 the then personal representative of G. sold the remaining forty shares to H. J. continued manager of the company up to his death in 1815; and the fifteen shares bought by him were subsequently sold by his representatives. H. died in 1851, and the forty shares were still

standing in his name. In 1862 a bill was filed by the personal representative of G. then recently constituted in England, against the personal representatives of J. and H, alleging that J. and H, who managed the business of Carron Company, had fraudulently misrepresented the state of the affairs of the company, whereby they had been enabled to purchase the fifteen and the forty shares respectively at an undervalue, and praying re-transfer of the forty shares, and that the estates of J. and H. might jointly and severally answer the difference between the purchase-money and value of the fifteen shares. It was held, on demurrer, that the bill was multifarious. *Walsham v. Stainton*, 557

MUTUAL ASSOCIATION. See Marine Insurance.

NOTICE. See Bills of Sale. Lease.

PARTIES—A bankrupt who, by fraud committed before his bankruptcy, has acquired property which has passed to his assignees, cannot properly be made a defendant to a suit for setting aside the fraudulent transaction, either for the purpose of fixing him with costs or otherwise. If a bill seeks discovery from a bankrupt merely as incidental to relief prayed against him, the bankrupt, not being a necessary party to the suit in respect of the relief, may demur to the discovery. An allegation of fraud is insufficient without a statement of the circumstances constituting the fraud. *Semble*—A gift to the testator's widow "for her sole use and benefit" does not give her a separate estate, so as to entitle her on marrying again to sue by her next friend. *Gilbert v. Lewis*, 347

— If a father, on the marriage of his daughter, makes the intended husband a promise for her benefit she alone cannot file a bill to enforce it. The husband and wife must be co-plaintiffs. *Laver v. Fielder*, 365

— See Bankruptcy. Fraud.

PARTNERS—Where each of two partners, upon entering into partnership, agreed to advance an equal sum of money in respect of capital, but did not make any stipulation as to interest on such sum, and it appeared that one of the partners advanced his share of capital, but that the other did not do so, the former was allowed, in taking the partnership accounts, interest at 5l. per cent. per annum during the period of the partnership upon the amount brought into the partnership by him, in addition to his share of the profits. *Hill v. King*, 79

— If a partnership is dissolved by decree, and accounts are directed, it means according to any existing articles of partnership, or system on which the accounts have been taken up to the time of the dissolution, no settled accounts being disturbed. A decree dissolving a partnership terminates any existing articles, and if thenceforward the business is carried on for the pur-

pose of winding up the affairs, the accounts must be taken in the ordinary form, allowing simple interest on the capital. *Watney v. Wells*, 194

— A partner who overdraws his share of profits contrary to the provisions of the deed of partnership, cannot, in the absence of an express provision, be charged with interest upon the sums overdrawn. *Meymott v. Meymott*, 218

— If a partnership entered into by articles for a term of years be continued without special agreement after the expiration of the term, the new partnership is a partnership at will only, and those provisions only of the articles which are applicable to a partnership at will are to be considered as binding on the new partnership. *Clark v. Leach*, 290

— A, carrying on business by himself, joined with B. and C, carrying on business under the style of "B. & C." in an adventure of a wholly different description from the usual business of "B. & C." It was held, by one of the Vice Chancellors, that the existence of the partnership between B. & C. did not itself afford any ground for inferring that the profits of the adventure were to be shared otherwise than if B. & C. had been separate traders; and that, in the absence of evidence of agreement to any other effect, the profits must be divided in equal third parts between A, B, and C. The adventure in question was for the supply of small-arms to a foreign government; and the arrangement to tender for the supply was verbally come to without any distinct agreement respecting the division of the profits. In the contracts for supply subsequently entered into with the representative of the foreign government A. signed separately, and B. & C. were made parties by the name of their firm, and signed in that character. It was held, by the Lords Justices, on appeal, that the proper inference from the form and mode of execution of the contracts was that the adventure was taken by B. & C. as a firm, i. e. as one person, conjointly with A. as another person, and, consequently, that the profits ought to be divided in moieties, one to A. and the other to B. & C, and they decreed accordingly. *Warner v. Smith*, 578

— See Administration of Estate. Trade-Mark.

PATENT—A patent having been granted to an invention for the purification of gas by means of precipitated or hydrated oxides of iron, the specification stating the mode of obtaining such oxides, the use of a natural substance containing precipitated oxide of iron was held not to be an infringement of the patent; but upon this substance being revived in the manner described in the specification an injunction to restrain the use of the substance so revived was granted. *Hills v. the Liverpool United Gaslight Co.*, 28

— The licensee under a patentee is estopped from disputing the validity of the patent during

the continuance of the licence. The appellants were the owners of patents for the manufacture of carpets. The respondent applied for a licence to use the patents, and it was agreed that certain machines, embodying the inventions of the appellants, should be prepared under their superintendence, the respondent paying for the machines, and also paying certain agreed royalties upon the carpets manufactured therewith. This agreement was acted upon, and whilst being acted upon the respondent obtained, from a different quarter, other machines, which also embodied the appellants' inventions, and used these machines as well as those supplied by the appellants. The appellants filed a bill in Chancery for an account of royalties in respect of the user of both sets of machines, whereupon the respondent, by way of defence to appellants' claims in respect of the machines not obtained from them, disputed the validity of the appellants' patents. It was held (by the House of Lords), that the agreement constituted the respondent a licensee of the appellants, and that, so long as he thought fit to claim the benefit of the agreement in respect of the machines supplied by the appellants, he was estopped from denying the validity of the patents, and must pay royalties in respect of the user of both sets of machines. It was held, also, that no term being stipulated for the continuance of the agreement, the respondent might, if he chose, decline to pay royalties thereunder altogether, leaving the appellants to their remedy for infringement in respect of the use of any of the machines. *Crosley v. Dixon*, 617

PAYMENT INTO COURT—The Commissioners of Works and Public Buildings took certain lands vested in charity trustees, and by reason of difficulties in the title paid the purchase-money into court, and it was subsequently reinvested in the purchase of other lands under an order made for that purpose, and the costs were ordered to be paid according to the act. It was held, upon the construction of sect. 49 of 9 & 10 Vict. c. 39, that the costs to be paid by the Commissioners were the costs of the original purchase and of the reinvestment in other lands. *Ex parte the Vicar and Churchwardens of St. Sepulchre's, in re the Westminster Bridge Act*, 1859, 463

— Trustees, who had a sum of money standing in their names at their bankers, signed an order directing the bankers to honour the cheques of any two of them, or of Messrs. G. & Co., their solicitors. W, who was one of the trustees, and one of the firm of G. & Co., drew out the money and applied it to his own use. Upon a bill against the trustees, it was held, on an admission of these facts by the co-trustees, that they must pay the money into court. *Ingle v. Partridge*, 813

PAYMENT OUT OF COURT—Where a petition is presented for payment of money out of court merely, and similar successive applications will have to be made, leave will be granted to make

such future applications to the Judge in chambers. *Winkworth v. Winkworth*, 40

PAYMENT OUT OF COURT (*continued*)—When a fund in court has not been dealt with for a considerable time, payment to the bare legal representative of the person who became absolutely entitled, will not be made in the absence of the parties beneficially interested. *Edwards v. Harvey*, 482

PENALTY—See Mortgage.

PETITION—Under 25 & 26 Vict. c. 108. s. 2. the Court will make an order (on petition) authorizing the sale of land with a reservation of the minerals, or of the minerals apart from the land, in general terms without reference to any particular sale. *Re Willway's Trust*, 22

— of rehearing. See Practice.

PLEADING—In a bill to restrain the infringement of a design for ornamenting lace, registered under the 5 & 6 Vict. c. 100, compliance with the act is sufficiently pleaded by alleging that the design and proprietorship have been duly registered, and a bill containing those allegations is not open to a demurrer for not alleging in detail that the plaintiff has complied with the various requirements of the act. And if a defendant insists that a plaintiff has lost his copyright by non-compliance in respect of matters subsequent to registration, he must raise the defence by plea or answer. *Sarasin v. Hamel*, 378

— A bill was filed to perpetuate testimony, charging that the matter in dispute (*viz.*, whether a particular deed was a forgery) could not be made the subject of judicial investigation, and interrogatories were filed. Defendants put in an answer, and witnesses were examined and cross-examined. The bill was then amended and further interrogatories filed seeking more extensive discovery. Defendants then pleaded in bar, that since the filing of the answer plaintiffs had filed a bill in another branch of the court against defendants and other persons, whereby they had made the matter in dispute the subject of judicial investigation, and that it was not the fact that the matter in dispute could not be made the subject of judicial investigation. It was held that the substance of the plea was, that the matter of dispute could be made the subject of immediate judicial investigation; and that as this might have been pleaded to the original bill, it could not be pleaded to the amended bill, and the plea was ordered to stand for an answer, with liberty to except. *Semble*—that a plea to the same effect to the original bill would have been good. *Ellice v. Rowpell*, 563

— See Bankruptcy. Multifariousness.

PORTIONS. See Settlements.

POWER OF APPOINTMENT—Donees of a power which authorized the appointment of personal

estate amongst their children, appointed it "upon the trusts following, that is to say"; then followed trusts for the benefit of some of the children, and to pay the interest to them for life, and after the decease of each child to dispose of her share amongst her children, who were not objects of the power. It was held the whole trust must be read together, and could not be treated as an absolute appointment followed by an attempt to settle the shares; consequently, that the appointees took only life interests, and the residue was unappointed. *Rucker v. Scholfield*, 46

— By marriage settlement certain property was settled on husband and wife for life, and afterwards to such children as the husband should by deed or will appoint, and in default of appointment to the children equally at twenty-one or on marriage. There were three children: one died an infant, another attained twenty-one and died before the father, and the third married and survived. The father by his will gave the residue of his estate and effects which he might die possessed of or entitled to, including the stocks, fund and securities which should be in the names of the trustees of his marriage settlement upon the trusts thereof, and which he directed should be considered as part of his residuary personal estate, to trustees to pay the interest to his wife for life, and then to his daughter. It was held, it was not testator's intention to exercise his power of appointment under the settlement, but only to dispose of that moiety of the trust funds which became his own absolutely by the death during his life of the child who had acquired a vested interest. *In re Bidwell's Settlement*, 71

— If a power is executed in favour of an object of the power, in order that other deeds may be executed by the appointee to raise inducements for a daughter of the donee of the power, also an object of the power, to abstain from marrying with a person objected to by him, the appointment cannot be supported if questioned in a Court of equity. *Semble*—it is immaterial whether the agreement by the appointee to carry out the desire of the donee is entered into before or after the appointment. *Topham v. the Duke of Portland*, 81

— Testator, by his will, gave all his personal property, except a specific portion, to his wife absolutely, subject to payment of debts; and he gave the specific portion of his property in manner therein mentioned. A few days afterwards he executed a deed, by which he settled a portion of his property upon his wife for life, and after her decease for himself for life, and after the death of the survivor, for such persons as the husband and wife should jointly appoint; and in default of appointment, either jointly by the husband and wife, or by the husband by will, the property was to go to the survivor. Another deed was subsequently executed in December, having only one witness, by which the testator covenanted that his devisees, or heirs, executors

or administrators, should after his death convey and assign all his realty and personalty of or to which he should at his death be seised or entitled for a beneficial interest, or which he should have disposed of by his will, to trustees, in trust to pay debts and transfer the residue to his wife, if living at his death, or to his next-of-kin. It was held, the specific bequest contained in the will operated in exercise of the power of appointment contained in the subsequent deed; that the instrument of December was a valid deed, and did not operate as a will so as to revoke the former will, and that the property passing under the appointment constituted assets available for the payment of debts created by the voluntary deed. *Patch v. Shore*, 185

— Under the Wills Act, 1 Vict. c. 26, a general devise by will executed after the 1st of January 1838 operates as an execution of a power of appointment vested in the testator after the execution of the will. The 8th section of the act does not prevent a general devise by a married woman from operating as such an appointment. *Semble*—a general power of appointment over an equitable estate given to the survivor of two persons to be executed by deed or will would, independently of the Wills Act, be well exercised by a will made during the lives of both the persons by that of one of them who afterwards proved to be the survivor, for a contingent power is in equity analogous to a contingent equitable interest, and as such an interest is (independently of the 8 & 9 Vict. c. 106.) capable of being alienated, so is the power capable of being exercised before the contingency occurs. A testamentary power of appointment over real estate was given to the survivor of A, B, and C; C. afterwards became a married woman, and by her will, executed after the 1st of January 1838, made a general devise of her residuary real estate, giving, amongst other things, a life interest to B. C. afterwards became the survivor; and it was held the will operated as an execution of the power, and that the gift of a life estate to B, whom the testatrix must necessarily survive before the power could vest in her, was not a sufficient expression of a contrary intention to take the case out of the act. *Thomas v. Jones*, 139

— The donee of a power cannot delegate its exercise to any other person; and where the Court sees that the purposes for which it is reserved have not been observed, but the appointment has for its object to effect intentions not in accordance with those of the donor of the power, it will treat that appointment as a fraud on the power; and it makes no difference whether the power is created by another person, or by the donee himself, without valuable consideration, the same rule of equity applying equally to both cases. The intentions of the donee of a power are to be collected from the instrument creating it, and not from parol evidence; but such evidence is admissible to shew the purposes for which the power is exercised, although those purposes do not appear from the instruments

by which it is exercised; therefore, where it appeared from such evidence that an appointment was made in favour of an object of the power, in order that other deeds might be executed by the appointee to raise inducements for a daughter of the donee of the power, who was herself an object of the power, to abstain from marrying a person objected to by the father, the appointment was set aside as not having been made for a purpose contemplated by the donor of the power. Where a settlement creating a power of appointment is made in the form accordant to the law of Scotland, the Court of Chancery in England declined to decide the validity of appointments made under it without first ascertaining the law of Scotland on the subject; and for that purpose directed a case to be stated for the opinion of the Court of Session, pursuant to the provisions of 22 & 23 Vict. c. 63. *Topham v. Duke of Portland*, 257

— Stock was settled to the separate use of a married woman for life, and after her decease as she should appoint by will, and in default of appointment for her next-of-kin. The married woman died in her husband's lifetime, having exercised her power, and a suit being instituted in chambers to administer her estate, her separate creditors took out a summons and sought to prove under the decree; and it was held, the married woman did not by exercising her power of appointment constitute the property appointed separate estate. *Vaughan v. Vanderstegen* adhered to. *Blackford v. Woolley*, 534

— If a power of appointment is exercised in favour of an object of the power, upon the understanding that deeds shall be executed by the appointee, settling the property on persons not objects of the power, in furtherance of the desire of the donee of the power to appoint to those persons, the appointment, although made without any corrupt motive, is void in equity as a fraud upon the power. *Secus*—where a *bond fide* appointment is made to an object of the power, with a view to an immediate settlement of the appointed property with the approbation of the appointee; as in the instance of an appointment by a parent to a child in contemplation of a settlement on the marriage of the latter, in which case the parental influence of the donee of the power may be legitimately exerted in procuring a proper settlement. *Pryor v. Pryor*, 731

— See *Legacy*.

POWER OF SALE—Application of sale monies. See *Inclosure Acts*.

PRACTICE—*Semble*—that a person brought before the Court by service of notice of the decree under 15 & 16 Vict. c. 86. s. 42 is entitled to present a petition of re-hearing. *Ellison v. Thomas*, 2

— Where a plaintiff's bill is retained in order that his right may be tried at law, he is bound to proceed at law with all reasonable diligence,

and is not entitled to wait till the forms of common law procedure compel him to go on. *Arnold v. Thomson*, 40

PRACTICE (continued)—Upon all applications to the Court under sect. 2. of "the act to confirm sales, &c, by trustees" (25 & 26 Vict. c. 108), the beneficiaries must appear and consent thereto. *Re Brown's Trust Estate*, 275

— A suit was instituted for a declaration of right as to the interests of tenants for life in the share of a deceased co-tenant for life. The decree made at the hearing after declaring the immediate rights of the tenants for life proceeded to declare that there were cross-remainders between them. The Lords Justices, although the usual time for re-hearing had elapsed, ordered a re-hearing of the case, at the instance of children of a tenant for life who had recently died, those children being prejudiced by the declaration as to cross-remainders, and the declaration being unnecessary for the determination of the question originally submitted to the Court. *Walmsley v. Foxhall*, 672

— Plaintiff setting down his cause as short, without the consent of defendant, is bound to give notice to defendant that he has done so; and in the absence of proof of such notice a decree cannot be made in a short cause against a defendant who does not appear. *Mollesworth v. Sneed*, 709

— A written bill being filed on the usual undertaking to file a printed bill, the fourteen days prescribed by the 4th rule of the 9th Consolidated Order elapsed without a printed bill being filed, the clerk, whose business it was to do so, being called into the country on business of his employer, and not informing him of his omission; and the written bill was taken off the file. Subsequently an injunction was moved for and obtained. Upon proceeding to file interrogatories the omission was discovered, and a motion made for leave to file a printed bill notwithstanding that the fourteen days had elapsed; and it was held, on the authority of the case of *Ferrand v. the Corporation of Bradford*, that the omission must be regarded as a venial slip, and that the written bill should be restored to the file, and a printed bill received; the plaintiff paying the costs of the application. Where a plaintiff omits to file a printed bill within the fourteen days, the application to the Court for leave to rectify the omission should not be made *ex parte*, but upon notice, and, as a rule, the defendants are entitled to appear upon the application, and the plaintiff must pay their costs. *Moss v. Syers*, 713

— Affidavits as to documents by executor at instance of creditor. See Administration of Estate.

— Appending printed bill to answer. See Answer.

— Appearance by creditors' representative sepa-

ately, on appeal by official manager. See Contributory.

— Entering affidavits as read. See Costs.

— New evidence on rehearing. See Evidence.

— Order for married woman to answer separately. See Attachment.

— Order on petition for sale of lands. See Petition.

— Sending questions to law. See Jurisdiction.

PRESUMPTION OF DEATH—A legatee under a will who had not been heard of since the year 1848 was presumed to be dead at the expiration of seven years; but there being no evidence to fix the death at any particular period, it was held that he had died subsequently to the death of the testator in 1851, and that his representatives were entitled to the legacy. *Dum v. Snowden*, 104

PRINCIPAL AND AGENT—The general lien of a consignee upon goods consigned to him, cannot be set up by him against positive directions given to him by the consignor; and if he accepts a consignment accompanied by such directions he is bound to apply it accordingly—so held, on appeal, by the Lords Justices. *Frith v. Forbes*, 10

— See Company. Mortgage. Vendor and Purchaser.

PRIORITY—The circumstance that legacies are payable immediately is not *per se* sufficient to give them priority over legacies the payment of which is postponed. *Nickisson v. Cockill*, 753

— Notice. See Bill of Sale. And see Administration of Estate.

PRIVILEGED COMMUNICATION. See Solicitor and Client.

PROCEEDING AT LAW. See Practice.

PRODUCTION OF DOCUMENTS—Where an answer had been put in by a defendant to an interrogatory as to documents, and it had not been excepted to, one of the Vice Chancellors decided that after decree the Court would not make an order for an affidavit by defendant as to documents, unless a special case was made out; but the Lords Justices, on appeal, held, that defendant notwithstanding he had answered and the answer had been taken as sufficient, must file the usual affidavit as to documents. *Hanslip v. Kitson*, 662

— Defendant, in compliance with an order, made the usual affidavit as to documents. After the affidavit had been filed, he put in his answer, and plaintiff having from the contents of the answer made out a special case as to the posses-

sion by defendant of particular documents, the Court ordered defendant to make a further affidavit stating whether he had those documents in his possession. *Noel v. Noel*, 676

PUBLIC COMPANY—A suit by the official manager of an unincorporated society representing a particular class of shareholders against another class of shareholders, praying that defendants might be declared liable to make good certain funds alleged to have been misapplied, cannot be maintained. An official manager of a company only provisionally registered, cannot bring an action, or institute a suit against any person, nor can any action or suit be instituted against such official manager. *Ernest v. Weiss*, 113

RAILWAY—A railway company, under the powers of their act, bought land for the purposes of their line, and purchased also, for trifling sums, from various landowners, the right of making a tunnel through their lands. Under this act minerals were excepted from purchases, and vendors were enabled to work the minerals, so that no damage be done to the railway. C, who derived title as landowner from the vendors to the company, gave notice, under the assumed powers of a subsequent act, of his intention to work for minerals within a certain distance of the line and the tunnel. The company filed a bill to restrain C. from so doing, and the Court being of opinion that the subsequent act was not applicable, and it appearing that his workings would endanger the line of railway, an injunction was granted by one of the Vice Chancellors, although it was admitted that plaintiff would thereby be prevented from getting minerals of very great value; and, on appeal, the decision was affirmed. *The North Eastern Rail. Co. v. Croxland*, 353

— A railway company is bound, under section 14. of the Railways Clauses Act, 1845, to construct its bridges according to the deposited plans, notwithstanding section 49. A bridge forming part of the line of railway is an "engineering work" within section 14. *Attorney General v. the Tewkesbury and Malvern Rail. Co.*, 482

— Contract with promoters for sale of land. See Specific Performance.

— Re-investment of purchase-money. See Costs. And see Company. Mine.

RECEIPT—for legacy. See Legacy.

RECEIVER—A brother and sister conveyed their separate estates to a mortgagee, and the deed contained a proviso that recourse should not be had to the sister's estate so long as the brother's estate was sufficient to pay the money lent. The brother's estate, owing to prior mortgages, was insufficient, but no formal administration of his estate had been made. Upon a bill to foreclose the sister's estate, it was held, the plaintiff, like

a subsequent mortgagee, was entitled to a receiver. *Acland v. Gravener*, 474

RE-CONVERSION—Land which, from being impressed with an absolute trust for sale, is personal estate in equity, cannot be re-converted into real estate by persons having only a defeasible title to proceeds of sale. To effect a re-conversion, there must be the concurrence of the absolute owners. *Sisson v. Giles*, 606

REHEARING. See Evidence.

REMOTENESS. See Will.

REVENUE. See Income Tax.

SECURITY FOR COSTS—Where plaintiff could not be found at the residence described in his amended bill, an application by a defendant (made a party to the suit by the amended bill), that plaintiff might be ordered to give security for costs, was refused, with costs, the misdescription having arisen by mistake, and no inquiry as to the plaintiff's residence having been made of his solicitor. *Knight v. Cory*, 127

SEPARATE USE. See Power of Appointment.

SERVICE—out of the jurisdiction. See Jurisdiction.

SETTLED ACCOUNT. See Solicitor and Client.

SETTLED ESTATES ACT—Property in the County Palatine was limited to trustees during the life of the longest liver of his wife and five named children; and from the death of such longest liver to the respective issue then living of his children, in undivided fifth shares, as tenants in common in fee with cross limitations. The longest liver of testator's wife and five children died in 1861, when the property vested absolutely in fee in undivided shares in numerous persons. All these persons, several of whom are still infants, concurred in an application for an order under the Settled Estates Act to sell the property; but the Vice Chancellor of the County Palatine thought the property had ceased to be "settled" within the meaning of the act, and that he had no power to make an order. The Lords Justices agreed, considering that, as when the application was made the particular limitations were spent and the property vested in fee, the case was not within the act. The time for ascertaining whether hereditaments stand limited by way of succession so as to bring them within the operation of the Settled Estates Act, is when application is made to the Court. *In re Birtle's Estates*, 439

SETTLEMENT—By a settlement, a sum of money was to be raised after the death of the settlor and another person for all the children of the settlor's son, other than an eldest or only son, for the time being entitled to certain other property. The eldest grandson having died before the period when the amount could be raised, or he became entitled to the other property, his representative was entitled to share in the fund to be raised

D

NEW SERIES, 32. - INDEX, *Chanc. & Bankr.*

for the younger children—so held by the Lord Chancellor, reversing the decision of one of the Vice Chancellors. *Ellison v. Thomas*, 32

SETTLEMENT (continued)—A gentleman wrote a letter to a young lady's mother proposing marriage with the young lady, who was then a minor, and saying "that if the latter had or might have money, his wish and intention would be that it should be settled for her sole and entire use." The proposal was accepted. The young lady was entitled to certain property, and the marriage took place while she was yet an infant, but without any settlement having been made of her property. A settlement upon her and her children of all her property present and future, was decreed. *Alt v. Alt*, 52

— A Frenchman residing in France married, according to the French law, an Englishwoman who had been for some time domiciled there. The parties at the same time declared, before a notary public, that they married without a marriage contract. They had, however, previously joined in a deed settling the wife's property in England. This being an English deed had no validity in France in consequence of the omission to comply with the French forms. Upon bill by the husband asking that the deed might be declared void and for payment of the money, it was held the settlement was not affected by the domicile of the husband and wife, but by the *lex loci contractus*; that the settlement was valid, and that its trusts must be performed. *Van Grutten v. Digby*, 179

— By a voluntary settlement J. D. conveyed freehold estates to trustees, to the use of J. D. and his wife, successively for their respective lives, with remainder to the use of their children, as J. D. should by will, or in default of appointment by him as his wife should by will, appoint, and in default of appointment to the use of trustees for 500 years, with remainder to the use of the first and other sons of J. D. and his wife successively in tail male; and the trusts of 500 years' terms were declared to be as soon as conveniently might be after the death of the survivor of J. D. and his wife, in case J. D. should have issue by his wife one son and also two or more children then in trust to raise the sum of 6,000*l.* for the portion or portions of any child or children of J. D. and his wife, other than their eldest and only son, equally to be divided between them if more than one. No period was fixed for vesting the portions. J. D., by a settlement made on the marriage of his daughter H. D., covenanted that he would not execute any appointment or do any other act to diminish the share to which H. D. might become entitled under the first-mentioned settlement: subsequently J. D., by will, appointed the estate to his second son J. S. D., charged with 1,000*l.* in favour of H. D., and 3,000*l.* in favour of another daughter. It was held, that by the covenant J. D. had released his testamentary power to the extent of disabling himself from affecting the

share of H. D. by any subsequent exercise thereof (but not to any greater extent), and that H. D. was entitled to the same share in the 6,000*l.* that she would have taken in default of appointment. For the purpose of ascertaining the share H. D. would have taken if there had been no appointment, and in construing the settlement upon that hypothesis, held, that the representatives of an eldest son who attained twenty-one, but died in the lifetime of H. D. without issue, were entitled to share in the 6,000*l.*; that the second son, who but for the appointment would have taken the estate as tenant in tail, was excluded from any share; that the representatives of the eldest son and of a daughter who attained twenty-one, but died unmarried in the lifetime of the tenant for life, were entitled to share in the 6,000*l.*; and that the representatives of a son who died an infant in the lifetime of the tenant for life were excluded. *Davies v. Hughes*, 417

— F, a widow, who was entitled to an annuity determinable in the event of her re-marriage in the lifetime of E. B. to avoid the forfeiture of her annuity, consented to live with D. as his wife, under a promise of marriage. In 1857 E. B. died, and upon her death differences arose, owing to which F. and D. lived separate for about two years, though D. occasionally visited F. While living separate, F. made a settlement of property to which she had become absolutely entitled for the benefit of herself, her putative daughter, and a daughter by a first marriage and her children, and other members of her family. About seven weeks afterwards D. married her, knowing of her property, and without having been informed of the settlement. Upon bill filed by D, it was held, the settlement must be regarded as a fraud upon his marital rights, and it was set aside. A delay of two years and a half from the time of discovery of the settlement to the filing of his bill, held, not sufficient to deprive D. of his right to relief, there being no suggestion that evidence had been lost in consequence of the delay. *Hunt v. Matheux* doubted. *Downes v. Jennings*, 643

— Wife's equity to. See Baron and Feme.

— See Marriage Settlement. Voluntary Settlement.

SHIP AND SHIPPING—The owners of a British ship mortgaged her in England, and she afterwards was taken by the mortgagors to New Orleans, where she was attached by creditors, who took proceedings in the Courts there for the purpose of making her available for their demands. The English mortgagees intervened in these proceedings for the purpose of asserting their rights; but their claim was wholly disregarded, the law of New Orleans not recognizing a mortgage of chattels; and, under an order of the Court, the ship was sold to a British subject. The ship having afterwards returned to England with a cargo, the mortgagees filed a bill to enforce their claim; but it was held the judgment of a foreign

Court of competent jurisdiction is conclusive *inter partes* on the merits of the matter in dispute, but may be reviewed by the Courts in England, if any error appears on the face of the record. Where a foreign tribunal acts in defiance of the comity of nations by refusing to recognize a title properly acquired according to the laws of England, its judgment will be disregarded by the English Courts. In the distribution of assets the *lex fori* prevails. *Simpson v. Fogo*, 249

SHORT CAUSE. See Practice.

SOLICITOR—Bill of Costs. See Taxation.

SOLICITOR AND CLIENT—Where relief is sought in respect of a fraud, there must, in order to take the case out of the rule of privilege, be at least a specific allegation in the bill connecting with the fraud the solicitor of the person who was a party thereto, although such person be now deceased. Where a bill alleged that a person now deceased had been party to a fraud and prayed relief in respect thereof, and the solicitor of such person, being called as a witness, demurred to certain questions put to him before the examiner upon the ground of privilege, the Court allowed the demurrer, there being no specific allegation in the bill connecting the solicitor with the fraud complained of. *Scoble*—A mere allegation in the bill connecting the solicitor with the fraud, where he is not made a co-defendant, and the issue of privilege is not distinctly raised, is insufficient. Whether communications made by a client to his solicitor in relation to business transacted for the former by the latter are privileged after the death of the client—*quære*. *Charlton v. Coombes*, 284

— Information obtained by a solicitor from a third party, though while acting professionally for a client, is not privileged. *Greenough v. Gaskell* not followed. *Ford v. Tennant*, 465

— Gift made in 1852, pending the relation of solicitor and client, by a client to his solicitor, by means of a parol direction on the part of the client to the solicitor to retain a sum of money in the hands of the latter belonging to the client, set aside upon a bill filed in November 1861, the relation of solicitor and client having continued from the time of the gift up to the early part of 1861, when it was terminated. Although a gift by a client to his solicitor may be influenced by proper motives, it is subject to be set aside unless there be clear evidence of removal of that pressure upon the client, which the Court always presumes where the relation of solicitor and client is proved to subsist. *O'Brien v. Lewis*, 569

— A solicitor does not, by taking the body of his client in execution on a judgment obtained by him at law for his costs in a suit in equity, lose his lien for such costs upon the costs of the suit ordered to be paid by the opposite party to his client. *O'Brien v. Lewis*, 665

— By agreement in writing between a solicitor and his client it was stipulated that the former should have 5*l.* per cent. commission on the gross amount of property recovered by him for the latter, in addition to his costs; and it was held, the stipulation was contrary to the policy of the law, and that the solicitor must refund the amount received by him for commission, though included in a settled account. *Pince v. Beattie*, 734

— See Annuity. Mortgage.

SPECIALTY DEBT. See Debtor and Creditor.

SPECIFIC PERFORMANCE—If the legislature prescribes formalities to be observed by parties contracting *inter se*, and one of them endeavours to avail himself of the want of such forms to postpone or avoid the completion of a contract entered into, the Court will itself ascertain whether the intentions of the legislature have, in substance, been complied with; and if they have, it will carry the contract into effect. Public companies having power to purchase land cannot contract for its purchase, and insist upon a custom to defer its completion to the extreme period of time allowed them for the taking of land and the completion of their works. No such custom exists, but they are bound to complete their contract within a reasonable time. *Baker v. the Metropolitan Rail. Co.* 7

— A mortgagor agreed to grant a lease of a shop; the lessee entered into possession and commenced alterations; the mortgagees refused to confirm the lease or to allow him to proceed with the alterations. Upon a bill against the lessor for specific performance, it was held, under the circumstances, as damages had clearly been sustained, that the Court would make an order to assess them, though the 21 and 22 Vict. c. 27. in simple cases never intended to transfer the jurisdiction from a court of law to a court of equity. Relief in equity is not incident to damages. *Hove v. Hunt*, 36

— An agreement, by a landowner, with the promoters of a railway company, that in the event of their obtaining an act of parliament he will sell them such land as they require at a fixed rate, is binding upon him, although the company has no existence at the time of the contract; and it is no objection on the ground of want of mutuality that the company are not bound to take the land. If, however, the company exercise their compulsory powers, and take proceedings under the sections in the Lands Clauses Consolidation Act relating to the purchase of lands otherwise than by agreement, they cannot afterwards enforce the agreement. *Bedford and Cambridge Rail. Co. v. Stanley*, 60

— A bill was filed for the purpose of enforcing the specific performance of an agreement between plaintiff and defendant, whereby defendant agreed to grant to plaintiff a lease of a wharf and premises for twenty-one years, and plaintiff

agreed to employ defendant as manager at the wharf at a salary and commission, the agreement providing that the employment should be co-extensive with the tenancy. It was held, on appeal; that the contract must be considered as one entire contract, and not within the equitable jurisdiction of the Court as applied to specific performance, and that when the Court cannot do complete justice between parties it will not interfere partially, and therefore the bill was dismissed. The cases in which the Court of Chancery has decreed specific performance of part only of an agreement, are cases in which the part enforced was considered as independent of that part which could not be enforced. *Ogden v. Fossick*, 73

SPECIFIC PERFORMANCE (*continued*)—The owner of an estate, consisting of freeholds, leaseholds for years, and leaseholds for lives, agreed to demise the same in consideration of receiving a year's rent in advance. He signed notices requesting the tenants to attorn to the lessee; but he did not, in the first instance, clearly understand the boundaries, limits and rental of the several estates. The agreement was subsequently added to by a further agreement and by verbal communications, and a sum for the year's rent was paid in advance. These arrangements still left the subject and the terms and conditions indefinite, and difficulties arose in carrying the agreement into effect. Upon a bill by the lessee for specific performance, it was held, there had been no part performance which had reference to the agreement alleged; that it was too vague and uncertain to be enforced; and that the bill must be dismissed; but, under the circumstances, without costs. And on appeal, *Lord Justice Knight Bruce* was of opinion the defendant was not sufficiently acquainted with the terms of the agreement to justify a decree for specific performance against him. If a bill is filed to enforce a parol agreement, on the ground of part performance, there must be no uncertainty; the terms of the agreement must be plainly and distinctly shewn, and it must also be shewn that the part performance referred to them. Where there has been part performance of a written agreement as varied by parol, and the non-performance of the agreement as so varied would, in the eye of the Court, amount to a fraud, evidence must be received to shew what the agreement as varied really was; and the authorities establish that in cases of agreements part performed, parol evidence is admissible to add to or alter a written agreement, and that a specific performance of the agreement as varied may well be founded on such evidence. *Price v. Salusbury*, 441

— A discretionary trust for sale cannot (as may a power simply collateral) be exercised by an infant. R. devised real estate to trustees, one of whom was an infant, upon trust for sale as they should think expedient. The trustees sold to K, who, upon disputes arising, filed a bill for specific performance; and it was held, that

the contract could not be enforced. *King v. Bellord*, 646

— In a suit by a vendor against a purchaser for specific performance the Court will not, upon an interlocutory application, direct an inquiry as to title and when it was first shewn, unless the other grounds of defence are manifestly frivolous. And, *semble*, in no case would such an inquiry be directed at the instance of a defendant purchaser. *Reed v. the Don Pedro North Del Rey Gold Mining Co. (Limited)*, 773

— Decree for settlement of wife's property. See Settlement.

— See Injunction. Lands Clauses Consolidation Act. Vendor and Purchaser.

STANNARIES COURT—Winding up mining companies in Devonshire. See Winding up of Companies.

STATUTE—Effect of, on covenant in a deed. See Deed.

— Mode of enforcing new right. See Insurance against Fire.

STAY OF PROCEEDINGS—A motion to stay further proceedings in a bill to perpetuate testimony, on the ground that a suit had been instituted in another Court in which the questions in difference might be determined, was refused with costs. *Ellice v. Roupell*, 778

— See Costs.

STOCK. See Lunacy Regulation Act.

SUCCESSION DUTY. See Income Tax.

SUPPLEMENTAL SUIT. See Demurrer.

SURVIVORSHIP. See Will.

TAXATION—A solicitor delivered his bill of costs to his client, made out in double columns, one being the amount allowed on taxation, which he refused to accept when tendered. The client then paid the larger sum to obtain his papers; and upon his petition it was held, notwithstanding the payment, that he was entitled to an order to tax the bill, as he had been constrained to pay the larger sum by the refusal of the solicitor to accept what he himself had stated he was legally entitled to. *Ex parte Tosland, re Letts*, 100

— At the hearing a decree was made in favour of the plaintiff, with costs. Upon taxation of the costs as between party and party, the expense of bringing defendant's witnesses to London to be cross-examined in court, though plaintiff's counsel, in the exercise of their discretion, did not think fit to cross-examine them, and the cost of a shorthand writer for taking notes of the examination, were allowed. But the expenses and costs of attendance in court of the country solicitor, whose agent had conducted the cause, and the costs of enrolling the decree

made in the cause, were not allowed. *Clark v. Malpas*, 318

— See Costa.

TENANT FOR LIFE—impeachable for waste is entitled only to the windfalls of such trees as he had a right to cut. He is also entitled to the thinings of plantations if properly made, and to the crops of all coppices cut in due rotation. *Bateman v. Hotchkin*, 6

— and remainderman: as to first year's income. See Annuities to Executors. And see Apportionment.

TRADE-MARK—A firm consisting of three partners for many years used the letters B. B. H. (being the initials of the three partners' names) with a device as a brand for the goods manufactured by them, and on one partner dying, the use of the brand was continued by the survivors. In 1858, one of the two survivors died under circumstances which, in the opinion of the Court, entitled the executor of the survivor to have the business sold as a going concern; and it was held, the right to use the brand did not form part of the saleable assets of the business. Distinction in this respect between a trade-mark indicating the locality where goods are made, and a trade-mark indicating the firm by which they are made. If the trade-mark had been of the former kind, it would have been saleable. Per the Master of the Rolls—A surviving partner has a right to use the name, and *pari ratione* the personal trade mark, of the old firm. *Blanchard v. Hill* doubted. *Hall v. Barrows*, 548

— In 1855 J. R. and C. P. Crockett, in partnership with other persons, carried on business as manufacturers of leather cloth, both at Newark, in the United States, and at West Ham, in England, under the style of the Crockett International Leather Cloth Company. In 1857 the C. I. L. C. Company sold to a newly-formed English company, "The Leather Cloth Company (Limited)," their business in England, together with their right to use, in Great Britain, the trade-marks up to that time used by them. The L. C. Co. thereupon commenced business at West Ham, using the trade-mark previously used by the C. I. L. C. Company, which contained the words "J. R. & C. P. Crockett, Manufacturers," and also the words "Crockett International Leather Cloth Company, Newark, N.J. U.S.A., and West Ham, Essex, England." On bill filed by the L. C. Company (Limited) to restrain a colourable imitation of this trade-mark by a rival company in England, it was held, that although goods sold by plaintiffs were not, in fact, manufactured by J. R. & C. P. Crockett, and although plaintiffs had no manufactory at Newark, U.S.A., they were entitled to be protected in the use of the trade-mark. The L. C. Co. had a patent for "tanned leather cloth," and were in the habit of stamping "Tanned Leather Cloth, Patented" on all their goods, whether tanned or not; and it was held,

that as any person could see whether the cloth was tanned or not, this was not such a misrepresentation as to preclude them from relief in a Court of equity. *Hall v. Barrows* observed upon. *The Leather Cloth Co. (Limited) v. the American Leather Cloth Co. (Limited)*, 721

— J. B. while trading as a manufacturer, acquired the right to use a particular corporate trade-mark containing the letters J. B. He subsequently entered into partnership, and by the articles then executed, it was agreed that the trade-mark should be a partnership asset, and that it should be lawful for the parties thereto, at the end of the partnership, to use the mark for the remainder of their lives, either alone, or in partnership with any other persons. The firm having fallen into difficulties, all the assets and all the estate and effects joint and separate of the partners were assigned by them to trustees, who subsequently assigned to H. B. the assets of the old firm, including all the right which they could assign of using the trade-mark. Upon bill filed by H. B. to restrain J. B. from using the trade-mark, or granting the use of it to others, it was held, that J. B. was entitled to use it himself, or to allow any person in partnership with him to use it; but that an injunction must be awarded to restrain J. B. from granting the use of the trade-mark to any person not in partnership with him. Whether the trade-mark was one which could properly be assigned, *quære*; but held, that J. B. had by his acts precluded himself from setting up, by way of defence, that he had no power to assign it. *Bury v. Bedford*, 741

— See Injunction.

TRANSFER OF SHARES. See Contributory.

TRUST AND TRUSTEE—Where estates were given to trustees upon trust (after a trust for one for life with remainder for his children) to convey to a person in the event of the death of the tenant for life without issue, the Lords Justices, differing from the Master of the Rolls (on application under 13 & 14 Vict. c. 60.), appointed trustees in the place of original trustees who refused to act. *In re Sheppard's Trusts*, 23

— A valuable consideration and a knowledge of the facts connected with a trust are essential to the validity of a release which will discharge trustees from liability. A lapse of ten years from the time when the *cetui que trust* attained twenty-one, held not to bar the *cetui que trust* from obtaining relief in equity against a breach of trust. *Farrant v. Blandford*, 107

— By a trust deed, executed in May 1841, a certain chapel at Ramsgate was conveyed to trustees upon trust at all times thereafter to permit the said chapel to be used, occupied and enjoyed as a place for public religious worship by the society of Protestant dissenters of the denomination called "Particular or Calvinistic Baptists," and by such other persons as should

thereafter be united to the said society and admitted members thereof; and it was held, that the doctrine of strict communion was not an essential doctrine of every Particular Baptist Church; that it was a matter of order and practice which each church had an inherent right to vary. That a large majority of the congregation of this chapel having arrived at the conclusion that unbaptized persons might be admitted to the communion, such a practice was not a breach of the trusts of the deed. *The Attorney General v. Etheridge*, 161

TRUST AND TRUSTEE (continued)—A trustee for sale of real estate having refused either to carry out a proper sale effected by his *cestui que trust*, or to concur in the appointment of a new trustee, except upon the terms of being supplied with information respecting matters unconnected with the trust, he was, upon a bill filed, removed from the trust, and ordered to pay the costs of the suit. *Palairt v. Carew*, 508

— The jurisdiction of the Court of Chancery under the Trustee Relief Act does not extend beyond the fund actually paid into Court; and the Court cannot, upon petition under that act, order a trustee to refund monies retained by him for costs. *Re Barber's Will*, 709

— executed or executory trust. See Will.

— for raising legacies. See Legacy.

— Infant's trustee. See Specific Performance.

— Revocation of, after representation. See Will.

— Sales by trustees. See Practice.

— See Bankers. Breach of Trust. Inclosure Acts. Payment into Court. Vesting Order.

UNDUE INFLUENCE—See Power of Appointment. Voluntary Settlement.

VENDOR AND PURCHASER—The Court will not grant an application by a sub-purchaser to be substituted as the purchaser of an estate sold by public auction under an order of the Court where neither the original purchaser nor the vendor consents to the application. *Re Goodwin's Settled Estates*, 70

— Where a deposit has been paid upon a parol agreement for the purchase of land, which is either abandoned or is incapable of being carried out, the purchaser is entitled to a return of the deposit. The forfeiture of a deposit must depend upon an agreement, either expressed or implied. *Casson v. Roberts*, 105

— Where, after a decree against a purchaser for specific performance, he made default in payment of the purchase-money, the Court, upon the application of the vendor, rescinded the contract and stayed all further proceedings

in the cause, except as to any application which might be made by the vendor to assess the damages incurred by him in consequence of the breach of the contract. *Sweet v. Meredith*, 147

— By the terms of a contract for the purchase of real estate, it was stipulated that "a copy of the pedigree on which the claim of the vendor as heir-at-law to the last owner was based should be furnished to the purchaser, who should admit the right of the vendor as such heir-at-law, and should not require any further evidence of marriages, births, failure of issue, descents, intestacies, survivorships or other matters of pedigree than such as were in the possession of the vendor." The vendor furnished a pedigree which was defective; and it was held, upon the construction of the contract, that the purchaser had thereby admitted the vendor's right as heir-at-law to the last owner, and that he could not object to any defect in the vendor's pedigree purporting to shew such heirship. Decree for specific performance, with direction to settle conveyance "by all necessary parties," in case the parties should differ. *Nash v. Browne*, 148

— A purchaser of real estate upon signing the contract assigned and delivered a negotiable bond, as a deposit, to G. T., who (though never admitted) alleged himself to be a solicitor and the solicitor for the vendor. G. T. transferred the bond to the defendant, as a security for his own debt. The vendor of the real estate was a fictitious person, and the contract a fraud. The purchaser filed his bill to get back the bond from the defendant; and upon an application for an injunction, it was held, the deposit did not make G. T. a trustee for the plaintiff; and that the defendant, being a purchaser for value without notice, could not be restrained from dealing with the bond. *Ashwin v. Burton*, 196

— Where a written agreement between a vendor and a purchaser did not express the intention of either of the parties thereto, the Court, upon a bill by the purchaser against the vendor to set aside the agreement, admitted parol evidence to shew that there was a mistake in the agreement as to the subject-matter of the purchase, and accordingly set the agreement aside. *Price v. Ley*, 530

— Invalidity of sale to agent. *Dally v. Wingham*, 790

— See Lands Clauses Consolidation Act.

VESTING ORDER—A mortgagee, having a power of sale upon non-payment of the money, with a trust to hand over the residue to the mortgagor, entered into possession, and subsequently died giving his general estate to his executor, but leaving no heir-at-law. The Court made a vesting order under section 15. of 13 & 14 Vict. c. 60. *Re Keeler's Mortgage Trust*, 101

VOLUNTARY SETTLEMENT—A voluntary settlement

which conveys real estate to a trustee for the settlor for life, with remainder to her nephew absolutely, will not be set aside upon unsupported allegations of fraud, undue influence, intimidation and coercion. *Toker v. Toker*, 322

— See Felon.

WASTE—Lands were devised to J. W. P. in fee simple, with an executory devise over if he died without issue male, and testator prohibited on pain of forfeiture the cutting of timber except for necessary repairs. J. W. P. cut down timber for other purposes; and it was held, affirming a decision of one of the Vice Chancellors, that forfeiture was not the only remedy, but that the estate of J. W. P. was liable to make good for the benefit of the executory devisee the value of the timber cut, and that this additional remedy did not take away the former remedy. *Blake v. Peters*, 200

— See Tenant for Life.

WILL—Testator gave his real estate to trustees to permit his wife to receive the rents for life, with remainder for the separate use of his daughter, and after her decease for the sole use and benefit of all and every the children and issue of his daughter which she might happen to leave her surviving, to take as tenants in common, and their respective heirs and assigns for ever; and if but one such child, then upon trust for such only child, his or her heirs or assigns for ever. But if his daughter should happen to die without leaving such issue, or leaving such, all of them should die during their minority and without leaving lawful issue, then upon trust for such persons as his daughter should by deed or will appoint. And testator bequeathed his personal estate in terms nearly identical with the devise of the real estate, except that in the gift over the language was "in case there shall be no child or issue of my said daughter." The daughter survived the widow and died, having had six children, two of whom only survived her; one child was unmarried, and the other had a son born before the death of the daughter. It was held, that all the children or issue of the daughter living at her death took *per capita* as tenants in common in fee simple as to the real estate, and absolutely as to the personalty, the property being divisible equally in thirds between the two children and the grandchild. *Cancellor v. Chancellor*, 17

— Where a niece had been induced to render valuable services to her uncle on the faith of his representation that by so doing she would become entitled to the benefit of the trusts created in her favour by a codicil to his will, and testator afterwards revoked such trusts, it was held he had no right to make such revocation, and a decree was made that the trusts in favour of the niece should be performed. *Loffus v. Maw*, 49

— A woman who under the old practice had

been divorced *à mens et thoro*, on the ground of adultery, and had not since been reconciled to her husband, was held, upon his dying intestate, to be entitled, as his widow, to a share of his personal estate, under the Statute of Distributions. *Rolfe v. Perry*, 149

— A bequest to trustees of a specific fund, for purposes mentioned in the will, with a direction "that it shall be liable to, and applicable by the trustees to the payment of the debts, testamentary and other expenses and legacies," will not only exonerate the residuary estate from debts, &c., but also render the specific fund liable to the costs of a suit for the general administration of the estate. *Webb v. De Beauvoisin*, 217

— Testator directed real estate to be purchased and settled in strict settlement, and declared that his trustees should stand possessed of his personal estate upon such trusts, &c., as were thereby declared concerning the lands directed to be purchased, or as near thereto as the rules of law and equity would permit, provided that the personal estate should not vest absolutely in any tenant in tail, unless such person should attain the age of twenty-one years. It was held, first, that the trusts of the personalty were not executory; secondly, reversing the decision of the Master of the Rolls, that the proviso suspending the absolute vesting of the personalty during the minority of tenants in tail applied only to such tenants in tail as took by purchase, and was therefore, not void for remoteness, and that the effect of the trust was to vest the personal estate in the first tenant in tail (an infant), subject to its being divested in the event of his dying under twenty-one. *Gosling v. Gosling*, 233

— Construction of gift of share of residue to testator's daughter, to be vested in her on her marriage with the consent of her guardians. *West v. West*, 240

— The selection by a testator of a particular portion of his personal estate for payment thereof of debts will exonerate the residuary personal estate from its liability. *Vernon v. Earl Manserv*, 246

— Testator devised his real estates unto and equally between his daughter and granddaughter for their respective lives, with benefit of survivorship; and from and after the decease of the survivor testator gave his real estates unto and to the use of all and every the child and children of his said daughter and granddaughter "lawfully to be begotten," equally as tenants in common in tail. The granddaughter having survived her mother, and died leaving issue; it was held, that, in the absence of special circumstances, the granddaughter was entitled under the above devise to a share with her children after the determination of her life estate. *Almack v. Horn*, 304

— Testator, who had seven sons, gave certain

chattels to his wife for life, and after her decease to such of his sons as should be then living and should first attain twenty-one. He then gave three specific parts of his real estate to six of his sons, naming them, each part to two, with benefit of survivorship, and another specific part to the remaining son, with a money legacy. He then gave all his residuary real estate and personal estate to trustees, upon trust, to sell and convert at their discretion, and out of the income to pay his wife an annuity, any deficiency to be made up out of the estates given to his sons, and subject thereto and after the decease of his wife to convey and transfer the residue of his real and personal estate to his seven sons before named or such of them as should be then living, share and share alike as tenants in common, and not as joint tenants, to be vested in him or them when and as he or they should respectively attain twenty-one, or die under that age, leaving issue at his or their decease. And in case any one or more of the said children should die under twenty-one without leaving issue, then to transfer and convey the share of such child so dying to the others or other of them as tenants in common, to be paid at the time appointed for payment of the original shares. It was held, that a son who died leaving a widow and children, but who predeceased the testator's widow, took no share in the residuary estate. *Re Crosse's Will*, 844

WILL (continued)—Testator, by his will, dated since the Wills Act, gave a legacy to his daughter, a married woman, who predeceased him, leaving issue, and also her husband, her surviving. The settlement made on her marriage contained a covenant that all property coming to her or to her husband in her right *during the coverture* should be settled; and it was held, that notwithstanding the fictitious survivorship created by section 83. of the Wills Act, for the purpose of preventing a lapse, the legacy was not acquired *during the coverture* within the meaning of the covenant, and was therefore not bound by the settlement. *Pearce v. Graham*, 859

— Testator gave certain dividends to his son, and at his death, to his (testator's) surviving daughters and their lawful offspring. Testator left his son and also four daughters him surviving. The will was attested by two of the daughters, and of these two one died in the son's lifetime and the other survived the son. It was held, the period for ascertaining the survivorship was the death of the son: that the word "offspring" meant "issue," and that therefore the daughters took absolutely as joint-tenants. Also, that the gift to the attesting daughter who survived the son being, by section 15. of the Wills Act, simply void, the other daughters, as joint-tenants, took the whole, and there was no lapse. *Young v. Davie*, 372

— Testator gave real and personal estate to trustees upon trust to receive the rents of certain leasehold premises, and pay the same to his daughter E. upon her sole receipt, for her sepa-

rate use, but in case of the death of E. before the expiration of the lease then upon trust for her children. E. died before the expiration of the lease without children; and it was held she was entitled to the leasehold premises absolutely. *Watkins v. Weston*, 396

— Testator made a codicil to his will in these words: "I acknowledge T. N, my second cousin, to be my next-of-kin and heir-at-law to all my real and personal property situate in the parish of M"; and this was held a good devise to T. N. of property in the parish of M. A codicil contained the following expression: "T. N, my second cousin, is my next-of-kin and heir-at-law, as my brother J. is dead, and has left no issue." It was held that it could not be inferred from this that testator was ignorant of the state of the family of another brother, who had left issue. *Parker v. Nickson*, 397

— Testator authorized the trustees of his will, in case his nephew F. and his clerk C. should elect to carry his business on, to permit them so to do, without any payment for goodwill, upon their giving bond for payment of the value of the stock-in-trade, &c. by half-yearly instalments extending over not more than ten years. It was held, upon F. and C. electing to carry on the business, that there was a specific bequest to them of the goodwill, and that upon making provision for payment of testator's debts and the value of the stock-in-trade, &c., they were entitled to the business from the time they made their election. The business was carried on upon premises partly freehold of testator and partly leasehold, and before any lease of the former was granted to F. and C. notice was given to take the premises under the powers of an act of parliament. It was held that F. and C. were not to be regarded as having become entitled to a lease of the freehold portion of the premises, and that the whole compensation in respect of the value thereof (irrespective of value of goodwill) belonged to testator's estate. *Semble*—a bequest of the goodwill of a business carried on by testator on his own freehold entitles the legatee to such limited occupation only of the premises as may be necessary to entitle him to obtain the benefit of his bequest, but not necessarily to have a lease of the premises. *Fryer v. Ward*, 433

— Testator, by his will, directed the interest only of all the residue of his property to be divided into as many equal parts or shares as there might be children of N. T. W, share and share alike, as each of the said children should come of age; and in case any one of them should die without any children of their own, his or her share of the said interest should devolve to the surviving children, share and share alike, and so on successively until the whole amount of the said residue should come into the hands of the grandchildren and great-grandchildren of N. T. W. It was held, first, that the children took immediate vested interests in the shares, subject to the executory gift over, and that the enjoyment only was postponed till twenty-one;

secondly, that the children took life interests only, and not absolute interests in the shares; and, thirdly, that the gift to the grandchildren and great-grandchildren of N. T. W. was not void for remoteness, as in the event of a child dying leaving issue, the death of that child was the period at which the class of persons to take his share was to be ascertained. *Wetherell v. Wetherell*, 476

— A testator gave certain property, including a sum of 2,700*l.* stock, to his wife for life, and after his wife's decease as to 800*l.* part of the said stock upon trust for his daughter A. E. Y. as therein mentioned, and after the decease of A. E. Y. in trust for her children *living at the time of her decease*, equally. The testator subsequently gave 1,200*l.*, further part of the said stock, upon trust for his daughter S. A. V. in similar terms to those used with respect to the gift of the 800*l.* stock to his daughter A. E. Y. and after the decease of his said daughter S. A. V. upon trust to transfer the said 1,200*l.* stock to *all and every* the children of his said last-mentioned daughter *at the same time and in the same manner* as was thereinbefore mentioned with respect to the sum of 800*l.* for the benefit of his daughter A. E. Y. It was held, that a child of S. A. V. who predeceased her mother, took no share in the fund. *Swift v. Swift*, 479

— By marriage settlement, dated in 1838, real estate was conveyed to such uses as M. B. N. (the intended wife) should by deed or will appoint, and in default of appointment to certain uses for the benefit of the children of the marriage, with an ultimate remainder to the use of M. B. N. in fee; and it was provided that all property which during the coverture should come to or vest in the husband in right of the said M. B. N. or in the said M. B. N. by descent, devise, limitation, gift, or otherwise, should be settled to the same uses. M. B. N. by her will, made shortly after the settlement, devised and bequeathed all the residue of her property, "except such real and personal estate as might remain subject to the trusts of her marriage settlement, by reason of no specific disposition thereof having been made by her under the power therein contained." In 1854 M. B. N. purchased real estate out of the savings of her separate property, and it was conveyed to the same uses and trusts as those declared by the settlement of 1838, omitting only the uses in favour of children. It was held, the exception in the will referred only to the property subject to the trusts of the marriage settlement at the date of the will, and that the real estate subsequently purchased by M. B. N. passed under her will. *Quere*, whether section 24. of the Wills Act would apply to an exception out of a devise. *Semble*, that a covenant to settle after-acquired property would not affect property purchased by a married woman out of the savings of her separate estate. *Hughes v. Jones*, 487

— A devise of residue of real estate upon contingent or future trusts, does not carry with it the intermediate income; but such income re-

sults to testator's heir-at-law; and the 1 Vict. c. 26. has made no difference in the law in this respect. A similar rule applies to a contingent or future bequest of any particular portion of the personal estate, as chattels real. *Semle*, as to a bequest of residue of personal estate, which, though contingent or future, carries with it all the intermediate income. *Hodgson v. Bectice*, 489

— R. C. by will, directed that his residuary real and personal estate should be sold and converted; and that his trustees should hold four-sixths of the proceeds upon trust for three reputed daughters and a lawful daughter (naming them) of his brother during their respective lives, and after their respective deaths upon trust for their children respectively, as they should respectively appoint, and in default of appointment upon trust for the children of the four daughters respectively, in equal shares, with cross-executory trusts as between the children of the same parent as regards the shares of male children dying under twenty-one and female children dying under twenty-one and unmarried, with an ulterior trust in case the said four daughters should all die without leaving any child or children, or leaving such, if such children should all happen to die under twenty-one, and without having been married. One of the four legatees died without having been married, and it was held, that as to her share cross-limitations must be implied between the other three legatees and their children, corresponding with the limitations contained in the will of the original shares. Also, that no such cross-limitations could be implied as to the share of any daughter after a child of that daughter had attained a vested interest, even though the daughter might subsequently die *without leaving a child*, the proper function of the cross-limitations being not to divest any estate once vested, but merely to supply the gap left by testator. *Re Clark's Trusts*, 525

— Testator gave his residuary personal estate to trustees, upon trust to sell and convert the same into money, and thereout, in the first place, to pay all his "just debts, funeral and testamentary expenses," and after full payment and satisfaction thereof, to hold the residue upon certain trusts therein declared. It was held, reversing a decision of the Rolls, that this was a sufficient expression of "a contrary or other" intention, under Mr. Locke King's Act, to make the personal estate primarily liable for the testator's mortgage debts. *Moore v. Moore*, 605

— Testator gave real and personal estate to trustees, upon trust to receive the rents of certain leasehold premises and pay the same to his daughter E. upon her sole receipt, for her separate use, but in case of the death of E. before the expiration of the lease, then upon trust to invest and accumulate the rents and profits for the benefit of the children of E. living at her decease. E. died before the expiration of the lease, without children; and it was held, affirming a decree of the Master of the Rolls, that E.

E

was absolutely entitled to the leasehold premises.
Watkins v. Weston, 609

WILL (continued)—E. P. by her will, dated in 1708, devised to A. and B. and their heirs, certain real estate, to hold to them, their heirs and assigns, to the use of S. L. (her grandson) for life; with remainder to the use of the trustees to preserve contingent remainders, with remainder to the use of the children of S. L. but if he should die without leaving such issue to the use of C. D. L. (another grandson) for life, with remainder to the use of the trustees to preserve contingent remainders, with remainder to the use of the children of C. D. L. but if he should die without leaving such issue to the use of her granddaughters, their heirs and assigns for ever, as tenants in common and not as joint tenants. Testatrix died in 1791, leaving her two grandsons, bachelors, surviving. Subsequently they married, and died, both leaving children. It was held, the children of S. L. took estates for life only; that no interests were effectually given to C. D. L. or his children or to the granddaughters of testatrix; and that, subject to the life estates to S. L. and his children, the inheritance devolved as under an intestacy to the heir-at-law of testatrix. The circumstance that the whole fee simple is (under a will made before 1838) devised to trustees, cannot be relied upon as a ground for enlarging a subsequent gift under the will to *cestuis que trust*, in a case where the will contains no ulterior though contingent gift to other *cestuis que trust* of the whole beneficial fee.
In re Pollard's Trusts, 657

— Except in those cases where a general conversion of real and personal estate is directed so as to form a mixed fund, the whole costs of construing the will of a testator, as well in reference to the devises of real estate as to the bequests of personalty therein contained, are primarily payable out of the personal estate in exoneration of the real. After a will had been executed and sufficiently attested by two witnesses, a devisee under the will at the request of the testator's wife, the testator intimating that it was unnecessary to do so, but not objecting otherwise, added her name as an attesting witness:—Held, that the act of attestation could not be disregarded as useless and ineffectual, and that by the express enactment of the Wills Act (section 15.) the devisee was excluded from taking any interest under the will. *Randfield v. Randfield*, 668

— Testator devised certain real estates to his four granddaughters, by name, for their respective lives, in equal shares, with remainder to trustees to preserve contingent remainders, "with remainder in equal shares to the use of the children of my said four granddaughters, and the heirs of their bodies, such children of my said granddaughters taking their mother's share as tenants in common in tail, remainder to the survivors of such children, and in default of issue by my said granddaughters," then over. There was a devise of residuary real estate in

similar terms, except that the remainder next following that to the children of the granddaughters as tenants in common in tail was thus expressed: "To the survivors or survivor of such children and the issue of their, his or her body in tail." It was held (reversing the decision of the Lords Justices, and affirming the decision of the Master of the Rolls), that under the words "in default of issue by my said granddaughters," the four granddaughters, and not their children, took by implication, subject to the prior limitations, estates tail in both classes of property, with cross-remainders between them in tail. *Atkinson v. Holtby* (House of Lords), 735

— "Already made" under 17 & 18 Vict. c. 113.
See Mortgage.

— Bequest of personal estate subject to payment of testator's debts. See Mortgage.

— Gift to testator's widow "for her sole use and benefit." See Parties.

— See Annuity. Election. Mortgage. Power of Appointment.

WINDING UP OF COMPANIES—Section 32. of 18 & 19 Vict. c. 32, extending the jurisdiction of the Stannaries Court over the county of Devon, does not oust the jurisdiction of the Court of Chancery over mines in that county; and therefore it is no objection to a petition for winding up a joint-stock mining company in that county that the petitioners are not owners of one-tenth in value of the shares, as required by 12 & 13 Vict. c. 108, s. 1. in the case of mining companies formed on the cost-book principle within the jurisdiction of the Court of Stannaries. Leave to present such a petition was held to have been properly granted under 20 & 21 Vict. c. 78, s. 12, on the ground that the Stannaries Court had no jurisdiction to restrain proceedings at law against individual shareholders. *Re the South Lady Bertha Copper Mining Co.*, 92

— A company of unlimited liability registered under 7 & 8 Vict. c. 110, after carrying on business was registered as a limited company under 19 & 20 Vict. c. 47, and was afterwards ordered to be wound up. The Court, affirming an order of one of the Commissioners of Bankruptcy, decided that the order must be carried out under the jurisdiction in Bankruptcy, both as to matters before as well as after registration, under the act of 1856. A call can be made by the Court of Bankruptcy upon the shareholders at the time of re-registration to discharge debts of the company then due, whenever they accrued. *Ex parte Stevenson, in re the Liverpool Tradesman's Loan Co.*, 96

— A company was, in 1852, registered as one of unlimited liability, under 7 & 8 Vict. c. 110. After the passing of 19 & 20 Vict. c. 47, it was re-registered as one of limited liability. In 1858 one of the Vice Chancellors made an order for

winding up the company, and appointed Mr. R. P. H. official manager, who proceeded in the winding up. On appeal to the Lords Justices, their Lordships discharged the order for winding up, and subsequently one of the Commissioners in Bankruptcy made an order for winding up, and appointed an official liquidator. R. P. H. paid over all the assets in his hands to such official liquidator, and presented a petition to the Commissioner, for payment of his costs and expenses as official manager out of the estate of the company, but the petition was dismissed on the ground that there was no jurisdiction to make the order; and, on appeal, the order of the Commissioner was affirmed, but without costs. *Ex parte Harding, in re the Plumstead, Woolwich and Charlton Water Co.*, 145

— A company originally constituted under 7 & 8 Vict. c. 110. neglected to register, as directed by 25 & 26 Vict. c. 89. s. 210. On a petition for winding up being presented by the company and the chairman jointly, it was held the company was precluded from petitioning by reason of its not having registered, and that it could not be permitted to evade the provisions of 25 & 26 Vict. c. 89. s. 210. by joining a shareholder as a co-petitioner, and that no order could therefore be made upon the petition. *In re the Waterloo Life, Education, Casualty, and Self-Relief Assur. Co.*, 370

— After an order has been made for winding up, a judgment creditor will be restrained by injunction from proceeding to execution under a *fi. fa.* against the company. *In re the Waterloo Life, Education, Casualty, and Self-Relief Assur. Co.*, 371

— A winding-up order having been made in 1849 under the Winding-up Act, 1848, in 1862 an order for a call was made in the usual

manner, and a circular notice of such order was sent by post, prepaid, to one of the contributories, and the circular notice so sent was not returned. At the expiration of three weeks a balance or four-day order was made, and as it was found impossible to effect personal service, an order for substituted service was obtained, which immediately reached the party, and he took out a summons to discharge the balance order and the order for substituted service. It was held, both orders were regular, and the summons was dismissed, with costs. *Re the Warwick and Worcester Rail. Co., ex parte De Beauvoir*, 453

— Notice was given by advertisement that it was intended voluntarily to wind up a company which had adopted the regulations contained in 19 & 20 Vict. c. 47, Table B, by a meeting to be held on a day and at an hour named. The meeting took place. It was resolved to have a voluntary winding-up, and an official liquidator was appointed, who sold property of the company by auction. On motion by the official liquidator to restrain a creditor from attaching the proceeds in the auctioneer's hands, it was held, the advertisement not having stated that an official liquidator was to be appointed, his appointment was invalid, and the motion must be refused, with costs. *In re the Stearic Acid Co.*, 784

— See Contributory.

WITNESS—Examination of. See Discovery.

WORDS—"Actual enjoyment and possession," 361

— "Children and issue," 17

— "In default of issue," 735

— "Lawfully to be begotten," 304

— "Offspring," 372

— "Settled," 137

BANKRUPTCY.

ACT OF BANKRUPTCY—A trader, by deed, after reciting that he was unable to pay his debts, conveyed certain real estate to a trustee, upon trust to pay all costs, charges and expenses, "already or hereafter" to become due to his solicitor, and the professional charges of an accountant, and apply the residue in payment of the debts of such of the creditors of the bankrupt as should execute the deed, rateably. The deed was not registered under section 194. of 24 & 25 Vict. c. 134; and it was held, that the deed could be received in evidence against the bankrupt, and (supporting a decision of one of the Commissioners) that it was under the circumstances of the case an act of bankruptcy. *Ex parte Wensley, in re Wensley*, 23

— A trader absented himself for three or four days from his place of business, and in his absence a bill of exchange was presented for payment and dishonoured; and application was also made for payment of other bills. The trader was adjudicated bankrupt, the act of bankruptcy being this absence "with intent to delay his creditors." One of the Commissioners in the country annulled the bankruptcy, the alleged bankrupt swearing that his absence was occasioned by an attempt of his to get up evidence of perjury against one of his workmen and to obtain pecuniary assistance. Pending this dispute as to the adjudication, the trader signed a declaration of insolvency. On appeal, the decision of the Commissioner was

affirmed, on the ground that there was not sufficient evidence to support the adjudication; but the Lord Chancellor, under the circumstances, refused to allow the trader his costs, as his "declaration of insolvency" while applying to annul an adjudication was inconsistent with an honest desire for the equal distribution of his assets. *Ex parte Barney, in re Horton*, 41

ADJUDICATION—Consolidation of Adjudications. See Consolidation.

— notwithstanding registration of deed of composition. See Trust and Composition Deeds.

— See Act of Bankruptcy. Annuling Adjudication.

ANNULING ADJUDICATION—A trader, resident in Scotland, was adjudged bankrupt on the petition of a creditor resident in the same country. The trader brought an action against the petitioning creditor, but the latter refused to appear to it. The Lords Justices ordered that if he did not appear to the action within ten days the adjudication should be annulled; and he having failed so to appear, the adjudication was annulled. The Court has jurisdiction to order a respondent in bankruptcy to pay the costs of a co-respondent. The official assignee, on the above bankruptcy being annulled, was allowed his expenses of the custody and sale of the bankrupt's estate out of the assets received by him, and the petitioning creditor was ordered to pay the amount of such expenses to the bankrupt as well as his costs and the costs of the official assignee. *Ex parte Woolheim, in re Woolheim*, 26

APPEAL—The date of an order is the day when it was made, and the time for appealing under the 12 & 13 Vict. c. 106. s. 12. runs from that day, and not from the day when the order was drawn up. *Ex parte Heslop* not followed. *Ex parte the Dudley and West Bromwich Banking Co., in re Hopkins*, 68

— New evidence on; and time for. See Practice.

APPEAL TO HOUSE OF LORDS—An order having been made in July 1861, granting a bankrupt his discharge, with a condition as to his after-acquired property, the Lords Justices refused an application by the bankrupt for leave to appeal to the House of Lords, and determined to rehear the case themselves, directing that a new deposit of 20*l.* should be made. After the case had been so re-heard, an order was made, varying the former order by suspending it for a certain time, giving the bankrupt protection in the mean time, and an unconditional discharge at its termination. *Ex parte Drinkwater, in re Drinkwater*, 20

ARRANGEMENT—with Creditors. See Act of Bankruptcy. Trust and Composition Deeds.

ASSIGNEES—A party bought land of a trader, and

afterwards the trader was adjudicated bankrupt. A person holding the purchase-deed for the purchaser, after the adjudication, was summoned, under section 120, of 12 & 13 Vict. c. 106, before a county court Judge, to produce the deed, who ordered it to be impounded, and the property to be delivered up to the assignees to be sold for the benefit of the creditors. On appeal, the Lord Chancellor discharged the order, and ordered that the assignees should pay the costs. *Ex parte Cole, in re Attwater*, 11

— What property passes to. See Order and Disposition.

BARON AND FEME—Mortgage of wife's estate. See Proof of Debts.

COMPANY—Winding up. See Contributory.

CONSOLIDATION OF PROCEEDINGS—Where one trader had been solely, and afterwards he and his partner had been jointly, adjudicated bankrupt, the Lord Chancellor (discharging an order made by the Registrar) gave leave to apply to the senior Commissioner as to the consolidation of the proceedings. *Ex parte Churchill, in re Griffiths, and in re Thorneycroft*, 48

CONTRIBUTORY—A person's name having been improperly placed on the register of shareholders in a public company was, on the winding up of the company, placed by the Commissioner on the list of contributories. On appeal, held, that the name being on the register, the Commissioner could not do otherwise than place it on the list of contributories. The proper course in a case like the foregoing is to apply, under the special statutory jurisdiction (see 19 & 20 Vict. c. 47. s. 25, 25 & 26 Vict. c. 89. s. 35), to remove the name from the register of shareholders. In such a case, a single notice of motion may be given intitled both in Chancery and in Bankruptcy, seeking to remove the name as well from the register of shareholders as from the list of contributories. *Ex parte Fox, in re the Moseley Green Coal and Coke Co. (Limited)*, 57

COSTS—An official assignee, who has no other duty than to consent, will not be allowed his costs out of the estate. *Ex parte Churchill, in re Griffiths, and in re Thorneycroft*, 48

— See Annuling Adjudication. Assignees.

DISCHARGE OF BANKRUPT—*Semble*—A speculation is not "rash and hazardous" within the meaning of the 159th section of the Bankrupt Act, 1861, unless it is not only dangerous, but such as no reasonable man would enter into. *Ex parte Downman, in re Downman*, 49

— The words "order of discharge" in the Bankruptcy Act, 1861, denote two different things: first, the order made by the Court on the application of the bankrupt, and which is made and pronounced by the Commissioner, subject to appeal, and is recorded in the pro-

ceedings; and, secondly, that further document or certificate which is formally drawn up and handed over to the bankrupt after the time allowed for appealing has elapsed. The order of discharge referred to by the 1st rule of the 159th section is the first of these, and the date from which it takes effect is the time when it is pronounced by the Court. Consequently, where, after the making of the order of discharge by the Commissioner, but before the expiration of the time required by the 170th section to elapse before the order of discharge should be drawn up, property devolved upon the bankrupt, it was held that he, and not the assignees, was entitled to it. *Ex parte Bell, in re Laforest*, 50

— See Appeal to House of Lords.

EVIDENCE—Introduction of new evidence on appeal. See Practice.

INTEREST. See Proof of Debts.

JURISDICTION—of Commissioner to order release from arrest. See Trust and Composition Deeds.

— to direct a prosecution at the assizes. See Offences and Misdemeanors.

— See Practice. Trust and Composition Deeds. Winding up of Companies.

LIEN. See Order and Disposition.

MORTGAGE—Dismissal of Bill to redeem no foreclosure. See Proof of Debts.

OFFENCES AND MISDEMEANORS—A bankrupt had been guilty of acts which amounted to a misdemeanor within section 221. of stat. 24 & 25 Vict. c. 134; and one of the Commissioners under section 159. granted him an order of discharge with a suspension of twelve months. On appeal, the Lords Justices considered that the Commissioner had jurisdiction to direct a prosecution before a Court of Criminal Justice, and that it was not incumbent on him, with or without a jury, to try the case himself; and they discharged the order, and directed a prosecution by the assignees at the next assizes. Subsequently friends of the bankrupt subscribed money in order to provide a dividend, if the order made by the Court should be discharged. Their Lordships discharged their order, and permitted the money to be accepted by the assignees. *Ex parte Dobson, in re Wilson*, 1

— Reasonable evidence of the guilt of parties is necessary before a prosecution by indictment, under section 221. of 24 & 25 Vict. c. 134, can be directed. It cannot be directed on a case of mere suspicion. *Ex parte Strickland, in re Still*, 12

OFFICIAL ASSIGNEE. See Costs.

ORDER AND DISPOSITION—In December 1861 the bankrupt contracted with W. to build a barge for him, to be paid for in bricks; the barge to be

completed on the 5th of June 1862. The bankrupt hired a yard for a certain number of months, for the purpose of performing the contract, which period expired before the completion of the work. In June it was agreed by the bankrupt in writing that the barge should be held as a security by W. for advances made by him; and in July the bankruptcy took place. The advances made by W. having exceeded the amount of work done and materials supplied by the bankrupt, it was held (reversing the decision of the County Court Judge sitting in Bankruptcy), that W. had a lien upon and was entitled to the custody of the barge, unless the assignees chose to complete the contract. *Ex parte Watts, in re Attwater*, 35

PARTNERSHIP. See Proof of Debts.

PRACTICE—The 32nd Order must be construed with reference to evidence on the matters in issue, and does not preclude the introduction of fresh evidence for the purpose of informing the Court of Appeal of what has taken place in the Court below. *Ex parte Page, in re Neal*, 14

— The Court of Appeal has jurisdiction to allow fresh evidence in addition to that before the Court below; and when produced, the Court of Appeal will entertain the question, and not send it back. The time for appeal against an adjudication does not expire until two calendar months after the advertisement of the bankruptcy, under section 233. of the Bankrupt Law Consolidation Act, 1849, varied by section 24. of 17 & 18 Vict. c. 119, notwithstanding that the former uses the word "commenced" proceedings. *Ex parte Miller, in re Miller*, 45

— Leave to appeal; and Rehearing. See Appeal to House of Lords.

— Time for appealing. See Appeal.

PROOF OF DEBTS—Under the usual order made upon the petition of an equitable mortgagee, directing the securities to be realized and applied in payment of principal, interest and costs, and giving the equitable mortgagee leave to prove for the deficiency, the calculation of interest must be made to the date of the bankruptcy only, and the mortgagee cannot claim to retain, in the first instance, out of the proceeds of the securities, interest accrued subsequent to the bankruptcy. *Ex parte Lubbock, in re Flood*, 58

— At the hearing of a suit instituted by the wife of a bankrupt for redemption of a mortgage executed by the husband and wife of the wife's real estate, the assignees of the bankrupt, who were co-defendants with the mortgagee, disclaimed their right to redeem, and a decree was made giving the first equity of redemption to the wife. After this decree, the Commissioner in Bankruptcy allowed the mortgagee to prove against the estate of the bankrupt for the full amount of his principal and interest. Upon appeal to the Lord Chancellor, it was held, that the disclaimer of the assignees operated only in

acceleration of the wife's right to redeem; but if she did not exercise the right, then, the purpose for which the disclaimer was given having ceased to exist, the assignee's equity of redemption would continue as before. Consequently, the mortgagee could only be admitted to prove, subject to the condition that in the event of the bill being dismissed as against him, the interest of the bankrupt in the mortgaged premises should be sold, and proof admitted for the residue of the mortgage debt, after deducting the proceeds; or, in the event of redemption by the wife, the proof should be admitted subject to the same being expunged, or remaining wholly or partially for the benefit of the person paying the mortgage debt. Explanation of the rule, that a dismissal of a bill for redemption operates as a decree for foreclosure. *Ex parte Paine, in re Gleaves*, 65

PROOF OF DEBTS (*continued*)—In 1856 an agreement was entered into between J. H. and R. F. D. under which the former was to carry on business during twenty-one years for the benefit of himself and of any person whom the latter might name within eight years. R. F. D. was to make advances, and to become surety to a bank for J. H.'s drafts, and the profits were to be applied, first, in payment of a salary and allowances to J. H., then in repayment of the advances made by R. F. D. with interest, and subject thereto were to belong as to one-third to J. H., and as to two-thirds to the nominee of R. F. D. R. F. D. died in 1861 without exercising his right of nomination, and in 1863 J. H. became bankrupt. On application by the executors of R. F. D. to prove under the bankruptcy for the amount due to his estate under the arrangement, it was held, the agreement did not constitute a partnership between J. H. and R. F. D., and that the executors of the latter were entitled to prove. *Ex parte Davis, in re Harris*, 68

PROPERTY OF BANKRUPT—After-acquired property. See Discharge of Bankrupt.

PROTECTION—from arrest. See Trust and Composition Deeds.

REGISTRAR SITTING FOR COMMISSIONER—An order made by a registrar sitting for the Commissioner under the 27th section of the Bankrupt Law Consolidation Act, 1849, must shew, on the face of it, the nature of the circumstances under which the registrar was authorized so to sit. *Ex parte Morgan, in re Pennell*, 61

SECURED CREDITOR—Interest subsequent to the bankruptcy. See Proof of Debts.

TRADING—Rash and hazardous. See Discharge of Bankrupt.

TRUST AND COMPOSITION DEEDS—Disputes having arisen among trustees of a deed between debtors and their creditors, two of them petitioned that the remaining trustee might be removed and the trust fund vested in them. The

Court of Bankruptcy made an order directing the fund in hand to be paid over to the Accountant in Bankruptcy; but on appeal, the Lord Chancellor decided that the Court had no power to make such order. *Ex parte Ruck, in re Wickenden*, 9

— In order that a trust deed for the benefit of creditors may be a protection against proceedings in bankruptcy, all the conditions of the 192nd section of the Bankruptcy Act, 1861, must be complied with, and it must be registered and advertised under that and the 193rd section, and a deed registered under the 194th section does not confer the same protection. A deed not registered under the 192nd section is not binding upon creditors who are not parties to it. The 192nd section is applicable only to deeds which contain provisions for the benefit of all the creditors; therefore a trust deed for the benefit of those creditors only who shall execute the same within twenty-eight days is not within that section, and cannot be registered except under section 194, and dissenting creditors are entitled to treat such a deed as an act of bankruptcy. It is not, however, required by the 192nd section, that a deed for the benefit of creditors should comprise the whole of a debtor's property.—*Tetley v. Taylor* disapproved of. By the 197th section, creditors under a trust deed are in the same position as creditors under a bankruptcy; and, therefore, if they hold security, they cannot prove without allowing for the value thereof. *Ex parte Morgan, in re Woodhouse*, 15

— On appeal, the Lords Justices held, that the certificate of registration of a composition deed by a trader is not conclusive evidence that all the conditions of section 192. of the Bankruptcy Act, 1861, have been complied with; and on a question arising whether the necessary assents of creditors had been actually given, these assents were ordered to be produced; and as it then appeared that they were in part conditional and not absolute, and that on the condition not being fulfilled the necessary proportion of creditors would not have assented, their Lordships held the deed was not a valid ground for annulling an adjudication subsequent to the date of the deed; and the bankrupt seeking to annul the adjudication might adduce further evidence; and (*per Lord Justice Turner*) the 192nd section extends to deeds of composition, although they neither contain, nor are accompanied by, any *cessio bonorum*; but the words "between a debtor and his creditors" in that section refer to all creditors, and not some of them only. *Ex parte Rawlings, in re Rawlings*, 27

— A deed executed between the debtor of the one part, and the several other persons whose names and seals were subscribed and set, being severally creditors of the debtor, of the other part, whereby a composition was paid in cash to the creditors upon their executing the deed, was declared by one of the Commissioners to be within section 192. of 24 & 25 Vict. c. 134; and was also declared, upon being duly registered

and the certificate of registration obtained, to be within section 198. After certificate of registration, the amount of composition was tendered to the only dissenting creditors and to their solicitors, and refused; and those creditors (knowing of the deed and of its registration) having arrested the debtor upon a judgment before obtained, the same Commissioner ordered his discharge. Upon appeal, the Lords Justices decided that the Commissioner had jurisdiction to order his release; but that the word "creditors," in the 192nd section, comprised the secured as well as the unsecured; and it appearing that the necessary proportion had not assented to the arrangements, and that the deed would enure to the benefit of those creditors only who executed it, the true interpretation of the act being that it should be for the benefit of all the creditors, the order of release was discharged. *Ex parte Godden, in re Shettle*, 37

TRUST DEED—The 197th section of 24 & 25 Vict. c. 134. gives to the trustees and creditors under a trust deed, duly registered, the same powers, rights and privileges as are possessed by assignees and creditors under a fiat; therefore, on the authority of *Cooper v. Harding*, such a trustee is entitled as a matter of course to summon as a witness any person whom he suspects to have property of the bankrupt in his possession, or supposes to be indebted to the bankrupt. *Ex parte Alexander, in re Thin*, 55

— The Court of Bankruptcy has jurisdiction to summon a trustee under a deed of assignment for benefit of creditors to be examined touching his dealings with the trust estate; and the Court of Appeal will not inquire into the sufficiency of the grounds upon which such a summons has been issued. *Ex parte Lawrence, in re Beale's Assignment*, 61

— A power in a deed of assignment for the benefit of creditors enabling the trustees to make such arrangements with the creditors whose debts are under 10*l.* as they may deem expedient, is inconsistent with the provisions in the Bankruptcy Act, 1861; but where the deed shewed a clear intention that the estate should be administered as in Bankruptcy, it was held, that the particular power might be rejected as repugnant to the general tenor of the deed, and that its existence formed no objection to the validity of the deed nor to the capacity of registering it

under the statute. *Ex parte Spyer, in re Josephs*, 62

— See Act of Bankruptcy.

WINDING UP OF COMPANIES—A company of unlimited liability, registered under 7 & 8 Vict. c. 110, after carrying on business was registered as a limited company under 19 & 20 Vict. c. 47, and was afterwards ordered to be wound up. The Court, affirming an order of one of the Commissioners of Bankruptcy, decided that the same must be done under the jurisdiction in Bankruptcy, both as to matters before as well as after registration, under the act of 1856. A call may be made by the Court of Bankruptcy upon the shareholders at the time of re-registration to discharge debts of the company then due, whenever they accrued. *Ex parte Stevenson, in re the Liverpool Tradesman's Loan Co. (Lim.)* 44; *Chanc.* 96

— Shares in a projected company, with limited liability, were allotted in payment of the purchase-money of property on which the intended company was about to carry on its business, and were accepted and treated by the vendor of such property as paid-up shares, and he afterwards transferred to each of the directors of the company 100 of them. One of the Commissioners of Bankruptcy in winding up the company placed the names of each of these directors on the list of contributories, and made a call upon them. On appeal, it was held, that as the shares had been allotted to a stranger as paid-up shares, they must be so considered, and the directors' names be removed from the list in respect of them. The directors of the company made an order awarding fees to those of their body who should attend their board-meetings, and afterwards allotted shares to those members who attended, according to the number of their attendances, which shares they deemed to be fully paid-up shares; and, on appeal, it was held, that the Court had no power to alter the agreement which had been come to, and that the shares having been issued as paid-up shares must be so treated. *Ex parte Currie, in re Great Northern and Midland Coal Co. (Lim.)* 48; *Chanc.* 57

— See Contributory.

WITNESS—Examination of. Right of trustee to summon. See Trust Deed.

TABLE OF THE CASES

IN

CHANCERY AND BANKRUPTCY.

VOL. XLI.—XXXII. NEW SERIES.

CASES IN CHANCERY.

- | | |
|--|--|
| <p> <i>Absolum v. Gething</i>, 786
 <i>Acland v. Gravener</i>, 474
 <i>Adams v. Swarder</i>, 567
 <i>Almack v. Horn</i>, 304
 <i>Alt v. Alt</i>, 52
 <i>Anchor Assurance Company's case</i>, 206
 <i>Arnold v. Thomson</i>, 40
 <i>Ashwin v. Burton</i>, 196
 <i>Atkinson v. Holtby</i> (House of Lords), 735
 <i>Attorney General v. Etheridge</i>, 161, 706
 — <i>v. Tewkesbury Rail. Co.</i>, 482

 <i>Baker v. Metropolitan Rail. Co.</i>, 7
 <i>Banks v. Braithwaite</i>, 35, 198
 <i>Barber's Will</i>, re, 709
 <i>Barnes v. Robinson</i>, 143
 <i>Baroness Braye, Settled Estates of</i>, in re, 432
 <i>Bateman v. Hotchkin</i>, 6
 <i>Baylis v. Watkins</i>, 106
 <i>Bedford and Cambridge Rail. Co. v. Stanley</i>, 60
 <i>Bernard v. Davies</i>, 41
 <i>Bidwell's Settlement</i>, in re, 71
 <i>Birtle's Estates</i>, in re, 439
 <i>Blachford v. Woolley</i>, 534
 <i>Blackmore</i>, in re, 436
 <i>Blake v. Peters</i>, 200
 <i>Bolding v. Lane</i>, 219
 <i>Bonfield v. Hassell</i>, 475
 <i>Bower v. Turner</i>, 540
 <i>Brandon v. Brandon</i>, 20
 <i>British Provident Life Assurance</i>, in re, 633
 <i>British Provident Life and Fire Assur. Soc.</i>, in re, 326
 <i>Bromley v. Williams</i>, 716
 <i>Brown's Trust Estate</i>, 275
 <i>Buckland v. Gibbins</i>, 391
 <i>Bull v. Withey</i>, 633
 <i>Bury v. Belford</i>, 741
 <i>Byron's Estates</i>, in re, 584

 <i>Caddick v. Cook</i>, 769
 <i>Cancellor v. Cancellor</i>, 17
 <i>Cardiff Preserved Coal and Coke Co. (Lim.)</i>, in re, 154 </p> | <p> <i>Casson v. Roberts</i>, 105
 <i>Catholic Printing and Publishing Co. v. Wyman</i>, 53
 <i>Charlton v. Coombes</i>, 284
 <i>Clark's Trusts</i>, in re, 525
 — <i>v. Leach</i>, 290
 — <i>v. Malpas</i>, 313
 <i>Colyer v. Colyer</i>, 101
 <i>Cookney v. Anderson</i>, 305, 427
 <i>Cotching v. Basset</i>, 286
 <i>Cotterell</i>, ex parte, 66
 <i>Cox v. Wright</i>, 770
 <i>Croft</i>, in re, 481
 <i>Crosse's Will</i>, in re, 344
 <i>Crosskill v. Bower</i>, 540
 <i>Crossley v. Dixon</i> (House of Lords), 617
 <i>Currie</i>, ex parte, 57, 421

 <i>Dally v. Wonham</i>, 790
 <i>Davidson v. Wood</i>, 400
 <i>Davies v. Huguenin</i>, 417
 <i>De Beauvoir</i>, ex parte, 453
 <i>Dickinson v. Teasdale</i>, 37
 <i>Downes v. Jennings</i>, 643
 <i>Dundas v. Murray</i>, 151
 <i>Dunn v. Snowden</i>, 104
 <i>Durham v. Crackles</i>, 111

 <i>Edwards v. Harvey</i>, 482
 — <i>v. Williams</i>, 763
 <i>Ellice v. Roupell</i>, 563, 624, 779
 <i>Elliott v. North-Eastern Rail. Co. (House of Lords)</i>, 402
 <i>Ellison v. Thomas</i>, 2, 32
 <i>Elsev v. Adams</i>, 616
 <i>Eno v. Tatam</i>, 159, 311
 <i>Era Assurance Society's case</i>, 206
 — <i>Williams's case</i>, 206
 <i>Ernest v. Weiss</i>, 113

 <i>Farrant v. Blanchford</i>, 107, 237
 <i>Fisher v. Brierley</i> (House of Lords), 281
 <i>Floyer v. Bankes</i>, 610
 <i>Ford v. Tennant</i>, 465 </p> |
|--|--|

Frith v. Forbes, 10
 Fryer v. Ward, 433
 Fuller v. Taylor, 376

Gadbury, re, 780
 Gibson v. Hammersmith Rail. Co., 337
 Gilbert v. Lewis, 347
 Gladstone v. Musurus Bey, 155
 — v. the Ottoman Bank, 228
 Gleaves v. Paine, 182
 Glover v. Daubney, 547
 Goodwin's Settled Estates, re, 70
 Goeling v. Goeling, 233
 Gossip v. Wright, 648
 Grady's case, 326
 Graham v. Wickham, 639
 Great Northern and Midland Coal Co., in re, 57,
 421
 Great Western Rail. Co. v. Metrop. Rail. Co., 382
 Gurney v. Gurney, 456

Hall v. Barrows, 548
 Hanslip v. Kitton, 662
 Harding, ex parte, 145
 Harms v. Parsons, 247
 Hibon v. Hibon, 374
 Hill, ex parte, 154
 — v. King, 79
 Hills v. Liverpool United Gaslight Co., 28
 Hodgson v. Bective, 489
 Hogg v. Jones, 361
 Hook v. Hook, 14
 Hooper, in re, 55, 106
 Hotten v. Arthur, 771
 Howard v. Chaffer, 686
 — v. Robinson, 686
 Howe v. Hunt, 36
 Howells v. Jenkins, 788
 Hughes v. Jones, 487
 — v. Young, 137

Ingilby v. Shafto, 807
 Ingle v. Partridge, 813
 Ives, in re, 673

Jacomb v. Knight, 601
 Joint-Stock Companies Winding-up Act, 1848, 206
 Jones v. Southall, 130

Keeler's Mortgage Trust, re, 101
 Kell v. Nokes, 785
 King v. Bellord, 646
 Knight v. Cory, 127

Laver v. Fielder (2 cases), 365
 Lechmere v. Brotheridge, 577
 — v. Clamp, 276
 Lacon v. Liffen, 25, 315
 Leather Cloth Co. v. American Leather Cloth Co.,
 721
 Letts, in re, 100
 Liverpool Tradesman's Loan Co., in re, 96
 Lodge v. Prichard, 775
 Loffus v. Maw, 49
 London and North-Western Rail. Co.'s Act, 1846,
 and the Rugby and Stamford Rail. Act, 1846, in
 re, 432

NEW SERIES, 32.—INDEX, *Chanc. & Bankr.*

London and South-Western Rail. Co., in re, 102
 London Assurance v. London and Westminster
 Corporation (Lim.), 664

Madden v. Ikin, 3
 Martin v. Whitmore, 497
 Maryport and Carlisle Rail. Co.'s Act, 1855, in
 re, 811
 Mason v. Stokes Bay Pier and Rail. Co., 110
 Massey v. Massey, 13
 Maunsell v. Midland Great Western (of Ireland)
 Rail. Co., 513
 Maxwell's Trusts, in re, 333
 M'Intosh v. Great Western Rail. Co., 412
 M'Veagh, re, 521
 — v. Croall, 521
 Meredith's and Conners's claim, ex parte, 300
 Meymott v. Meymott, 218
 Millett v. Davey, 122
 Molesworth v. Sneed, 709
 Moore v. Moore, 605
 Moorhouse v. Lord (House of Lords), 295
 Moss v. Syers, 711, 713
 Mosse v. Salt, 756

Nash v. Browne, 148
 National Assur. and Investment Assoc., in re, 66
 Nickisson v. Cockill, 753
 Noel v. Noel, 676
 North-Eastern Rail. Co. v. Crosland, 353

O'Brien v. Lewis, 569, 665
 Ogden v. Fossick, 73
 Orpen, in re, 633

Paget v. Huish, 468
 Palaret v. Carew, 508
 Parker v. Nickson, 397
 — v. Whyte, 520
 Patch v. Shore, 185
 Pearce v. Graham, 359
 Peto v. Brighton, Uckfield and Tunbridge Wells
 Rail. Co., 677
 Phillips, ex parte, 102
 — v. Gutteridge, 1
 Pince v. Beattie, 734
 Plumstead, Woolwich and Charlton Water Co., re,
 145

Pollard's Trusts, in re, 657
 Pratt v. Bull, 21, 144
 Price v. Ley, 530
 — v. Salusbury, 441
 Prideaux v. Lonsdale, 317
 Proud v. Proud, 125
 Pryor v. Pryor, 731

Randfield v. Randfield, 668
 Reed v. the Don Pedro North Del Rey Gold
 Mining Co., 773
 Reeve v. Whitmore, 497
 Reveley's Settled Estates, re, 812
 Rolfe v. Perry, 149, 471
 Rowley, in re, 158
 Rucker v. Scholefield, 46

St. Sepulchre's, Churchwardens of, ex parte, 463
 Sarazin v. Hamel, 378, 380
 Saunder's Estate, in re, 224
 — v. Warton, 224

F

- Saxon Life Assurance Society, 206
 Scammell v. Light, 58
 Scholefield v. Redfern, 627
 Sheppard's Trusts, in re, 23
 Shrewsbury v. North Staffordshire Rail. Co., 674
 Simpson v. Fogo, 249
 — v. Scottish Union Fire and Life Insurance Co., 329
 Sisson v. Giles, 606
 Smyth and Arnold's Estate, in re, 779
 South-Eastern Rail. Co. and the Lands Clauses Consolidation Act, in re, 20
 South Lady Bertha Copper Mining Co., re, 92
 State Fire Insurance Co., in re, 185, 300
 Stearic Acid Co., in re, 784
 Sterne v. Beck, 682
 Stevenson, ex parte, 96
 Suffolk v. Lewis, 232
 Sutton, in re, 437
 — v. Rees, 437
 Swainston v. Clay, 388, 508
 Sweet v. Meredith, 147
 Swift v. Swift, 479

 Thomas v. Jones, 139
 Thornton v. M'Kewan, 69
 Tilleard, in re, 765
 Tinsley v. Lacy, 535
 Toker v. Toker, 322
 Topham v. Portland, 81, 257, 606
 Tosland, ex parte, 100
 Tottenham v. Green, 201
 Towsey v. Groves, 225

 Tuckniss v. Alexander, 794
 Tyrwhitt v. Tyrwhitt, 558

 Van Grutten v. Digby, 179
 Vernon v. Manvers, 244, 246

 Wall v. Cockerell (House of Lords), 276
 Wallace v. Auldjo, 748
 Walmsley v. Foxhall, 672
 Walsh v. Secretary of State for India (House of Lords), 585
 Walsham v. Stainton, 557
 Warner v. Smith, 573
 Warwick and Worcester Rail. Co., in re, 453
 Waterloo Life, Education, &c. Assur. Co., 370, 371
 Watkins v. Weston, 396, 609
 Watney v. Wells, 194
 Weatherly v. Ross, 128
 Webb v. De Beauvoisin, 217
 Webster's case, 135
 West v. West, 240
 Westminster Bridge Act, 1859, in re, 463
 Wetherell v. Wetherell, 476
 Willway's Trust, re, 226
 Wilson's Estates, in re, 191
 Windover v. Smith, 561
 Winkworth v. Winkworth, 40
 Wright v. Wilkin, 227
 Wyllie v. Pollen, 782

 Young v. Davies, 372

CASES IN BANKRUPTCY.

- Ex parte Alexander, re Thin, 55
 — Barney v. Horton, 41
 — Bell, re Laforest, 50
 — Churchill, re Griffiths, 48
 — Cole, re Attwater, 11
 — Currie, re Great Northern and Midland Coal Co., 48
 — Davis, re Harris, 68
 — Dobson, re Wilson, 1
 — Downman, re Downman, 49
 — Drinkwater, re Drinkwater, 20
 — Dudley and West Bromwich Banking Co., re Hopkins, 68
 — Fox, re Moseley Green Coal Co. (Lim.), 57
 — Godden, re Shettle, 37
 — Lawrence, re Beale's Assignment, 61
 — Lubbock, re Flood, 58

 — Miller, re Miller, 45
 — Morgan, re Woodhouse, 15
 — Morgan, re Pennell, 61
 — Page, re Neal, 14
 — Paine, re Gleaves, 65
 — Rawlings, re Rawlings, 27
 — Ruck, re Wickenden, 9
 — Spyer, re Josephs, 62
 — Stevenson, re Liverpool Tradesman's Loan Co., 44
 — Strickland, re Still, 12
 — Watts, re Attwater, 35
 — Wensley, re Wensley, 23
 — Woolheim, re Woolheim, 26

 In re Thorneycroft, 48

1



